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 INDEPENDENT WOMEN'S LAW CENTER AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Jennifer C. Braceras
INDEPENDENT WOMEN'S LAW CENTER
4 Weems Lane #312
Winchester, VA 22601
(202) 429-9574
jennifer.braceras@iwf.org

John S. Moran
Counsel of Record
Farnaz F. Thompson
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2817
jmoran@mcguirewoods.com

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QUESTION PRESENTED

Whether Section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

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INTRODUCTION & INTERESTS OF *AMICUS CURIAE*[1]

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum ("IWF"), a nonprofit, nonpartisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for individual liberty, equal opportunity, and respect for the American constitutional order.

The disparate-impact theory adopted by the Ninth Circuit is nowhere sanctioned in the text of the Rehabilitation Act of 1973 and, thus, undermines rule-of-law principles that IWLC and IWF seek to defend. In addition, the application of disparate-impact theory to the Rehabilitation Act will have significant negative implications for at least two policy areas of concern to IWLC and IWF: (1) the affordability of health insurance and (2) the flexibility granted to state and local officials to adopt and implement education policy.

For these reasons, IWLC and IWF urge the Court to reverse the Ninth's Circuit's ruling below and

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[1] No party's counsel authored any part of this brief. No person or entity, other than *amicus curiae* and its counsel, paid for the preparation or submission of this brief. All parties have consented to the filing of this brief.

hold that the Rehabilitation Act and the Affordable Care Act do not permit disparate-impact lawsuits.

STATEMENT

I. Statutory Background

In 1917, Congress passed the Smith-Hughes Act to provide for vocational education of veterans with disabilities. *See* Pub. L. 64-347. Through subsequent legislation, Congress extended vocational services to civilians with disabilities and expanded the scope of services and other assistance.

With the Rehabilitation Act of 1973, Congress superseded these prior laws and established a broad range of programs to promote the welfare of citizens with disabilities. *See generally* Pub. L. 93-112; 29 U.S.C. § 701 *et seq*. Section 504 of the Rehabilitation Act provides, as relevant here:

> "No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * * ."

29 U.S.C. § 794(a). Congress made this and other nondiscrimination provisions applicable to certain health-insurance policies through the ACA. *See* 42 U.S.C. § 18116(a)).

II. Procedural History

This is one of several lawsuits in which HIV-positive plaintiffs have challenged their insurance company's policies on paying for specialty drugs, arguing that the policies violate § 504, as incorporated through the ACA. The Sixth Circuit rejected this theory in *Doe* v. *BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (2019), but other courts have allowed it, relying primarily on this Court's decision in *Alexander* v. *Choate*, 469 U.S. 287 (1985).

In this case, the district court granted Petitioners' motion to dismiss under Rule 12(b)(6). *See* 348 F. Supp. 3d 967 (N.D. Cal. 2018). The district court held that Respondents *could* bring a disparate-impact claim under § 504 based on *Choate*, but that they had not pleaded a viable disparate-impact claim under *Choate*'s framework. *See id.* at 982–86. The Ninth Circuit reversed in relevant part on appeal, accepting the disparate-impact theory and holding that Respondents had pleaded a viable claim under *Choate*. *See* 982 F.3d 1204, 1210–12 (2020).

This Court granted certiorari to resolve whether § 504 provides a disparate-impact cause of action, and if so, whether such a claim could be used to challenge facially neutral terms and conditions of a health-insurance plan.

SUMMARY OF ARGUMENT

The Ninth Circuit's ruling below rests on an approach to statutory interpretation that runs contrary

to the rule of law. By balancing perceived congressional objectives, rather than closely analyzing the text of the statute, the Ninth Circuit utilized a mode of statutory interpretation that this Court emphatically rejected in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).

Respondents (and the Ninth Circuit below) rely primarily on the reasoning in *Alexander* v. *Choate*, 469 U.S. 287 (1985), a case decided 16 years before *Sandoval*. That case rested on a survey of congressional purpose that cherry-picked favorable comments like "looking over a crowd and picking out your friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotations omitted). This approach, which allows judges to substitute (intentionally or unintentionally) their own personal policy-preferences for the collective preferences of our elected representatives, has been long ago discredited. Today, we expect judges to stay in their constitutionally prescribed lanes and interpret statutes by focusing on the text.

