No. 20-1374

In the Supreme Court of the United States

CVS PHARMACY, INC., ET AL., PETITIONERS

v.

JOHN DOE, ONE, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether disparate-impact claims are cognizable under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and by extension Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. 18116.

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INTEREST OF THE UNITED STATES

This case presents the question whether claims for disparate-impact discrimination are cognizable under Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), Pub. L. No. 93-112, Tit. V, § 504, 87 Stat. 394 (29 U.S.C. 794), and by extension Section 1557 of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, Tit. I, Subtit. G, § 1557, 124 Stat. 260 (42 U.S.C. 18116). The federal government is charged with enforcing these statutes. See 29 U.S.C. 794a(a)(2); 42 U.S.C. 2000e-5, 18116(a). Congress directed all federal agencies to issue regulations implementing Section 504 with respect to the programs or activities to which they provide financial assistance. See 29 U.S.C. 794(a). The Department of Justice is charged with coordinating federal agencies' implementation and

enforcement of Section 504. See 28 C.F.R. Pt. 41; Exec. Order No. 12,250, 3 C.F.R. 298 (1980 Comp.); see also 28 C.F.R. 0.51(b)(3). The United States therefore has a substantial interest in the question presented.

STATEMENT

1. a. Enacted in 1973, the Rehabilitation Act "aim[s] to root out disability-based discrimination, enabling each covered person * * * to participate equally to all others in * * * federally funded programs." *Fry* v. *Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017). The Act reflects Congress's determination that individuals with disabilities should "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." 29 U.S.C. 701(a)(3)(F). Section 504(a) of the Act states that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

In *Alexander* v. *Choate*, 469 U.S. 287 (1985), this Court considered whether Section 504 "reaches only purposeful discrimination." *Id.* at 292. The Court observed that construing Section 504 in that manner would make it "difficult if not impossible" to address "much of the conduct that Congress sought to alter in passing the Rehabilitation Act." *Id.* at 296-297. But the Court also emphasized the need to keep Section 504 "within manageable bounds," and it rejected the proposition "that all disparate-impact showings constitute prima facie cases under § 504." *Id.* at 299. Accordingly, the Court "assume[d] without deciding" that Section 504 "reach[es] some claims of disparate-impact dis-

crimination," but held that such claims would be limited to disparate impacts so significant that "an otherwise qualified handicapped individual" was not "provided with meaningful access to the benefit that the grantee offers." *Id.* at 299, 301, 309. Between 1985 (when the Court decided *Choate*) and 2019, every court of appeals to resolve the question held that disparate-impact claims are cognizable under Section 504. See pp. 11-12, *infra*.

b. Section 1557 of the ACA states that "an individual shall not, on the ground prohibited under" Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1684 *et seq.*, the Age Discrimination Act of 1975 (Age Act), 42 U.S.C. 6101 *et seq.*, or Section 504 of the Rehabilitation Act, "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. 18116(a). Section 1557 also incorporates "[t]he enforcement mechanisms provided for and available under" the enumerated anti-discrimination provisions. *Ibid.*

2. a. Respondents are four individuals living with HIV/AIDS, one of whom represents a fifth individual who died during the pendency of this litigation. Pet. App. 5a; see Pet. Br. II. They allege that petitioners, CVS Health Corporation and two subsidiaries, collectively administer the health plans provided by respondents' employers. Pet. App. 6a. The plans classify the medications respondents use to treat HIV/AIDS as "specialty medications." *Ibid.* To obtain in-network pricing on specialty medications, enrollees must receive the medications by mail or pick them up at a CVS

pharmacy. *Id.* at 5a-6a. Without in-network pricing, the prescriptions would cost "thousands more dollars per month." *Id.* at 7a.

Respondents sued petitioners in the United States District Court for the Northern District of California, alleging (as relevant here) that the specialty-medication requirements discriminate on the basis of disability, in violation of Section 1557 of the ACA. Pet. App. 24a, 32a. Respondents alleged that complying with the requirements caused them numerous difficulties and indignities. *Id.* at 27a. Respondents asserted that medications delivered by mail were sometimes delivered late or exposed to the elements, endangering respondents' health, and that the deliveries risked notifying neighbors or coworkers that respondents have HIV/AIDS, compromising their privacy. *Id.* at 7a-8a. As to pickup at a CVS pharmacy, respondents claimed that they sometimes needed to make multiple trips to distant pharmacies to obtain correct prescriptions and that their privacy was violated when pharmacists called out their names and medications in front of other customers. *Ibid.* Respondents further alleged that the specialty-medication requirements forced them to forgo consultation with knowledgeable pharmacists at their community pharmacies, who were familiar with their medical histories and could adjust their drug regimens to avoid dangerous drug interactions and to address serious side effects. *Id.* at 5a, 7a, 26a-27a.

b. The district court granted petitioners' motion to dismiss the amended complaint. Pet. App. 24a-79a. As relevant here, the court explained that Section 504 encompasses disparate-impact discrimination. *Id.* at 35a. A disparate impact, the court continued, is "actionable only where it 'effectively denies otherwise qualified

handicapped individuals the meaningful access' to programs or benefits to which they are entitled." *Id.* at 36a (quoting *Choate*, 469 U.S. at 301). Applying that standard, the court determined that, even if the specialty-medication requirements disproportionately impact enrollees with HIV/AIDS, "that impact is not so significant as to constitute a denial of 'meaningful access' to [respondents'] prescription drug benefits." *Id.* at 40a.

c. The court of appeals reversed and remanded. Pet. App. 1a-23a.

As relevant here, the court of appeals first held that a disability-discrimination claim under Section 1557 of the ACA incorporates Section 504's legal standard, such that the relevant inquiry is whether the plaintiff has "state[d] a claim under Section 504." Pet. App. 11a. That holding is undisputed before this Court.

Evaluating respondents' disparate-impact claim under Section 504, see Pet. App. 9a, 11a-16a, the court of appeals then framed the question before it as whether respondents "had been denied 'meaningful access'" to a benefit, *id.* at 12a (quoting *Choate*, 469 U.S. at 302); see *id.* at 15a. The court understood respondents' complaint to allege that the "benefit" petitioners provide "includ[es] medically appropriate dispensing of [respondents'] medications and access to necessary counseling." *Id.* at 14a. The court concluded that respondents had sufficiently pleaded a denial of meaningful access to that benefit by alleging that, "[d]ue to the structure of the [specialty-medication] Program as it relates to HIV/AIDS drugs," respondents "cannot receive effective treatment" while complying with the specialty-medication requirements. *Ibid.*; see *id.* at 14a-15a.

