No. 20-1374

IN THE

Supreme Court of the United States

CVS PHARMACY, INC., CAREMARK, L.L.C., AND CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C.,
Petitioners,

v.

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

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

BRIEF FOR THE EMORY ENVIRONMENTAL LAW SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PAUL KOSTER
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROGRAM
1301 Clifton Road
Atlanta, Georgia 30322
(404) 727-3957
Paul.Koster@emory.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Emory Environmental Law Society ("EELS") is a student organization at Emory Law School devoted to promoting awareness of environmental concerns and issues. EELS is dedicated to helping its members learn about current environmental legal issues and provides its members with environmentally focused volunteer opportunities in the Atlanta community. Advocating for equal rights and disability rights protection, especially through the lens of national parks access, falls squarely within EELS's purpose of providing law school students the opportunity to confront environmental issues across Georgia, the United States, and the world.

Amicus's members are students within the Emory Law School community, which has over 790 students. *Amicus*'s members have an interest in disability rights and equal access to national parks. This case will directly impact *amicus*'s members, their rights, and their use of federally funded lands.

---

[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* affirm that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed pursuant to Sup. Ct. R. 37.3(a), and the consents of Petitioners and Respondents were received on October 26, 2021.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Rehabilitation Act of 1973 (RHA) was designed to protect the rights of people with disabilities and ensure their enjoyment of "full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society."[2] Section 504, a component of the RHA, was passed against the backdrop of nationwide protests in support of federal disability rights. In light a widespread call for action, Section 504 was passed—the first law in the United States guaranteeing federal civil rights protection for people with disabilities.[3]

Section 504 "prohibits discrimination on the basis of disability in programs or activities that receive Federal financial assistance."[4] The language of Section 504 is broad, nowhere limiting itself to bar only intentional discrimination. As such, Section 504 has had sweeping impact across industries. From education to healthcare to national parks, Section 504

---

[2] 29 U.S.C. § 701(a)(3)(F).

[3] Britta Shoot, *The 1977 Disability Rights Protest That Broke Records and Changed Laws*, ATLAS OBSCURA (Nov. 9, 2017), https://www.atlasobscura.com/articles/504-sit-in-san-francisco-1977-disability-rights-advocacy; *see also* Kitty Cone, *Short History of the 504 Sit-in*, DISABILITY RIGHTS EDUC. & DEF. FUND, https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/ (last visited Oct. 21, 2021).

[4] *Protecting Students With Disabilities*, OFFICE FOR CIVIL RIGHTS, https://www2.ed.gov/about/offices/list/ocr/504faq; *see also* 29 U.S.C. § 794.

has influenced and shaped accessibility across the nation.

This Court is asked to determine whether disparate impact causes of action for disability discrimination exist under Section 504. In support of Respondents, *amicus* believe that in light of Section 504's broad language, history, and prior judicial interpretations, it does. Though the case at issue revolves around Section 504 and its application in the healthcare sector, this brief formulates its argument through the lens of national parks accessibility to emphasize the far-reaching influence of Section 504, and, by proxy, the Court's decision in this case.

While visiting a national park and visiting a healthcare professional may seem like distinct experiences, they are equally governed by Section 504 and equally affected by changes to Section 504 enforcement. This Court should not consider the implications of its decision only in the context of healthcare. A decision in favor of Petitioners will have far-reaching implications in limiting disability rights well beyond the facial scope of this case.

ARGUMENT

I. Section 504's broad protection against intentional and disparate impact discrimination increased both the scope of required accommodations necessary for national parks accessibility and the breadth of individuals ensured access to the parks

The passage of Section 504 broadened the protections offered to people with disabilities visiting national parks and increased the scope of visitors who were guaranteed accessibility. Before Section 504, U.S. National Parks were legally bound with respect to accessibility solely by the Architectural Barriers Act of 1968 (ABA).[5]

The ABA only guarantees physical access to facilities, so many of the changes instituted pursuant to the statute focus on remediating physical barriers. However, Section 504's protections are broader in scope, and so a wider set of access barriers are forbidden under Section 504. In this way, Section 504 has caused the NPS to consider and accommodate disabilities which may have gone unrecognized otherwise. As the NPS Director wrote in a guidance to national park management with instructions on how to comply with both the ABA and Section 504, "the NPS not only has to be concerned with enabling people