In this case, a textual interpretation of § 504 "leaves no room" for Respondents' disparate-impact theory. *Doe* v. *BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 243 (2019). Section 504 prohibits discrimination "solely by reason of [one's] disability," 29 U.S.C. § 794(a), which connotes intentional discrimination and but-for causation, *see Comcast Corp.* v. *Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020). Section 504 also prohibits discrimination solely by reason of a disability *only if* the person is "otherwise qualified" to participate in the program or activity in question, 29 U.S.C. § 794(a), plainly leaving

room for different treatment based on different circumstances.

While the text of the statute suffices to resolve this case, the negative policy consequences of indulging Respondents' disparate-impact theory illuminate precisely why courts should not engage in "balancing" Congress's numerous, and often illusive, policy objectives.

Judicially applying disparate-impact theory to the Rehabilitation Act, and by extension the Patient Protection & Affordable Care Act (ACA), will exacerbate the rapidly increasing healthcare costs that have plagued American families for decades. Although Congress passed the ACA ostensibly to reduce healthcare costs, it has not had much impact for the average American family. To the contrary, by shifting healthcare costs from those with expensive pre-existing conditions to the relatively healthier pool of insureds for any given policy, it has increased costs for many Americans. Accepting Respondents' theory would further increase the financial burden on some insureds without the consent of our elected representatives.

In addition, allowing disparate-impact lawsuits under the Rehabilitation Act will have monumental unintended consequences for elementary and secondary education. Almost all academic standards have a negative disparate impact on students with learning disabilities. Recent litigation has shown that private plaintiffs are ready, willing, and able to sue schools over such standards. In recent weeks, we have also seen the Department of Education invoke

disparate-impact liability under § 504 to investigate five States that have barred public schools from mandating universal mask-wearing during the COVID-19 pandemic. And a precedential ruling on disparate-impact liability under § 504 could bleed over to Title IX, which contains similar operative language. Applying disparate-impact liability to schools under § 504 and Title IX would raise serious constitutional questions under the Spending Clause and Due Process Clause.

All of this to say that the Court should tread carefully before sanctioning the use of disparate-impact theory untethered from the text of the Rehabilitation Act which will have significant negative policy consequences that Congress may not have even considered.

ARGUMENT

I. The Decision Below and Respondents' Position Rely on an Approach to Statutory Interpretation That This Court Has Soundly Rejected.

"Respondents would have [the Court] revert in this case to the understanding of private causes of action that held sway [60] years ago." *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001). Under the old view, federal courts had broad license—indeed, an independent "duty"—"'to provide such remedies as are necessary to make effective the congressional purpose' expressed by any statute." *Ibid.* (quoting *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964)). Thus, if the Court thought a private right of action would best effectuate

a statute's purpose, but Congress had neglected to enact one, an "implied" right of action would be recognized. *See, e.g.*, *J.I. Case*, 337 U.S. at 433–34. Or if the Court thought that disparate-impact liability would better effectuate a statute's purpose than requiring evidence of discriminatory intent, the Court would allow it. *See, e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The Court has since "sworn off" this ill-fated approach, *Sandoval*, 532 U.S. at 287, and rightly so. Indeed, the Court does not apply this old approach even to statutes enacted when it was the prevailing interpretive method. *See ibid*.

The case upon which Respondents and the Ninth Circuit primarily rely, *Alexander* v. *Choate*, 469 U.S. 287 (1985), reflects exactly this antiquated approach. In *Choate*, the Court took a broad survey of the congressional purpose behind § 504. The Court inferred that "[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." *Id.* at 295. It drew this inference not from the text of the statute but from the Court's review of floor statements made by a small group of Members of Congress. *See id.* at 295–96. Significantly, these floor statements were not made in support of § 504 of the Rehabilitation Act itself; they were made in support of earlier proposed amendments to Title VI—amendments which Congress never enacted, but which the Court judged to be "the predecessor[s] to § 504." *Id.* at 295 & n.13. The Court acknowledged that it had to look back to these earlier proposals because there was a stark "lack of debate devoted to

§ 504 in either the House or the Senate when the Rehabilitation Act was passed in 1973." *Id.* at 296.

