No. 18-35892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs/Appellants,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants/Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Hon. Richard A. Jones, U.S. District Judge
(Seattle, Case No. 2:17-cv-01609-RAJ)

APPELLEES' SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The United States Court of Appeals for the Sixth Circuit's recent opinion in *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (6th Cir. 2019), contains two holdings that are directly applicable to this case. First, the court held that disability discrimination claims under Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18116(a), are analyzed under the existing legal standards applicable to claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). Second, the court concluded that Section 504's prohibition of discrimination "solely by reason of . . . disability" does not reach claims under a disparate-impact theory because such claims do not involve actions taken for discriminatory reasons.

This Court should reach the same conclusions with respect to Plaintiffs' claims. Contrary to Plaintiffs' repeated insistence, the Sixth Circuit's analysis confirms that Section 1557 simply applied existing discrimination law to a new context. It did not create a new, relaxed, or different legal standard other than Section 504's existing prohibition. Moreover, although several courts have assumed that some form of disparate-impact theory is viable under Section 504, the Sixth Circuit's cogent analysis explains why that theory is inconsistent with the text, context, structure, and goals of the Rehabilitation Act, as outlined by the Supreme Court. The Court may affirm on any ground supported by the record, and

BlueCross further demonstrates why the District Court correctly dismissed Plaintiffs' claims.

II. ARGUMENT

A. *BlueCross* Confirms That Section 1557 Incorporates the Standards for Disability Discrimination Under Section 504 of the Rehabilitation Act.

In *BlueCross*, the plaintiff argued that Section 1557 allows disability discrimination claims to proceed under the standards applicable to *any* of the four civil rights statutes it references. 926 F.3d at 238. The Sixth Circuit rejected this contention based on a plain reading of the statute: "If the claimant seeks relief for discrimination 'on the ground prohibited' by § 504 of the Rehabilitation Act, for example, he must show differential treatment 'solely by reason of' disability, not some other standard of care. Otherwise, the health insurer's actions do not amount to the kind of 'discrimination' barred by the law." *Id.* (citations omitted).

Plaintiffs' argument here is slightly different but equally foreclosed by *BlueCross*. They contend that Section 1557's incorporation of only the "ground prohibited under" and "enforcement mechanisms of" Section 504 demonstrate an intent *not* to incorporate its "legal standards." (*See* Reply Brief, Dkt. 28 at 7-8.) *BlueCross*, however, is directly contrary to this view. First, the Sixth Circuit concluded that the ACA "does not change the nature" of the "grounds" it references and that "Congress incorporated the legal standards that define discrimination under each one." *BlueCross*, 926 F.3d at 239 (citing *Panama R.*

Co. v. Johnson, 264 U.S. 375, 392 (1924)). Second, the court explained that Congress's statement that those statutes' enforcement mechanisms "shall apply" indicated that Section 1557 "covers the distinct methods available under the four listed statutes for compelling compliance with the substantive requirements of each statute." *Id.* In sum, the Sixth Circuit held that "the Affordable Care Act picks up the standard of care for showing a violation of § 504," but does not create a brand-new standard. *Id.*

This holding is consistent with the opinion of almost every district court to consider the issue. *See, e.g., Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 699 (E.D. Pa. 2015); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 738 (N.D. Ill. 2017); *York v. Wellmark, Inc.*, No. 4:16-cv-00627-RGE-CFB, 2017 WL 11261026, at *18 (S.D. Iowa Sept. 6, 2017); *Doe v. BlueCross BlueShield of Tenn., Inc.*, No. 2:17-cv-02793-TLP-cgc, 2018 WL 3625012, at *6 (W.D. Tenn. July 30, 2018); *Schmitt v. Kaiser Found. Health Plan of Wash.*, No. C17-1611RSL, 2018 WL 4385858, at *1 (W.D. Wash. Sept. 14, 2018)).[1]

[1] The lone opinion to the contrary held that Section 1557 created a new, single standard for anti-discrimination claims but declined to define that standard. *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415, at *11 (D. Minn. Mar. 16, 2015). Three of the district courts adhering to the majority rule have specifically rejected the holding in *Rumble*. *See Gilead Scis., Inc.*, 102 F. Supp. at 699 n.3; *Briscoe*, 281 F. Supp. 3d at 738; *York*, 2017 WL 11261026, at *18.

B. *BlueCross* Resolves the Issue Left Open in *Choate*, Holding That Disparate-Impact Claims Are Not Viable Under Section 504.