---

[5] *See Accessibility Compliance: Helping All Visitors Have a Positive and Rewarding Experience at Our Venues,* NAT'L PARK SERV., https://www.nps.gov/articles/accessibility.htm (last visited Oct. 19, 2021).

with disabilities to have access to parks and facilities but, once there, the NPS also needs to do everything feasible to enable them to receive as close to the same benefits as those received by other visitors. This also means our obligation extends to individuals with visual impairments, hearing impairments, and cognitive impairments, as well as those with mobility impairments."[6]

The importance of Section 504 in shaping the NPS's approach to accessibility cannot be overstated. The NPS decided to approach the issue of accessibility in a "comprehensive, organized way, rather than on a project-by-project basis," at least in part because of the influence of Section 504.[7] "Historically, national parks in the [U.S.] supported individual visitors with disabilities informally until the early 1970s—i.e., there was no official policy or guideline to follow, and so support was provided ad hoc . . . . [The NPS] first considered accessibility as a national issue following the passage of Section 504."[8] Now, to comply with Section 504, the NPS requires "meaningful access" to all national parks for all visitors.[9]

---

[6] U.S. DEP'T OF INTERIOR, NAT'L PARK SERV., *Dir.'s Ords. No. 42: Accessibility for Park Visitors* (Nov. 3, 2000), https://www.nps.gov/subjects/policy/upload/DO_42_11-3-2000.pdf.

[7] Simon Hayhoe, *Inclusive Capital, Human Value and Cultural Access: A Case Study of Disability Access at Yosemite National Park*, in THE ROUTLEDGE HANDBOOK OF DISABILITY ARTS, CULTURE, AND MEDIA 125, 132 (Bree Hadley & Donna McDonald eds., 2018).

[8] *Id.* at 131.

[9] *See, e.g.*, BUREAU OF LAND MGMT. AND CALIFORNIA DEP'T OF FISH AND GAME, U.S. DEP'T OF THE INTERIOR, VOL. II, *HEADWATER*

This broad interpretation, which draws no distinction between barring intentional and disparate impact discrimination, is consistent with both the history and legislative intent of Section 504. The passage of Section 504 was motivated, if not caused, by a nationwide protest calling for federal civil rights protection for people with disabilities. This protest, known as the 504 Sit-In, is "the longest non-violent occupation of a federal building in United States history"[10] and demonstrates the widespread need for broad, federally protected disability rights. As Senator Hubert Humphrey stated regarding the passage of Section 504, "the time has come to firmly establish the right of [Americans with disabilities] to dignity and self-respect as equal and contributing members of society and to end the virtual isolation of millions of children and adults."[11]

Accessibility and enjoyment of the national parks goes hand-in-hand with Senator Humphrey's acknowledgment of the need to eliminate the isolation of people with disabilities. As Representative Katie Porter (D-CA), Chair of the House Natural Resources Subcommittee on Oversight, has more recently acknowledged, "[o]ur public lands are national

---

FOREST RESERVE PROPOSED RESOURCE MANAGEMENT PLAN AND FINAL EIS/EIR (Sep. 2003) (acknowledging both Section 504's requirement of "meaningful access to federally funded 'programs and activities'" and its prohibition on operating any "federal or federally funded program or activity" which discriminates against people with disabilities applies to National Park Service).

[10] Shoot, *supra* note 3; *see also* Cone, *supra* note 3.

[11] 118 CONG. REC. 32310 (1972) (statement of Sen. Humphrey).

treasures belonging to all Americans, and they should be accessible to all Americans. Yet, this promise is not a reality for many people with disabilities."[12]

Even with the ABA, Section 504, and the later passed Americans With Disabilities Act (ADA), accessibility is still a work in progress. The broad protection available under Section 504 both has helped shaped national park accessibility in the past and, as discussed below, currently provides safeguards against future barriers to access to the parks. Should this Court find that Section 504 does not include disparate impact claims, the scope of protection offered by Section 504 will be severely restricted not only in healthcare accessibility, but also across all contexts, including national park accessibility.