The *Choate* Court also purported to glean from the Congressional Record 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 296–97. The Court's lead example was a passage from the 1973 Senate Report on the Rehabilitation Act suggesting that "elimination of architectural barriers was one of the central aims of the Act." *Id.* at 297 (citing S. Rep. No. 93–318, p.4 (1973), 1973 U.S.C.C.A.N. 2076, 2080). But the Court neglected the Report's discussion of *how* the Labor and Public Welfare Committee thought the Rehabilitation Act would address architectural barriers. The Report explains that the Act would impose grant conditions requiring compliance with an earlier statute, the Architectural Barriers Act of 1968, Pub. L. 90–480, and would "direct the Secretary [of Labor] to prescribe regulations which bring [certain federally funded] facilities into compliance with the Architectural Barriers Act * * * ." 1973 U.S.C.C.A.N. at 2113. The Report further describes the establishment of the Architectural and Transportation Barriers Compliance Board to help "eliminate architectural barriers to handicapped individuals' access to *Federal* buildings." *Id.* at 2122 (emphasis added). And yet, nothing in the Senate Report on which the *Choate* Court relied even remotely suggests that Congress sought to eliminate architectural barriers through disparate-impact liability.

The Court's remaining examples of congressional purpose were similarly tenuous. The Court cited statements by Committee Chairman Harrison A. Williams, Jr. 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 * * * ,'" *Choate*, 469 U.S. at 297 (quoting 118 Cong. Rec. 3320 (1972)), as well as similar statements by Senator Hubert H. Humphrey, *see ibid* (citing 118 Cong. Rec. 525–26). The Court opined 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." *Ibid.* But again, the Court neglected the Report's discussion of *how* these issues were to be addressed, including through grant programs, through improvements to federal facilities and programs, and through subsequent legislation that might result from further study.

In short, the Court's analysis was a classic example of "looking over a crowd and picking out your friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotations omitted). Perhaps not surprisingly, then, the Court itself expressed reservations about "interpret[ing] § 504 to reach all action disparately affecting the handicapped" since "the handicapped typically are not similarly situated to the nonhandicapped." *Choate*, 469 U.S. at 298. The Court expressed concern that "respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to

consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped." *Ibid*. Affirmatively considering the needs of the handicapped would be a noble endeavor, but the Court recognized that, if mandated by law, "[t]he formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden." *Ibid*. Tellingly, the Court found "nothing to suggest" that Congress intended to impose this burden through the Rehabilitation Act. *Id.* at 299.

At no point in assessing whether § 504 reaches disparate-impact claims did the Court quote a single word of statutory text. *See id.* at 292–99. Instead, the Court undertook its survey of congressional purpose and framed its role as being "responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." *Id.* at 299. The Ninth Circuit adopted this methodology wholesale below, clearly stating that it would "assess Section 504 claims under the standard articulated in *Choate*." 982 F.3d 1204, 1210.

But whatever merit this probing of congressional purpose may have had under the "*ancien regime*," *Sandoval*, 532 U.S. at 287, that's not how we interpret statutes today. Rather, this Court has made clear time and again that interpretation of an anti-discrimination statute, like any statute, "must focus on the text." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009).

A textual interpretation of § 504 "leaves no room" for Respondents' disparate-impact theory. *Doe*

v. *BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 243 (CA6 2019). By its terms, § 504 prohibits discrimination "solely by reason of [one's] disability." 29 U.S.C. § 794(a). "Reason" of course connotes intentional decision-making, rather than unintended consequences. *E.g.*, *Reason*, WEBSTER'S II NEW RIVERSIDE DICTIONARY (1984) ("The motive or basis for an action, decision, feeling, or belief").[2] Consistent with that understanding, this Court has held that, where a statute prohibits action "by reason of" a particular trait, Congress's word choice "indicate[s] a but-for causation requirement." *Comcast Corp.* v. *Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020) (citing *Gross*, 557 U.S. at 176–77). This also comes against the backdrop that, as a matter of "'textbook tort law,'" "a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation." *Id.* at 1014 (quoting *Univ. of Texas Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 347 (2013)). But-for causation is a far cry from disparate-impact liability.