The court of appeals declined to address respondents' "failure-to-accommodate claim" on the ground

that respondents had raised that theory "for the first time on appeal." Pet. App. 16a n.1. The court affirmed the district court's dismissal of respondents' remaining claims (other than a state-law claim predicated on the alleged ACA violation). *Id.* at 16a-23a.

SUMMARY OF ARGUMENT

This Court's decision in *Alexander* v. *Choate*, 469 U.S. 287 (1985), while formally leaving open the question whether disparate-impact claims are ever cognizable under Section 504, aptly identified persuasive reasons for concluding that Section 504 extends beyond intentional discrimination against persons with disabilities. The Court emphasized in particular that the cramped construction petitioners now advocate would render Section 504 ineffective as to core applications that Congress intended to cover. The *Choate* Court rejected the specific disparate-impact claim before it, however, and it more generally "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504." *Id.* at 299. Courts of appeals have since been attentive to *Choate*'s guideposts. Ten circuits have recognized disparate-impact claims under Section 504, while remaining cognizant of this Court's admonition that disparate-impact liability is available only if the plaintiff establishes a denial of "meaningful access to the benefit that the grantee offers." *Id.* at 301.

A. The circuits' near-uniform understanding reflects the best reading of Section 504's text. Section 504 uses the passive voice to identify particular outcomes to which persons with disabilities should not be subjected "by reason of" their disabilities. That language, which makes no reference to any specific actor and accordingly no reference to any actor's intent, is most

naturally read to focus on the causal link between the plaintiff's disability and particular undesired effects, rather than on the motives or intent of the defendant. A student who uses a wheelchair and is unable to reach an auditorium that is accessible only by stairs, for example, is naturally described as "being excluded from the assembly solely by reason of his disability."

B. Statutory context and purpose powerfully support that reading. The Rehabilitation Act seeks to secure full integration into society of individuals with disabilities. Before the statute's enactment, the exclusion of such individuals was principally caused not by animus or by intentional disparate treatment, but by the failure to perceive or address the impact of facially neutral actions, such as the construction and use of inaccessible buildings. Interpreting Section 504 to require a showing that the defendant took a particular action because of, not merely in spite of, its effect on individuals with disabilities would prevent the Act from reaching core applications that Congress sought to cover.

C. Agency regulations that this Court has deemed particularly worthy of deference, and that Congress expressly referenced in a subsequent statute, have construed Section 504 to authorize disparate-impact claims.

D. Far from expressing disapproval of the consistent court of appeals decisions and agency regulations that have recognized disparate-impact liability, Congress has specifically reconfirmed the Rehabilitation Act's focus on full integration in subsequent amendments to the Act. Congress's 2010 incorporation of Section 504's substantive standards into the ACA, without any change to the legal standards that pre-ACA courts had

applied in adjudicating Section 504 claims, likewise implies approval of the existing legal regime.

E. Petitioners identify no textual support for limiting Section 504 to intentional discrimination. Petitioners repeatedly paraphrase the key statutory language in a way that obscures Congress's use of the passive voice to describe the adverse effects from which Section 504 protects persons with disabilities. And while petitioners focus on the requirement that the denial or exclusion be "solely by reason of" disability, that language simply identifies the required causal link between the plaintiff's disability and particular adverse outcomes.

F. Petitioners' reliance on the other statutes referenced in Section 1557 of the ACA is misplaced. Under Section 1557, an individual cannot be denied the benefits of "any health program or activity, any part of which is receiving Federal financial assistance," on the grounds specified in four pre-existing anti-discrimination provisions. 42 U.S.C. 18116(a). To the extent Section 1557 bears on the question presented here, Congress's application of Section 504's substantive protective standards to additional regulated entities and activities, without any alteration of Section 504 itself, suggests approval of the then-existing consensus that Section 504 authorizes disparate-impact claims.

G. Petitioners' concession that reasonable-accommodation claims may be available substantially undercuts their argument. Reasonable-accommodation claims, which invoke a funding recipient's affirmative obligation to accommodate individuals with disabilities, do not require proof of discriminatory intent. Petitioners identify no sound textual basis for reconciling their acquiescence in reasonable-accommodation claims with

their argument that Section 504 forbids only intentional discrimination.

H. Petitioners' policy arguments are directed at an expansive disparate-impact theory that is divorced from Section 504's text and that the *Choate* Court specifically rejected. Under *Choate*, a disparate impact is actionable only if it denies meaningful access to a benefit the defendant provides. During the decades since *Choate*, lower courts have developed a substantial body of law clarifying the limits of disparate-impact liability under Section 504.

Petitioners identify no basis for concluding that lower courts' efforts to strike an appropriate balance in this well-charted territory have produced unworkable results. Nor is there any reason to suppose that applying this framework to the healthcare context will be unmanageable. This Court first articulated the "meaningful access" standard in analyzing (and ultimately rejecting) a healthcare claim, see *Choate*, 469 U.S. at 302-304, and the limiting principles it set out fully address petitioners' concerns.

ARGUMENT

DISPARATE-IMPACT CLAIMS ARE COGNIZABLE UNDER SECTION 504 OF THE REHABILITATION ACT AND SECTION 1557 OF THE ACA

Section 504 of the Rehabilitation Act "enabl[es] each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in * * * federally funded programs." *Fry* v. *Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017). In *Alexander* v. *Choate*, 469 U.S. 287 (1985), this Court considered whether Section 504 reaches disparate-impact discrimination. The Court explained 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 further explained that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach" if Section 504 were "construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-297.

At the same time, the *Choate* Court was cognizant of the need to keep Section 504 "within manageable bounds." 469 U.S. at 299. The Court explained that adopting the interpretation advocated by the *Choate* respondents, under which Section 504 would "reach all action disparately affecting the handicapped[,] * * * could lead to a wholly unwieldy administrative and adjudicative burden." *Id.* at 298. The Court found in the Rehabilitation Act's text and history "nothing to suggest that such was Congress' purpose." *Id.* at 299.