II. Enforcement of Section 504 in the context of national parks shows how a change in Section 504's scope could lead to unpredictability far beyond the realm of healthcare

For nearly 50 years, lower courts and agency decisionmakers have relied upon an interpretation of Section 504 of the RHA from *Alexander v. Choate*, in

---

[12] Allison Norlian, *Accessibility and The Great Outdoors: In Congressional Hearings, Disability Advocates Call Attention To 'Barriers' in National Parks*, FORBES (May 5, 2021 9:40 AM), https://www.forbes.com/sites/allisonnorlian/2021/05/05/accessibility-and-the-great-outdoors-in-congressional-hearings-disability-advocates-call-attention-to-barriers-in-national-parks/?sh=2472287751db.

which this Court held that people with disabilities cannot be denied "meaningful access" to services benefitting from federal financial assistance, even under facially neutral policies.[13] Justice Marshall's words in *Choate* have had far-reaching implications, stretching all the way to litigation concerning national parks. The cases and history discussed below demonstrate a change in Section 504's scope could lead to unpredictability far beyond the realm of healthcare.

The existence of disparate impact claims with Section 504 has been explored in a variety of contexts, including state and national park litigation. In *Galusha v. New York State Department of Environmental Conservation*, the United States District Court for the Northern District of New York, citing *Choate*, granted a preliminary injunction against the New York Department of Environmental Conservation, which had been restricting non-emergency vehicle access to parts of Adirondack Park.[14] Though the Northern District of New York was determining the applicability of the ADA (which offers similar protections as Section 504 but against public entities), it turned to the ADA's "forerunner, Section 504 of the Rehabilitation Act," for interpretative guidance.[15] Notably, the Northern District of New York described a "long followed"[16] RHA jurisprudence, which specifically "established that Section 504 of the Rehabilitation Act provides that an established

---

[13] *Alexander v. Choate*, 469 U.S. 287, 301 (1985).
[14] *Galusha v. N.Y. State Dep't of Env't Conservation*, 27 F. Supp. 2d 117, 120–21 (N.D.N.Y. 1998).
[15] *Id.* at 123.
[16] *Id.*

disparate impact happening to the detriment of persons with disabilities is sufficient to state a claim."[17] The Northern District of New York then justified the existence of disparate impact within the ADA because of its existence in Section 504.[18] The Northern District of New York's discussion of Section 504 provides useful background on how courts understand the scope of Section 504 and demonstrates the relevance of the statute to park access discourse.

Similarly, in *Gray v. Golden Gate National Recreation Area*, the United States District Court for the Northern District of California inherently acknowledged disparate impact claims in Section 504 when it granted certification for a class of plaintiffs with vision-related disabilities seeking to sue the Golden Gate National Recreation Area and the NPS.[19] In the case, the plaintiffs' only claim was a violation of Section 504, alleging the defendants' "systematically discriminated against them on the basis of their vision and/or mobility disabilities by failing to provide adequate accommodations."[20] In finding the commonality requirement of class certification was met, the Northern District of California noted "there is evidence of multiple people suffering the same injury (lack of access) and evidence that the injuries were caused by systemwide policies and practices of failing to comply with access

---

[17] *Id.*
[18] *Id.*
[19] *Gray v. Golden Gate Nat'l Rec. Area*, 279 F.R.D. 501, 502 (N.D. Cal. 2011).
[20] *Id.* at 503–04.

requirements"[21] of Section 504. Defendants challenged the certification on the ground the plaintiffs did not point to "any specific policy or practice" which was discriminatory, but rather identified an "ongoing failure to provide program access."[22] However, the Northern District of California explicitly acknowledged that "Rehabilitation Act claims *do not require proof of the intent* behind the alleged barriers, but instead rely on evidence that they exist."[23] In doing so, the Northern District of California demonstrated an inherent acceptance that Section 504 includes disparate impact claims. Ultimately, the case was resolved by settlement, and notably, *Gray* has been described by the Disability Rights Advocates organization as "the *first* comprehensive settlement . . . [to] increase the accessibility of a federal park."[24]

The mere existence of disparate impact with Section 504 does not guarantee those claims' success or foretell an overburdened, costly enforcement. In *Isle Royale Boaters Association v. Norton*, the United States District Court for the Western District of Michigan resolved a RHA and ADA challenge to the NPS's 1998 General Management Plan for Isle Royale National Park by granting the Park Service's motion

---

[21] *Id.* at 517.

[22] *Id.*

[23] *Id.* at 518 (emphasis added).