That is not all. Section 504 prohibits discrimination solely by reason of a disability *only if* the person is "otherwise qualified" to participate in the program or activity in question. 29 U.S.C. § 794(a). This language makes clear that "the Act allows the

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[2] Even more emphatically, "solely" suggests that the illicit motive must be the only reason for the defendant's action. *See Sole*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986) ("belonging exclusively or otherwise limited to [usually] specified individual, unit, or group"); *Husted* v. *A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842 (2018) (holding that "solely by reason of" means "for no reason other than").

disabled to be disparately affected by legitimate job criteria" and shows that the Act does not bar non-discriminatory actions which may have a disparate impact on those with disabilities, *Doe*, 926 F.3d at 242 (internal quotations omitted)—in contrast to other federal statutes, like the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, which impose more affirmative obligations to accommodate those with disabilities.

As Petitioner notes, the Court could reject Respondent's disparate-impact theory under § 504 consistent with *Choate*, *see* CVS Br. 24–28, especially since *Choate* disclaimed any decision on whether that section reaches "conduct that has an unjustifiable disparate impact upon the handicapped." 469 U.S. at 299. But the Court need not, and should not, bother to reconcile its interpretation of § 504 with the analysis in *Choate*. As described above, that analysis reflects a long-discredited mode of interpretation. Any attempt to harmonize *Choate* and *Sandoval* would sow confusion and undermine the Court's clear commitment over the past decades to textual statutory interpretation.

Textualism is both the preferred modern approach to statutory interpretation and "the oldest and most commonsensical interpretive principle." A. SCALIA & B. GARNER, READING LAW 15 (2012). The Court should not obscure it by clinging to discredited atextual readings of § 504 from the past.

II. If the Court Were to Look Beyond the Text of § 504, There Are Good Reasons Not to Adopt Disparate-Impact Liability.

A primary aim of textualist interpretation is to focus on the plain meaning of the statute over judicial policy preferences. But since the Court is presented with policy arguments both directly, through this case's briefing, and indirectly through the Ninth Circuit and Respondents' reliance on *Choate*, the Court should also consider the considerations that weigh against adopting disparate-impact liability under § 504. Two important areas would be particularly affected by judicially-crafted disparate-impact liability: (a) the cost of health insurance, and (b) education policy. It is precisely because disparate-impact lawsuits can have significant adverse policy consequences, in these and other areas, that the decision to impose such liability must be made by the democratically elected branches of government, not by the unelected judiciary.

A. *Disparate-impact liability under § 504 would exacerbate healthcare costs in the United States.*

Expanding liability against health insurers under § 504 would exacerbate the challenges that everyday Americans face in securing affordable healthcare coverage.

America had a healthcare problem well before the COVID-10 pandemic. The cost of health insurance for the average American has risen steadily over the past two decades from $5,791 for family coverage in

1999 to $20,576 for the same coverage in 2019, a 255% increase.[3] Meanwhile, the median family income over the same period grew only 14% from $73,206 to $83,698.[4] By these averages, families' healthcare costs rose from under 8% of annual household income in 1999 to over 24% in 2019. The Patient Protection & Affordable Care Act (ACA) was supposed to help curb this trend, but it hasn't. The ACA's passage in 2010 had no appreciable effect on the steady increase in insurance costs for the average American family over the last 20 years.[5]

While the ACA has not delivered results for the average American family, it has helped those like Respondents who have dramatically costly medical conditions. At the core of the ACA was a "three-part solution" "[t]o ensure that individuals with medical histories have access to affordable insurance." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 597 (2012) ("*NFIB*") (Ginsburg, J., concurring in part). This scheme included (1) the "guaranteed issue" provisions, *see* 42 U.S.C. §§ 300gg–1, 300gg–3, 300gg–4(a), which prohibit insurers from denying coverage

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[3] *See* Fig. 1.10, *Average Annual Premiums for Single Family Coverage, 1999–2019*, Kaiser Family Foundation, "2019 Employer Health Benefits Survey" (Sept. 25, 2019), *available at* https://www.kff.org/report-section/ehbs-2019-section-1-cost-of-health-insurance/ (last visited Sept. 5, 2021).

[4] *See* Table F-7, *Type of Family–All Families by Median and Mean Income: 1947 to 2019*, U.S. Census Bureau, "Historical Income Tables: Families," *available at* https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html (last visited Sept. 5, 2021).