The *Choate* Court therefore "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504," while "[a]ssum[ing] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." 469 U.S. at 299. The Court identified "the sort of disparate impact that federal law might recognize," *ibid.*, as a claim that "an otherwise qualified handicapped individual" was not "provided with meaningful access to the benefit that the grantee offers," *id.* at 301. The Court explained that, "while a grantee need not be required to make fundamental or substantial modifications to accommodate the handicapped, it may be required to make reasonable ones." *Id.* at 300 (internal quotation marks omitted). The Court described that approach as striking "a balance between the statutory

rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs." *Ibid.*

The *Choate* Court rejected the plaintiffs' challenge to a state Medicaid program's reduction in covered inpatient hospital days. The Court explained that, although individuals with disabilities were more likely than other persons to require additional days of hospitalization per year, the challenged limitation would not deny the plaintiffs meaningful access to program benefits because they would still receive the fourteen days of care the State "ha[d] chosen to provide" under its Medicaid program. *Choate*, 469 U.S. at 289-290, 302. The Court further explained that, while "reasonable accommodations in the grantee's program or benefit may have to be made" to ensure that individuals with disabilities have access to that benefit, *id.* at 301, the grantee is "not require[d] * * * to alter [its] definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." *Id.* at 303.

Although *Choate* formally left open the question presented here, the Court's opinion emphasized both the strong reasons for concluding that *some* disparate-impact claims are cognizable under Section 504, and the need for caution in determining *which* disparate-impact claims should be recognized. In the first thirty-four years after *Choate*, every court of appeals to resolve the question concluded that Section 504 allows disparate-impact liability based on the denial of "meaningful access" to a benefit, developing a robust framework for identifying disparate impacts that are significant enough to be actionable under Section 504. See, *e.g.*, *Ruskai* v. *Pistole*, 775 F.3d 61, 78-79 (1st Cir. 2014); *Disabled in Action* v. *Board of Elections in the City of*

New York, 752 F.3d 189, 196-197 (2d Cir. 2014); *Nathanson* v. *Medical Coll. of Pa.*, 926 F.2d 1368, 1384 (3d Cir. 1991); *National Fed'n of the Blind* v. *Lamone*, 813 F.3d 494, 502-504, 510 (4th Cir. 2016); *Brennan* v. *Stewart*, 834 F.2d 1248, 1261-1262 (5th Cir. 1988); *McWright* v. *Alexander*, 982 F.2d 222, 228-229 (7th Cir. 1992); *Durand* v. *Fairview Health Servs.*, 902 F.3d 836, 842 (8th Cir. 2018); *Mark H.* v. *Lemahieu*, 513 F.3d 922, 936-937 (9th Cir. 2008); *Robinson* v. *Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *American Council of the Blind* v. *Paulson*, 525 F.3d 1256, 1268-1269 (D.C. Cir. 2008). But see *Doe* v. *BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 241 (6th Cir. 2019). That body of law is consistent with the most natural reading of Section 504's text, which is reinforced by other traditional tools of statutory construction.

A. The Plain Language Of Section 504 Encompasses Disparate-Impact Claims

Section 504 states 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" covered programs and activities. 29 U.S.C. 794(a). By its plain terms, the statute protects a covered individual from specified outcomes—"be[ing] excluded" from participation, "be[ing] denied" benefits, or "be[ing] subjected to" discrimination—when the adverse effect occurs "solely by reason of," *i.e.*, has a sufficient causal link to, that individual's disability. *Ibid.*; see *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 9 (2010). Section 504 is written in the passive voice, "focus[ing] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean* v. *United States*, 556

U.S. 568, 572 (2009). Congress's "use of the passive voice" powerfully indicates that the provision "does not require proof of intent." *Ibid.*

Even when interpreting statutes that contained references to regulated parties' intent, this Court has recognized disparate-impact claims where the text "refers to the consequences of actions and not *just* to the mindset of actors." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015) (emphasis added) (FHA); see *Smith* v. *City of Jackson*, 544 U.S. 228, 236, 240 (2005) (plurality opinion) (ADEA); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment) (agreeing "with all of the Court's reasoning"); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971) (Title VII).

In each of those cases, the Court construed statutory provisions that prohibited regulated parties from engaging in specified conduct. See 29 U.S.C. 623(a)(2) (ADEA) (making it unlawful "for an employer * * * to limit, segregate, or classify his employees" in certain circumstances); 42 U.S.C. 2000e-2(a)(2) (Section 703(a)(2) of Title VII) (same); 42 U.S.C. 3604(a) and 3605(a) (FHA) (making it unlawful "for any person or other entity * * * to discriminate" or "to refuse to sell or rent * * * or otherwise make unavailable or deny, a dwelling"). Recognizing disparate-impact liability is all the more appropriate here because Section 504 focuses *exclusively* on the outcome for an affected "individual," 29 U.S.C. 794(a), "without respect to any actor's intent or culpability." *Dean*, 556 U.S. at 572.[1]

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[1] Petitioners would distinguish those provisions because most include the words "otherwise adversely affect" or "otherwise make unavailable." Br. 37-39; see 29 U.S.C. 623(a)(2); 42 U.S.C.

That understanding of the statutory text comports with ordinary usage. A student who uses a wheelchair and is unable to attend an assembly because the school's auditorium lacks a ramp is naturally described as "being excluded from participation in the assembly solely by reason of his disability." If a pharmacy requires customers to fill out a paper form to obtain in-network prices for a drug, a blind customer who is otherwise eligible for in-network prices but is unable to complete the form is "being denied the benefit solely by reason of her disability." The causal link that the statute requires is a link between the customer's disability and her lack of access to program benefits. That causal connection can exist, and can reliably be established, even if the pharmacy adopted the paper-form requirement for reasons unrelated to its exclusionary effect on blind persons. Cf. *Cinnamon Hills Youth Crisis Ctr., Inc.* v. *Saint George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.) (explaining that a blind tenant who relies on a guide dog and is subject to a "no pets" policy, and a paraplegic individual precluded from living in a first-floor apartment, are unable "to live in those housing facilities * * * *because* of conditions created by their disabilities").