[24] *See* Perri Meldon, Interpreting Access: A History of Accessibility and Disability Representations in the National Park Service 60–61 (2019) (M.A. thesis, University of Massachusetts Amherst) (on file with the UMass Amherst Libraries "ScholarWorks" system).

for summary judgment.[25] While the Western District of Michigan found the plaintiffs had standing to sue under Section 504 as people without disabilities "who are affected by discrimination against" people with disabilities, it did not find the plaintiffs' claims, which included a Section 504 disparate impact claim, meritorious.[26] The Western District of Michigan explained no evidence existed of discrimination within the challenged NPS action as "the Park [would] remain, as a whole, readily accessible" to people with disabilities.[27] *Isle Royale* shows that Section 504's inclusion of a disparate impact cause of action does not guarantee that claim's success and demonstrates yet another court understanding Section 504 to allow for disparate impact causes of action.

Each of the above cases demonstrates a shared understanding across courts that Section 504 allows for disparate impact claims. A finding to the contrary by this Court would not only affect the applicability of Section 504 within the healthcare realm, but across all sectors. While visiting a national park and visiting a healthcare professional may seem like distinct

---

[25] *Isle Royale Boaters Ass'n v. Norton*, 154 F. Supp. 2d 1098, 1140 (W.D. Mich. 2001), *aff'd*, 330 F.3d 777 (6th Cir. 2003).

[26] *Id.* at 1134–35.

[27] *Id.* at 1135. In 2013, *Isle Royale*'s analysis was cited with approval in *Coppi v. City of Dana Point*, in which the Central District of California denied a motion for summary judgment in an ADA-related action. *Coppi v. City of Dana Point*, No. SACV11-01813 JGB(RNBx), 2013 WL 12131354, *11 (C.D. Cal. 2013). In doing so, the court reviewed *Isle Royale*, writing: "In *Isle* . . ., the Sixth Circuit affirmed a district court's finding that the [NPS] did not violate a provision of the RHA *that is analogous to* Title II of the ADA." *Id.* at *9 (emphasis added).

experiences, they are equally governed by Section 504, and by proxy, equally affected by changes to Section 504 enforcement. This Court should not consider the implications of its decision only in the context of healthcare providers. A decision in favor of Petitioners will have far-reaching implications in limiting disability rights well beyond the healthcare scope of this case.

III. Should Section 504 only bar intentional discrimination, the public's opportunity to hold the NPS accountable and create actionable change within national parks would be severely restricted

As Professor Robert L. Burgdorf Jr. has explained, "[i]n implementing the requirements of [S]ection 504 . . . the [NPS] has spent the last decade and a half developing ways to make parks and recreation areas accessible to all persons with disabilities . . . . In fact, through the application of a few simple principles, the [NPS] has found it feasible to provide an effective level of accessibility at almost all of its parks and facilities without undercutting environmental integrity."[28] Even so, "[i]t is often only through complaints that parks take the necessary steps to break barriers."[29]

The NPS has not always implemented Section 504 as stringently as it does today, and Section 504 complaints by visitors have served as the primary

---

[28] Robert L. Burgdorf Jr., *Equal Access to Public Accommodations*, 69 MILBANK QUARTERLY 183, 187 (1991).
[29] Meldon, *supra* note 24, at 61.

avenue for redress for park inaccessibility. In a 2006 oversight hearing on disability in the national parks system, Representative Stevan Pearce, Chairman of the Subcommittee on National Parks stated, "we have failed in our job of oversight, I will tell you that 100 percent."[30] As one witness put it, "the only way to force the priority [of accessibility] is to file a 504 complaint."[31]

In explaining to the public how to file a discrimination complaint, the NPS directs: "Individuals, or their representatives, may file a disability rights complaint with the NPS if they believe they have been discriminated against or denied access to any program, service, or activity conducted by NPS or by an NPS recipient of federal financial assistance."[32] Nowhere in this directive does the NPS require the discrimination be intentional. To the contrary, a park visitor who believes a neutral policy discriminates against an individual with a disability or otherwise denies an individual with a disability access is told, by the NPS, to file a complaint. These complaints create the impetus for national parks to address policies, both intentional and facially neutral, that would otherwise leave

---

[30] *Disability Access in The Nat'l Park System Before the Subcomm. on Nat'l Parks, H. Comm. on Resources*, 109th Cong. 28 (2006) (statement of Rep. Stevan Pearce, Chairman, Subcomm. on Nat'l, Park).