[5] *See supra* n.2.

based on pre-existing conditions; (2) the "community rating" provisions, *see* 42 U.S.C. §§ 300gg, which severely restrict price discrimination; and (3) the individual mandate, *see* 26 U.S.C. § 5000A, which requires most Americans to maintain "minimum essential coverage."

As the four dissenting Justices in *NFIB* explained, Congress's plan in the ACA relied on spreading healthcare costs from those with expensive pre-existing conditions to the relatively healthy:

> [Under the ACA's "guaranteed issue" provisions], an insurer may not deny coverage on the basis of * * * any pre-existing medical condition that the applicant may have, and the resulting insurance must cover that condition. *See* § 300gg–3.
>
> Under ordinary circumstances, of course, insurers would respond by charging high premiums to individuals with pre-existing conditions. The Act seeks to prevent this through the community-rating provision. Simply put, the community-rating provision requires insurers to calculate an individual's insurance premium based on only four factors: (i) whether the individual's plan covers just the individual or his family also, (ii) the "rating area" in which the individual lives, (iii) the individual's age, and (iv) whether the individual uses tobacco. § 300gg(a)(1)(A). Aside from the

> rough proxies of age and tobacco use (and possibly rating area), the Act does not allow an insurer to factor the individual's health characteristics into the price of his insurance premium. This creates a new incentive for young and healthy individuals without pre-existing conditions. The insurance premiums for those in this group will not reflect their own low actuarial risks but will subsidize insurance for others in the pool. Many of them may decide that purchasing health insurance is not an economically sound decision—especially since the guaranteed-issue provision will enable them to purchase it at the same cost in later years and even if they have developed a pre-existing condition. But without the contribution of above-risk premiums from the young and healthy, the community-rating provision will not enable insurers to take on high-risk individuals without a massive increase in premiums.

NFIB, 567 U.S. at 651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). The ACA was thus designed to spread costs from those with expensive pre-existing conditions to those without them. That redistribution necessarily has had winners and losers.

Respondents' theory would push the ACA scheme even further by redistributing additional costs to the average policyholder. Nothing in the ACA requires every policyholder to bear the cost of

distributing and stocking specialty drugs. Yet, according to Respondents' theory, that is precisely what Congress required by applying the Rehabilitation Act to health insurance through the ACA. If insurance companies cannot save costs by limiting payments for specialty drugs to a preferred network, who will bear those unsaved costs? They will be borne by rest of the insurance pool, which by the ACA's strictures includes a lot of people who do not need specialty drugs.

Specialty drugs just happen to be the first insurance cost to reach the Court. Should the Court countenance Respondents' theory, a whole slew of new cost-shifting claims would arise. The federal courts would face the regular task of deciding which insurance costs—co-pays, cost-shares, out-of-network charges, and more—impose an undue burden on those with disabilities and must therefore be redistributed across the insurance pool. Congress did not give the courts that power in the Rehabilitation Act, nor in the ACA. The Court should not usurp it now.

B. *Disparate-impact liability under § 504 would have significant negative effects on elementary and secondary education in the United States.*

The potential consequences of disparate-impact liability under § 504 of the Rehabilitation Act for American education cannot be overstated. Section 504 expressly covers any "college, university, or other postsecondary institution" or any "local educational agency * * * or other school system" that receives

federal funding, 29 U.S.C. § 794(b)(2)(A)–(B), which means that most educational institutions in the United States are subject to it.

In important ways, federal law has advanced education opportunities for students with disabilities—most notably through the Education for All Handicapped Children Act in 1975, Pub. L. 94–142, which is now known as the Individuals with Disabilities Education Act (IDEA), Pub. L. 101–476, passed two years after the Rehabilitation Act. The IDEA requires that States provide disabled students with a "free appropriate public education" as a condition of receiving federal funds. 20 U.S.C. § 1412(a)(1).[6] This Court has, on several occasions, addressed the scope of school districts' obligations under the IDEA. *See, e.g.*, *Endrew F. ex rel. Joseph F.* v. *Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230 (2009); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F. ex rel. Charlene F.*, 526 U.S. 66 (1999). And § 504 helps to ensure that qualifying students covered by the Rehabilitation Act receive such benefits.