2000e-2(a)(2), 3604(a). But the term "otherwise" in those statutes "signal[s] a shift in emphasis from an actor's intent to the consequences of his actions" because the provisions "begin with prohibitions on disparate treatment" and end with "phrases looking to consequences." *Inclusive Communities*, 576 U.S. at 534-535. Here, no shift in emphasis is needed because Section 504 focuses on effects from soup to nuts.

B. Section 504's Context And Purpose Support The Recognition Of Disparate-Impact Claims

1. Statutory context reinforces the conclusion that Section 504 extends beyond intentional discrimination. Section 504(c), which Congress added to the statute in 1988, see Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 4, 102 Stat. 29, states that "[s]mall providers" "are not required by [Section 504(a)] to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility" where "alternative means of providing the services are available." 29 U.S.C. 794(c). That carveout takes as its premise that Section 504 *can* require structural alterations "for the purpose of assuring program accessibility"—that is, to secure a certain outcome (program access) for individuals with disabilities. *Ibid.*; see 28 C.F.R. 41.56 (addressing Section 504 violations where "facilities are inaccessible to or unusable by handicapped persons"). A building's lack of accessibility features, however, rarely if ever results from intentional discrimination. See *Choate*, 469 U.S. at 297 (explaining that "elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of excluding the handicapped") (citation omitted). Congress's enactment of Section 504(c) three years after this Court's decision in *Choate* suggests approval of the *Choate* Court's assumption that at least some disparate-impact claims are cognizable under Section 504.

2. The Act's purpose likewise supports that interpretation. Congress sought to enable individuals with disabilities "to participate equally to all others in * * * federally funded programs." *Fry*, 137 S. Ct. at 756. Petitioners would limit Section 504's coverage to actions

taken "'because of,' not merely 'in spite of,' [their] adverse effects" on individuals with disabilities. *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979). Although that type of discrimination against individuals with disabilities is a serious problem, it represents only a sliver of the exclusionary conduct that Congress sought to address. Congress's primary focus was on combatting "discrimination stemming * * * from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing]'" persons with disabilities. *School Bd. of Nassau Cnty.* v. *Arline*, 480 U.S. 273, 278-279 (1987) (brackets in original) (quoting S. Rep. No. 1297, 93d Cong., 2d Sess. 50 (1974)).

Interpreting Section 504 to extend beyond intentional discrimination therefore is essential "to give effect to the statutory objectives," such as the elimination of architectural barriers. *Choate*, 469 U.S. at 299; see *id.* at 296-297; Rehabilitation Act § 2(11), 87 Stat. 357; S. Rep. No. 318, 93d Cong., 1st Sess. 4 (1973). More broadly, as Congress reiterated in subsequent amendments, the Act seeks to maximize the "inclusion and integration into society" of individuals with disabilities. 29 U.S.C. 701(b)(1); see 29 U.S.C. 701(a)(3)(F), (6)(B), and (c)(3); p. 25, *infra*. Limiting the Act's coverage to obstacles produced by intentional discrimination would make that promise "ring hollow." *Choate*, 469 U.S. at 297.

C. Longstanding Agency Regulations Entitled To Deference Confirm That Section 504 Extends Beyond Intentional Discrimination

Three years after Congress enacted the Rehabilitation Act, President Ford directed the Department of Health, Education and Welfare (HEW) to "establish

* * * guidelines for determining what are discriminatory practices, within the meaning of [S]ection 504," and to coordinate enforcement of that provision. Exec. Order No. 11,914, 3 C.F.R. 117 (1976 Comp.). Those HEW regulations "provide an important source of guidance on the meaning of [Section] 504," *Arline*, 480 U.S. at 279 (citation and internal quotation marks omitted), and "particularly merit deference," *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984); see *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 195 (2002) (explaining that the HEW regulations "are of particular significance 'in interpreting the Rehabilitation Act'").

From the outset, HEW interpreted Section 504 to authorize disparate-impact claims, explaining that it "prohibits not only those practices that are overtly discriminatory but also those that have the effect of discriminating." *Coordination of Federal Agency Enforcement of Section 504 of the Rehabilitation Act of 1973*, 43 Fed. Reg. 2132, 2134 (Jan. 13, 1978). Accordingly, HEW's regulations prohibited forms of disparate-impact discrimination like "utiliz[ing] criteria or methods of administration * * * that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 45 C.F.R. 84.4(b)(4), 85.51(b)(3) (1978); see also 45 C.F.R. 84.13(a), 84.42(b)(2), 84.44(a), 84.52(a)(4) (1977); 42 Fed. Reg. 22,676, 22,688 (May 4, 1977).[2] Every agency responsible

[2] A subsequent Executive Order charged the Attorney General with coordination of federal agencies' implementation and enforcement of Section 504. Exec. Order No. 12,250, § 1-201(c), 3 C.F.R. 298 (1980 Comp.). It also "deemed" HEW's coordination regulations "to have been issued by the Attorney General." *Id.* § 1-502, 3 C.F.R. 300 (1980 Comp.). The regulations now are codified at 28 C.F.R. Part 41.

for administering the Rehabilitation Act has likewise concluded that Section 504 reaches disparate-impact discrimination. See, *e.g.*, *Choate*, 469 U.S. at 298 n.17 (citing regulations). Congress has specifically referenced the Section 504 regulations in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, see 42 U.S.C. 12201(a), and directed that certain ADA regulations be consistent with the Section 504 regulations, see 42 U.S.C. 12134(b); p. 25, *infra*, strongly suggesting that it considers them lawful in the context in which they were promulgated.

D. Congress Has Ratified The Understanding That Disparate-Impact Claims Are Cognizable Under Section 504

As agencies and courts of appeals uniformly determined that Section 504 allows disparate-impact claims, Congress repeatedly amended the Rehabilitation Act. Its decision not "to revise or repeal the [agencies'] interpretation" while making other changes is itself "persuasive evidence that the interpretation is the one intended by Congress." *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); see, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 159 (2013). And some of those post-*Choate* amendments assume the correctness of (and build upon) the agency and judicial consensus. In 1988, Congress added Section 504(c), which addressed small providers' obligation to make structural alterations and incorporated by reference "the regulations existing on March 22, 1988." 29 U.S.C. 794(c); see p. 15, *supra*. In 1992, Congress added broad findings and statements of purpose, applicable to the whole Act, to emphasize its focus on "full inclusion and integration" of individuals with disabilities. Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat.