[31] *Id.* (statement of Janice Schacter. Chair, Hearing Access Program, Hearing Loss Association of America).

[32] Language pulled directly from the NPS public complaint filing webpage: *Filing a Complaint: EEO Technical Guidance*, NAT'L PARK SERV., https://www.nps.gov/aboutus/eeotechguidance.htm (last visited Oct. 21, 2021).

people with disabilities without meaningful access "to our significant sites and the stories within."[33]

Due to Section 504 complaints and a groundswell of disability advocacy, the NPS has implemented a range of technologies to make programs and physical structures compliant with Section 504. Following the 2006 hearing, the NPS initiated the Audio-Visual Initiative for Visitors with Disabilities to add captions, audio-descriptions, and assisted listening devices to over 100 existing major audiovisual programs in 85 parks.[34] The NPS correctly understands that ensuring qualified individuals are not "excluded from the participation in, [or] denied the benefits of" its programs requires affirmative accommodations to provide equitable experiences.[35] This commitment to inclusion and accessibility is demonstrated in the current Programmatic Accessibility Guidelines for National Park Service Interpretive Media, which states compliance with Section 504 requires a broader understanding of how people with disabilities receive and process information and the multitude of methods necessary to ensure effective accommodation.[36] These

---

[33] U.S. DEP'T OF THE INTERIOR, NAT'L PARKS SERVICE, ALL IN! ACCESSIBILITY IN THE NAT'L PARK SERVICE 3 (2014).

[34] *Disability Access in The Nat'l Park System Before the Subcomm. on Parks, Forests and Public Lands, H. Comm. on Natural Resources*, 110th Cong. 13 (2008) (Statement of Stephen E. Whitesell, Associate Director, Park Planning, Facilities, And Lands, Nat'l Park Service).

[35] 29 U.S.C. § 794.

[36] *Programmatic Accessibility Guidelines for Nat'l Park Serv. Interpretative Media*, HARPERS FERRY CTR. (Feb. 2012),

methods and techniques include, but are not limited to, the use of qualified sign language interpreters and cued speech, captions on audiovisual programs, assistive listening devices, readers for people with visual impairments, audio and braille versions of printed information, and other advances such as computer technology.[37]

Without Section 504's broad mandate and the requirement to address Section 504 complaints, both because of internal policy and the threat of litigation, the NPS may not have taken steps to make the parks and their programs accessible to the estimated 28 million people with disabilities who visit national parks annually.[38] The NPS has acknowledged its consideration of litigation costs with respect to its interest in accessibility. As its Accessibility Task Force commented in a strategic plan proposed to promote accessibility, the NPS "risks continued exposure to lawsuits from a lack of compliance with accessibility laws, which has the potential for a huge financial impact on parks."[39]

Complaints from the public and the authority imbued in them because their litigative potential ensures the voices of national park visitors with disabilities be heard. Absent a disparate impact cause of action, Section 504's applicability will be severely limited; only complaints alleging intentional

---

http://npshistory.com/publications/interpretation/accessibility-guide-v2.1.pdf.

[37] *Id.*

[38] U.S. DEP'T OF THE INTERIOR, *supra* note 33, at 6.

[39] *Id.*

discrimination will be required to be resolved. Had the NPS understood Section 504 to be limited to intentional discrimination, it is unclear whether the parks would have adapted, and at what pace, to be at the level of accessibility they are today. While the NPS could elect on its own to continue to work towards increased accessibility, absent the threat of disparate impact claims under Section 504 there would be limited recourse if it did not.

As demonstrated above, Section 504 has played a critical role in both how the NPS has adapted operations in favor of accessibility and how the public keeps the NPS accountable. Revocation of disparate impact causes of action from Section 504 will have sweeping consequences. We ask this Court to consider how many other areas besides healthcare, such as national parks, would not have taken steps towards accessibility absent the threat of complaints and litigation stemming from disparate impact causes of action under Section 504.

CONCLUSION

For the foregoing reasons, *amicus* respectfully request this Honorable Court affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

PAUL KOSTER
Counsel of Record
EMORY LAW SCHOOL SUPREME COURT ADVOCACY PROGRAM
1301 Clifton Road
Atlanta, GA 30322
(404) 727-3957
Paul.Koster@emory.edu
Counsel for Amicus Curiae