[6] *See also* 20 U.S.C. § 1401(9) (defining "free appropriate public education" as "special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include appropriate preschool, elementary school, or secondary school education in the State involved; and (C) are provided in conformity with the individual education program required under section 1414(d) of this title").

There are several education-related reasons why the Court should be reluctant to embrace disparate-impact liability under § 504.

1. **The threat of disparate-impact liability would put education officials between a rock and a hard place.** Even after careful consideration, it is not always obvious which school policy best serves disabled students. Indeed, one reason the *Choate* Court avoided full disparate-impact liability is that it would create, in effect, "a National Environmental Policy Act for the handicapped, requiring the preparation of 'Handicapped Impact Statements' before any action was taken by a grantee that affected the handicapped." 469 U.S. 298–99. Without knowing in advance what approach a court will later find to be best for disabled students, education officials may find themselves damned if they do, and damned if they don't. This is particularly true given that disabled students are not a monolith and a policy that assists students with one type of disability may negatively impact others.

Take, for example, the recent nationwide debate over mask mandates in public schools. Amidst intense debate over whether school children should be required to wear masks, several States have prohibited schools from imposing universal mask mandates,[7] and in response, the Office for Civil Rights

[7] *See, e.g.*, House File 847, Iowa Code § 280.31; Oklahoma Enrolled Senate Bill 658; 2021 S.C. Laws Act 94 (H. 4100), eff. July 1, 2021, Proviso 1.108; State of Tennessee, Executive Order by the Governor No. 84, An Order Regarding Mask Requirements in Schools; Utah Code § 53G-9-210.

("OCR") within the Department of Education has "opened directed investigations * * * exploring whether statewide prohibitions on universal indoor masking discriminate against students with disabilities who are at heightened risk for severe illness from COVID-19 by preventing them from accessing in-person education."[8] OCR says that its "investigations will explore each state's compliance with Section 504 of the Rehabilitation Act of 1973" and "whether statewide prohibitions on universal indoor masking violate Title II of the Americans with Disabilities Act of 1990, which prohibits disability discrimination by public entities, including public education systems and institutions."[9]

The propriety of school mask mandates is a hot topic of national debate. Many feel strongly that the health and development of young children, including those with disabilities, are best served by universal masking. But many also feel strongly that the health and development of young children, including those with disabilities, are best served by allowing students to attend school without masks.[10] At least some

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[8] Department of Education, Press Release, "Department of Education's Office for Civil Rights Opens Investigations in Five States Regarding Prohibitions of Universal Indoor Masking" (Aug. 30, 2021), *available at* https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-opens-investigations-five-states-regarding-prohibitions-universal-indoor-masking (last visited Sept. 6, 2021).

[9] *Ibid.*

[10] *See, e.g.*, Marty Makary & H. Cody Meissner, "The Case Against Masks for Children," THE WALL STREET JOURNAL (Aug. *(cont'd)*

researchers suggest that universal masking can interfere with development of students' language skills. [11] Education officials could therefore find themselves between a rock and a hard place: if they do not require universal masking, they can be threatened with liability for a disparate impact on students whose disabilities put them at increased health risk; and if they do require universal masking, they can be threatened with liability for a disparate impact on students whose disabilities make it difficult for them to learn without reading lips or observing facial cues.

Whatever policy outcome is the right one, it is clear that Congress did not take these decisions away from education officials in 1973 and threaten them with *post hoc* litigation over the alleged disparate impact of their decisions.

If the Court endorses the Ninth Circuit's approach below it will effectively direct federal courts to resolve important questions of educational policy

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8, 2021), *available at* https://www.wsj.com/articles/masks-children-parenting-schools-mandates-covid-19-coronavirus-pandemic-biden-administration-cdc-11628432716 (last visited Sept. 6, 2021); Autumn Foster Cook, "Requiring Kids to Wear Masks All Day at School Does More Harm Than Good," DESERET NEWS (Aug. 13, 2021), *available at* https://www.deseret.com/opinion/2021/8/13/22623659/requiring-kids-to-wear-masks-all-day-at-school-does-more-harm-than-good-utah (last visited Sept. 6, 2021).