4344, 4346-4347 (1992 Amendments); see 29 U.S.C. 701(a)(3)(F), (b)(1), and (c)(3); p. 25, *infra*.

By 2010, when Congress enacted Section 1557 of the ACA, dozens of agencies and every court of appeals to resolve the issue had construed Section 504 to authorize disparate-impact claims. See pp. 11-12, 17-18, *supra*; *Choate*, 469 U.S. at 297 n.17. Congress "is presumed to be aware" of those "administrative [and] judicial interpretation[s]," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), and it has cross-referenced the regulations in other statutory provisions. See 29 U.S.C. 794(c); 42 U.S.C. 12201(a), 12134(b). Against that backdrop, Congress drafted Section 1557 of the ACA to bar discrimination based on, *inter alia*, the "ground prohibited under" Section 504, and to adopt all "[t]he enforcement mechanisms provided for and available under" Section 504. 42 U.S.C. 18116(a). By making actionable any claim alleging discrimination "on the ground prohibited under" Section 504, *ibid.*, Congress subjected additional regulated entities and activities to Section 504's substantive standards and remedies. That extension, unaccompanied by any change to the substantive standards themselves, is best understood to reflect Congress's approval of the then-consensus view of Section 504's scope. See *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019).

E. Petitioners' Contrary Arguments About Section 504 Lack Merit

Petitioners identify no textual support for their contention that Section 504 prohibits only intentional discrimination against persons with disabilities. Petitioners also fail to grapple with the well-developed body of lower-court precedents adjudicating disparate-impact claims under Section 504, or with the way Congress has

built upon that body of law in subsequent statutory enactments.

1. Petitioners acknowledge that the "defining feature" of statutes that are limited to disparate treatment is that "they tie statutory prohibitions to the defendant's motive." Br. 14. But petitioners identify no motive-focused language in Section 504. Petitioners repeatedly paraphrase the statute to suggest that it specifies the conduct in which funding recipients are forbidden to engage. See, *e.g.*, Br. 15-17, 21. The actual language, however, focuses solely on the outcomes for affected individuals—"be[ing] excluded" from participation, "be[ing] denied" benefits, or "be[ing] subjected to" discrimination, 29 U.S.C. 794(a)—without any discussion of "*why* the funding recipient acts," Pet. Br. 15.

Petitioners argue that the word "discrimination" implies a focus on the funding recipient's motives. Br. 15. But Section 504 protects individuals with disabilities from "be[ing] subjected to discrimination" *in addition* to the other listed outcomes. 29 U.S.C. 794(a). Nothing in the ordinary meaning of those other statutory terms suggests that an individual can "be excluded from the participation in" or "be denied the benefits of" a federally funded program only when the funding recipient acts with a discriminatory purpose. In any event, this Court has interpreted statutory prohibitions on "discriminat[ion]" as authorizing disparate-impact claims. See, *e.g.*, *Inclusive Communities*, 576 U.S. at 534 ("discriminate"); *Board of Educ. of the City Sch. Dist. of New York* v. *Harris*, 444 U.S. 130, 139-141 (1979) ("discrimination").

Petitioners are also wrong in asserting that the phrase "by reason of" in Section 504 "focuses on motives." Br. 16. That language simply requires a causal

link between the adverse outcome for the protected individual and the individual's disability. See pp. 12-14, *supra*. Common usage is again illustrative. To say that the fox was unable to drink the milk by reason of the vessel's narrow opening, cf. *Griggs*, 401 U.S. at 431, implies no view on whether the vessel was selected to foil the fox or was simply the most cost-effective or elegant one available. In any event, petitioners acknowledge that "by reason of" is equivalent to "because of." Br. 16. And this Court's precedents "dispose of th[e] argument" that the phrase "because of" excludes disparate-impact claims. *Inclusive Communities*, 576 U.S. at 535; see also, *e.g.*, *City of Jackson*, 544 U.S. at 233 (plurality opinion); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).

The fact that Section 504(a) is limited to adverse outcomes that occur "*solely* by reason of" an individual's disability (Pet. Br. 17-21) likewise does not support petitioners' reading. The word "solely" in this context speaks to the rigor of the causation requirement. See, *e.g.*, *CG* v. *Pennsylvania Dep't of Educ.*, 734 F.3d 229, 235-236 (3d Cir. 2013). While that language may reduce the frequency with which disparate-impact claims prevail, it does not categorically exclude unintentional denials of access. See *Fry*, 137 S. Ct. at 749 (describing Title II of the ADA, which omits "solely," and Section 504 as imposing "the same prohibition").

Petitioners assert that this Court has twice "interpreted statutes or regulations containing a sole-cause standard to exclude disparate-impact liability." Br. 18-19 (citing *Wimberly* v. *Labor & Indus. Relations Comm'n*, 479 U.S. 511 (1987), and *Anderson* v. *Edwards*, 514 U.S. 143 (1995)). But while the claims in those cases failed because the plaintiffs could not satisfy

the applicable causation requirements, see *Anderson*, 514 U.S. at 151; *Wimberly*, 479 U.S. at 517, neither of those decisions addressed the availability of disparate-impact claims.

Petitioners suggest (Br. 17) that "it is not even clear" how a disparate-impact theory would work under Section 504's sole-cause requirement, but decades of experience provide ample guidance. Courts have properly concluded, for example, that a school district's failure to provide a sign-language interpreter was actionable where it was "solely the [plaintiffs'] inability, as deaf persons, to effectively communicate" without the interpreter "that prevent[ed] their participation in * * * School District activities." *Rothschild* v. *Grottenthaler*, 907 F.2d 286, 291 (2d Cir. 1990). Courts likewise have properly *rejected* disparate-impact claims where plaintiffs demonstrated statistical disparities but failed to establish causation. See, *e.g.*, *CG*, 734 F.3d at 236.[3]

Petitioners are also wrong in inferring (Br. 21) from Section 504's focus on an "individual" that "Congress excluded disparate-impact liability." An individual (like the student who cannot reach a room that is inaccessible by wheelchair, see p. 14, *supra*) can often demonstrate that her exclusion from the benefits of federally funded programs has occurred "solely by reason of" her disability, without relying on statistical evidence or on any description of the experiences of other persons.

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[3] Petitioners suggest (Br. 18) that there is tension between the sole-cause standard and establishing causation by statistical analysis. But because a direct causal link between a disability and disparate outcomes exists in many cases, identifying statistical disparities is neither necessary, *Paulson*, 525 F.3d at 1259, nor sufficient, *Choate*, 469 U.S. at 289-290, to establish disparate-impact liability.

2. While acknowledging that the governing agency regulations interpret Section 504 to prohibit disparate-impact discrimination, petitioners dismiss those regulations as "atextual." Br. 27. Petitioners fault the agencies for failing to consider the "solely by reason of" language, and they criticize the agencies for failing to treat "statutory silence" on the question as a "red flag." Br. 27-28. Those criticisms are misconceived.

As we explain above, Section 504(a) contains no reference to the motivation of the federal funding recipient. The provision's silence on that point indicates that Section 504(a) is not limited to intentional discrimination. And when an individual's disability prevents her from accessing program benefits to which she is otherwise entitled, her exclusion is naturally characterized as occurring "solely by reason of" her disability. See pp. 12-14, *supra*. To the extent that Section 504(a)'s lack of any specific reference *either* to disparate impact *or* to intentional discrimination creates a genuine ambiguity, a statute's "silen[ce] * * * with respect to the specific issue" before a court indicates Congress's intent that the agency charged with implementing the statute should fill the gap. *City of Arlington* v. *FCC*, 569 U.S. 290, 296 (2013) (quoting *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

3. Petitioners argue that the *Choate* Court devoted insufficient attention to statutory text and relied unduly on legislative history and purpose. See Br. 24-27. But there was nothing untoward about the Court's attaching significant weight to the concern that Section 504 would largely fail to achieve Congress's objectives if it were construed to reach only intentional discrimination. See *Choate*, 469 U.S. at 296-297; cf. *Voisine* v. *United States*, 136 S. Ct. 2272, 2280-2281 (2016) (discussing the Court's

unwillingness to interpret 18 U.S.C. 922(g)(9) in ways that would render it "broadly inoperative" or "ineffective" in multiple jurisdictions); *Inclusive Communities*, 576 U.S. at 539. And while the *Choate* Court did not conduct the sort of close textual parsing that is characteristic of present-day statutory interpretation, its assumption that some (though not all) disparate-impact claims are cognizable under Section 504 is consistent with the most natural reading of the provision's text. See pp. 12-14, *supra*.

In addition, quite apart from the strengths and weaknesses of the *Choate* Court's analysis as an original matter, ten courts of appeals have agreed that Section 504(a) encompasses some disparate-impact claims, and they have developed standards for determining which such claims are cognizable. The extensive body of law that has developed against the backdrop of *Choate* counsels against revisiting its conclusions.

4. Petitioners observe (Br. 33-37) that the ADA, enacted in 1990, contains explicit and detailed disparate-impact provisions. Petitioners urge this Court to infer, from the absence of similar provisions in the Rehabilitation Act, that the earlier statute reaches only intentional discrimination. That argument lacks merit. See *Fry*, 137 S. Ct. at 749, 756, 758 (noting the substantial similarities of purpose and coverage between Section 504 and Title II of the ADA).

Congress enacted the ADA not to address perceived deficiencies in the Rehabilitation Act's substantive standards, but rather to extend the statute's existing protections beyond Executive Branch agencies and recipients of federal funds. See *Berardelli* v. *Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 115 (3d Cir. 2018). In drafting the ADA, Congress resolved by statute

some subsidiary questions that the Rehabilitation Act had left to agency rulemaking and judicial construction. The ADA more generally provides, however, that nothing in that statute "shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act * * * or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. 12201(a); see Pet. Br. 35 n.4. The ADA thus cross-referenced the agency regulations that had previously construed Section 504 to authorize disparate-impact claims. And by directing that those regulations be used as a point of reference in implementing the ADA itself, Congress signaled its approval of the agencies' pre-existing construction of Section 504. See p. 18, *supra*. That provision dispels any possible inference that the 1990 Congress viewed the ADA's endorsement of disparate-impact claims as a departure from prior law.

Two years after enacting the ADA, Congress amended the Rehabilitation Act to (*inter alia*) add findings and statements of congressional purpose that apply to the entire Act and that emphasize Congress's determination that individuals with disabilities are entitled to full inclusion and participation in American society. 1992 Amendments, 106 Stat. 4344, 4346-4347; see 29 U.S.C. 701(a)(3)(F), (b)(1), and (c)(3). Those findings and statements of purpose closely resemble parallel language enacted in the ADA. See *Berardelli*, 900 F.3d at 116. That correspondence would be inexplicable if Congress had viewed Section 504 as limited to intentional discrimination.

F. The Other Statutory Provisions Referenced In Section 1557 Of The ACA Do Not Suggest That Section 504 Excludes Disparate-Impact Discrimination

Section 1557 of the ACA references not only Section 504, but also Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Age Discrimination Act of 1975. Petitioners contend that those other statutes proscribe only intentional discrimination, and that Section 1557's grouping of the four laws together implies that Section 504(a) is similarly limited. That argument is unsound.

1. Section 601 of Title VI directly reaches only purposeful racial discrimination, while authorizing agencies to prohibit disparate-impact discrimination through regulations that can be enforced by the agencies themselves, but not by private plaintiffs. See *Alexander* v. *Sandoval*, 532 U.S. 275, 285-286, 293 (2001); *Choate*, 469 U.S. at 293. Petitioners argue that Section 504 should be construed in the same way because Section 601 and Section 504 use "materially similar language." Br. 30. This Court's interpretation of Section 601, however, did not turn on that provision's text.

This Court initially construed Title VI to authorize disparate-impact claims brought by private plaintiffs. *Lau* v. *Nichols*, 414 U.S. 563, 566, 568-569 (1974); see *Sandoval*, 532 U.S. at 285. Five Justices subsequently relied on legislative history to conclude that Section 601 reached only as far as the Equal Protection component of the Fifth and Fourteenth Amendments, and therefore did not prohibit race-based preferences in college admissions. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 284-287 (1978) (Powell, J.); *id.* at 325, 328-336 (Brennan, J., White, J., Marshall, J., Blackmun, J., concurring in the judgment in part and dissenting in part).