[11] *See* Nobrega et al., "How face masks can affect school performance," 138 INT. J. PED. OTORHINOLARYNGOLOGY 110,328 (2020), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7462459/ (last visited Sept. 9, 2021).

through § 504 litigation and encouraging plaintiffs to challenge all sorts of facially-neutral policies that might have a disparate impact on disabled students—all outside the processes Congress established for making individual accommodations to students under the IDEA, the ADA, or other statutes.[12]

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[12] The prospect of intrusive disparate-impact litigation is not just hypothetical. In *Brown* v. *Coulston*, 463 F. Supp. 3d 762 (E.D. Tex. 2020), *appeal dismissed*, No. 20-40432, 2020 WL 10224613 (CA5 Sept. 25, 2020), the parents of a ten-year-old student challenged a School Resource Officer's reaction to the student's violent outburst on a disparate-impact theory under § 504. In *H.P. by & Through W.P.* v. *Naperville Cmty. Unit Sch. Dist. #203*, 910 F.3d 957 (CA7 2018), a student alleged that a school district's residency requirement imposed a disparate impact under § 504 after she moved to live with her father following her mother's suicide. In *A.H. by Holzmueller* v. *Illinois High Sch. Ass'n*, 263 F. Supp. 3d 705, 710 (N.D. Ill. 2017), *aff'd*, 881 F.3d 587 (CA7 2018), a high-school student athlete with cerebral palsy sued under § 504 and other laws to "establish realistic qualifying times for para-ambulatory athletes to compete in the state finals and * * * [to] establish a para-ambulatory division in [the district's] annual 5K 'Road Race' event." *Id.* at 710. And in *McPherson* v. *Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453 (CA6 1997), a student-athlete argued that the school district's eight-semester eligibility requirement violated his rights under § 504 because his attention deficit hyperactivity disorder (ADHD) made him less likely to graduate from high school within four years. None of this is to suggest these plaintiffs' claims—many of which rested on statutory authority beyond § 504—lacked merit. Rather, the question is whether Congress has adopted a disparate-impact scheme under the Rehabilitation Act of 1973 that purports to answer these and many other questions. The text of the statute, and even a reasonable assessment of the legislative history, makes clear that Congress has not.

2. **The Court should reject a disparate-impact theory as a matter of constitutional avoidance.** This Court has long held that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." *F.C.C.* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (citing *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)). For the Court to construe § 504 to impose disparate-impact liability on educational institutions as a condition of receiving federal funding would raise serious constitutional doubts. For public institutions, the constitutional doubt arises under the Spending Clause. In *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), the Court held that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. Congress had enacted a "bill of rights" for disabled students, but the Court still held that States could not be required to abide by it under the Spending Clause unless Congress had made it a clear condition of accepting federal funds. *See ibid.* Even if the Court were otherwise inclined to extend disparate-impact liability under § 504 to States who receive federal funds, doing so would "run counter to the principle in *Pennhurst* that Congress must speak with a clear voice and impose a condition in unambiguous terms." Farnaz F. Thompson, *Eliminating A Hostile Environment Towards Colleges and Universities: An Examination of the Office for Civil Rights' Unconstitutional Process and Practices*, 28 REGENT U. L. REV. 225, 245 (2016). For private institutions, a similar problem would arise under the Due Process Clause. *See id.* at 248 & nn. 139, 144.

Thus, while the text of the Rehabilitation Act suffices to resolve this case, the Court should also recognize that there are compelling reasons not to embrace Respondents' disparate-impact theory.

CONCLUSION

The text of the Rehabilitation Act of 1973 does not authorize disparate-impact litigation. That should be the end of the matter. It is worth pointing out, however, that the numerous negative policy consequences of disparate-impact litigation under § 504 (some unforeseen) are precisely the reason why the representatives of the people, not unelected judges, should bear responsibility for determining whether to allow such lawsuits to proceed.

For these reasons, the judgment below should be reversed.

Respectfully submitted,

Jennifer C. Braceras
INDEPENDENT WOMEN'S LAW CENTER
4 Weems Lane #312
Winchester, VA 22601
(202) 429-9574
jennifer.braceras@iwf.org

John S. Moran
Counsel of Record
Farnaz F. Thompson
MCGUIREWOODS LLP
888 16th Street N.W.
Suite 500
Washington, DC 20006
(202) 828-2817
jmoran@mcguirewoods.com

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