A different splintered majority of the Court subsequently concluded that this combination of opinions in *Bakke* was controlling as a matter of stare decisis, and that *Bakke* limited Section 601 to intentional discrimination. See *Guardians Ass'n* v. *Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 610-611 (1983) (Powell, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 639-642 (Stevens, J., dissenting). In *Alexander* v. *Sandoval*, the Court accepted that reading of *Bakke*, which was undisputed by the parties, without independently analyzing the text of Section 601. 532 U.S. at 280-281; see *id.* at 279-280 (describing the proposition that "[Section] 601 prohibits only intentional discrimination" as one that "must be taken as given").

The Court's conclusion that Section 601 reaches only intentional discrimination was based on legislative history and constitutional considerations "peculiar to Title VI." *Choate*, 469 U.S. at 294 n.11. There is no sound reason to import this Court's construction of Section 601 into a different statute where those rationales are inapposite. That is particularly so because, although this Court ultimately construed Section 601 to reach only intentional discrimination, the 1973 Congress that enacted the Rehabilitation Act would have understood Section 601 to authorize disparate-impact claims. See *id.* at 295 n.13 ("Congress [in 1973] 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."). Congress's incorporation of similar language into Section 504 therefore cannot reasonably be viewed as evidence of an intent to limit that provision's coverage to intentional discrimination.

As Congress and this Court have recognized, moreover, the principal cause of discrimination against individuals with disabilities is the failure to anticipate or perceive the impact on such persons of facially neutral program requirements or limitations. Recognizing disparate-impact claims therefore is uniquely necessary to effectuate Congress's core purpose in enacting Section 504. See pp. 15-16, *supra*. The fact that disability discrimination is at issue is also relevant to the textual analysis, since it is particularly natural to say that a prohibited outcome occurs "solely by reason of" an individual's disability. See p. 14, *supra*. The courts of appeals have almost uniformly construed Section 504 to reach disparate-impact discrimination, despite this Court's narrower reading of Section 601, see pp. 11-12, *supra*, and Congress has not amended either statute to eliminate the divergence.

2. Petitioners assert (Br. 28) that Title IX and the Age Act, the other two provisions referenced by Section 1557 of the ACA, are limited to intentional discrimination. But that question has not been settled under either statute. At least two courts of appeals have suggested that Title IX authorizes disparate-impact claims. See *Doe* v. *University of Denver*, 952 F.3d 1182, 1193 n.8 (10th Cir. 2020); *Brine* v. *University of Iowa*, 90 F.3d 271, 274 (8th Cir. 1996), cert. denied, 519 U.S. 1149 (1997). And multiple Title IX regulations bar disparate-impact discrimination. See, *e.g.*, 34 C.F.R. 106.21(b)(2), 106.43, 106.52, 106.53(b).

It is likewise far from settled whether the Age Act is limited to intentional discrimination. The Age Act contains language similar to that of Section 4 of the ADEA, see Pet. Br. 31—specifically, its clarification that an "otherwise prohibited" action is permitted "where the

differentiation is based on reasonable factors other than age," 29 U.S.C. 623(f)(1). In *City of Jackson*, the Court cited that provision as "support" for reading Section 4 of the ADEA to reach disparate-impact discrimination. 544 U.S. at 239-240 (plurality opinion); *id.* at 243 (Scalia, J., concurring in part and concurring in the judgment).

In any event, the fact that Congress incorporated the substantive standards of four distinct anti-discrimination provisions into Section 1557 of the ACA does not imply that the four provisions should be construed *in pari materia* in determining their substantive scope. The more natural inference to be drawn from the ACA's application of the pre-existing anti-discrimination requirements to additional regulated parties and activities, without any alteration of the four provisions themselves, is that Congress generally approved the ways in which those provisions had previously been applied. That inference reinforces the conclusion that Section 504 of the Rehabilitation Act reaches at least some disparate-impact claims.

G. Petitioners' Acceptance Of Reasonable-Accommodation Claims Further Undermines Their Position

In the decades since *Choate*, the courts of appeals have delineated two related theories of liability for challenging actions that have the effect of excluding individuals with disabilities from federally funded programs. Section 504 plaintiffs sometimes assert that a funding recipient's policy is unlawful because it denies individuals with disabilities meaningful access to program benefits. Other Section 504 plaintiffs invoke a funding recipient's affirmative obligation to accommodate persons with disabilities through the creation of individualized exceptions to general policies that otherwise remain in effect. See, *e.g.*, *Arline*, 480 U.S. at 287 n.17, 289 n.19;

Choate, 469 U.S. at 301 n.21; 28 C.F.R. 41.53, 42.511. A claim that all U.S. currency must be modified because, in its current form, it denies meaningful access to visually impaired individuals, see *Paulson*, 525 F.3d at 1259-1260, might proceed on the former theory. A student whose access to program benefits depends on use of a service animal might seek, as a reasonable accommodation, an exception to a no-animals policy, rather than challenging the policy itself. See, *e.g.*, *Berardelli*, 900 F.3d at 125.

For present purposes, the most salient point is that reasonable-accommodation claims do not require proof of discriminatory intent. See, *e.g.*, *Enica* v. *Principi*, 544 F.3d 328, 339 (1st Cir. 2008); *Lamone*, 813 F.3d at 510. In that respect, they share a defining feature of disparate-impact liability. See *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 645-646 (1989) (defining a disparate-impact theory as one that challenges "a facially neutral" practice and is not premised on "evidence of the [defendant's] subjective intent to discriminate"); see also *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52-53 (2003). Since neither type of claim requires proof that the defendant adopted the general policy at issue *because of* its exclusionary effect on individuals with disabilities, reasonable-accommodation claims are indistinguishable for purposes of the statutory-interpretation question presented here: whether Section 504 can "rectify the harms resulting from action that discriminated by effect as well as by design." *Choate*, 469 U.S. at 297; see Pet. Br. 14 (distinguishing statutes that turn "on the defendant's motive" from those that regulate conduct that "produces differential *outcomes*"). In *Choate* itself, this Court cited multiple reasonable-accommodation cases as examples of courts interpreting Section 504 to

"reach[] disparate-impact discrimination." See 469 U.S. at 297 n.17.

Petitioners recognize (Br. 23-24) that reasonable-accommodation claims may be available under Section 504. But petitioners make no effort to reconcile that position with their core argument that Section 504 applies only when "federal-funding recipients act for the prohibited reason of the individual's disability." Br. 16; see Br. 13-21. With rare exceptions, the barriers to access that reasonable-accommodation claims seek to address were not adopted with discriminatory intent. Like petitioners, the only court of appeals (the Sixth Circuit) that has disapproved disparate-impact claims under Section 504 has accepted that reasonable-accommodation claims are cognizable. See *BlueCross BlueShield*, 926 F.3d at 243. The Sixth Circuit stated that "[a] claim based on a denial of a reasonable accommodation differs from a disparate-impact claim," *ibid.*, but it did not attempt to reconcile that statement with its antecedent determination that Section 504(a)'s language "does not encompass actions taken for nondiscriminatory reasons," *id.* at 242.

Petitioners suggest that reasonable-accommodation claims may fit the language of Section 504 because they are "individualized." Br. 23 (quoting *Arline*, 480 U.S. at 287). But a disparate-impact claim in the disability context likewise asks whether an "otherwise qualified handicapped *individual*" has "meaningful access to the benefit that the grantee offers." *Choate*, 469 U.S. at 301 (emphasis added). Nor do petitioners identify any textual reason that the only permissible Section 504 remedy is an individualized exception. After all, ensuring meaningful access for an individual sometimes requires systemic changes. See, *e.g.*, *Paulson*, 525 F.3d at 1259-

1260 (access to U.S. currency). And while petitioners argue (Br. 33-37) that Section 504 should be construed to avoid overlap with the ADA, and express concern (Br. 40-46) about the practical consequences of allowing disparate-impact claims, reasonable-accommodation claims implicate the same considerations. Petitioners' willingness to accept reasonable-accommodation claims belies their core contention that Section 504 is limited to conduct undertaken with discriminatory intent.

H. Petitioners' Policy Arguments Are Premised On Misunderstandings About The Range Of Disparate-Impact Claims That Courts Have Allowed Under Section 504

Petitioners contend that recognizing disparate-impact liability under Section 504 "would carry adverse policy consequences." Br. 40 (capitalization omitted). But petitioners' policy arguments are not directed at the actual body of disparate-impact precedents that lower courts have developed during the decades since *Choate*. Rather, they are directed at an extreme version of disparate-impact liability that the *Choate* Court long ago rejected.

1. Petitioners hypothesize (Br. 41, 44-45) a legal regime in which any disparity in result between an individual with a disability and others would be actionable. But Section 504's language is far more circumscribed, referring specifically to situations where an individual is "excluded from" participation in or "denied the benefits of" an activity. 29 U.S.C. 794(a). Accordingly, the Court in *Choate* properly "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under" Section 504. 469 U.S. at 299. Instead, a Section 504 plaintiff asserting a disparate-impact theory must establish that the challenged practice denied him "meaningful access to the benefit that

the grantee offers." *Id.* at 301. A Section 504 plaintiff cannot succeed simply by showing that a certain limitation "falls most heavily on the handicapped." *Id.* at 306.

In asserting that "[o]pening the door" to disparate-impact suits would have untoward results, Br. 45, petitioners ignore the fact that the door has long been open, since disparate-impact liability has been available under Section 504 for decades. See pp. 11-12, *supra*; *Choate*, 469 U.S. at 297 n.17 (collecting cases). Cf. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 196 (2012). The real-world courts that have applied the theory have not "struggle[d] to identify * * * guardrails," Br. 45, but instead have carefully circumscribed disparate-impact liability consistent with this Court's guidance, agency regulations, statutory text, and common sense. See *Paulson*, 525 F.3d at 1267-1268 (citing cases); see also, *e.g.*, *Jones* v. *City of Monroe*, 341 F.3d 474, 479 (6th Cir. 2003) (rejecting a claim to more accessible city-provided parking because the benefit the city offered was "free downtown parking at specific locations," and "not free downtown parking that is accessible to wherever a citizen, disabled or non-disabled, chooses to go or work").[4]

2. Petitioners express (Br. 40-43) particular concern about the policy implications of allowing disparate-impact claims to be brought in the healthcare context

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[4] Petitioners appear to accept that the statutory standards governing disparate-impact liability under the ADA have avoided the sort of over-expansive liability they associate with disparate-impact claims under the Rehabilitation Act. See Br. 36. They offer no persuasive reason to reject the substantially parallel limits developed by agencies and courts in applying Section 504. See, *e.g.*, *Payan* v. *Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 737 (9th Cir. 2021) (explaining that Title II of the ADA and Section 504 generally "are interpreted coextensively").

pursuant to Section 1557 of the ACA. That concern is unfounded.[5]

The Court in *Choate* articulated and applied the meaningful-access standard in the specific context of a healthcare claim. 469 U.S. at 302-304. It was in that setting that the Court emphasized the need to "keep [Section] 504 within manageable bounds." *Id.* at 299. The Court explained that a Section 504 defendant is "not require[d] * * * to alter [its] definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." *Id.* at 303.

For that reason, the State in *Choate* was free to define its benefit as fourteen days of inpatient coverage, even though individuals with disabilities would have disproportionately benefited from a longer coverage period. 469 U.S. at 302-303, 308. And even a plaintiff who identifies a cognizable disparate impact will not prevail if remedying the denial of access, either by a systemic change or through an individualized accommodation, would be unreasonably burdensome or would require a "fundamental alteration in the nature of the program." *Southeastern Cmty. Coll.* v. *Davis*, 442 U.S. 397, 410 (1979); see *id.* at 413.[6] There is consequently no sound

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[5] Because this Court's grant of certiorari was limited to the threshold question whether disparate-impact claims under Section 504 are *ever* cognizable, the United States does not address the court of appeals' application of disparate-impact principles to respondents' allegations in this case. See Pet. 27 (framing the first question presented as whether "section 504 reaches some disparate-impact claims," and the second question as whether the decision below "would still be wrong" even if some disparate-impact claims can go forward).

[6] Monetary damages are available in even more limited circumstances, where a funding recipient engages in "intentional conduct

reason to believe that the ACA's application of Section 504's substantive standards to additional healthcare-related entities and activities will render unworkable the legal regime that lower courts have developed during the decades since this Court's decision in *Choate*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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that violates the clear terms of" Section 504. *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002); see 29 U.S.C. 794a(a)(2).