The Sixth Circuit next "resolve[d] what *Choate* did not and conclude[d] that § 504 does not prohibit disparate-impact discrimination." *BlueCross*, 926 F.3d at 241 (citing *Alexander v. Choate*, 469 U.S. 287 (1985)). Relying on the statutory text prohibiting discrimination "solely by reason of . . . disability," as well as precedent interpreting similar anti-discrimination statutes, the court concluded that the statute "does not encompass actions taken for nondiscriminatory reasons." *Id.* at 242.

The court's holding is consistent with the Supreme Court's opinion in *Choate*. In *Choate*, the Court discussed what it called "two powerful but countervailing considerations," noting that "just as there is reason to question whether Congress intended § 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination." 469 U.S. at 299. Rather than resolve this question, the Court "decline[d] the parties' invitation to decide" the issue. *Id.* Notably, it *did* "reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504," but it only "assume[d] without deciding" that some such claims could be viable. *Id.*

Ultimately, the Court employed the "meaningful access" standard of *Southeastern Community College v. Davis* "[t]o determine which disparate impacts

§ 504 *might* make actionable." *Id.* (emphasis added) (citing *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979)). The Court, therefore, did decide that at least some disparate impacts are not actionable, but it did not need to reach the question of whether any are because, even under the standard that might apply, the petitioners' claims failed. *Id.* at 309. As the Sixth Circuit later explained, this resolution explicitly left open the question of whether Section 504 allows any disparate-impact claims at all. This Court should adopt the Sixth Circuit's determination of that issue.[2]

It is well established that "[t]he starting point in discerning congressional intent is the existing statutory text." *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 802 (9th Cir. 2017) (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004)). The "inquiry will 'end[] there as well if the text [of the statute] is unambiguous.'" *Id.* (brackets in original) (quoting *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004)). "The preeminent canon of statutory interpretation requires [courts] to presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Id.* (internal quotation marks omitted; second brackets in original) (quoting *BedRoc Ltd.*, 541 U.S. at 183). "If 'the

[2] Although this Court has applied *Choate*'s "meaningful access" standard, it has not directly addressed the question left open by *Choate* and determined whether Section 504 allows disparate-impact claims in the first place. *See, e.g., Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013).

statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms.'" *Id.* (quoting *Lamie*, 540 U.S. at 534).

As the Sixth Circuit held, the text of Section 504 leaves no room for disparate-impact claims. "Disparate-impact discrimination occurs when an entity acts for a nondiscriminatory reason but nevertheless disproportionately harms a protected group." *BlueCross*, 926 F.3d at 241 (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). But Section 504 only bars conduct that discriminates "solely by *reason* of . . . disability," which cannot include actions taken for nondiscriminatory reasons. 29 U.S.C. § 794(a) (emphasis added). Supporting that approach, the Supreme Court has held that Title VI of the Civil Rights Act of 1964, which uses almost identical language, does not create a private right of action for disparate-impact claims. *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001).

The Sixth Circuit's analysis and conclusion are also consistent with the Court's approach to disparate-impact liability in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). There, the Court examined the statutory text of the Fair Housing Act in light of its precedent interpreting other anti-discrimination laws, specifically Title VII and the Age Discrimination in Employment Act. *Id.* at 2516-18. The Court stated (conjunctively) that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and

not just to the mindset of actors, *and* where that interpretation is consistent with statutory purpose." *Id*. at 2518 (emphasis added). Thus, when Congress intends to bar disparate impacts resulting from facially neutral policies, the statute contains language like "otherwise adversely affect" or "otherwise make unavailable." *Id.* at 2518-19 (citations omitted). As the Sixth Circuit observed, Section 504 lacks that essential textual link to a disparate-impact theory.

Because the text of Section 504 does not prohibit actions taken for nondiscriminatory reasons, the Court should simply "enforce it according to its terms" rather than graft general statutory purposes onto an unambiguous provision. *Lamie*, 540 U.S. at 534; *see also Mertens v. Hewitt Assocs*., 508 U.S. 248, 261 (1993) ("[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.").

C. Even if This Court Disagrees with the Sixth Circuit, Plaintiffs Have Failed to Plead a Disparate-Impact Claim.

Alternatively, if this Court declines to adopt the Sixth Circuit's reasoning in *BlueCross*, it should nonetheless affirm the district court's dismissal of the Complaint because Plaintiffs failed to plead facts supporting a claim for disparate impact, and even if they had, the Hearing Loss Exclusion applies equally to the disabled and non-disabled and therefore does not deny "meaningful access" to the benefits provided under the policy.

First, Plaintiffs fail to plead facts supporting the allegation that the Hearing Loss Exclusion disproportionately burdens the disabled "solely by reason of" their disabled status. (Answering Brief, Dkt. 23 at 35-36.) Instead, they repeatedly refer to the alleged discrimination as "explicit, categorical," and "deliberate," suggesting a disparate treatment claim. (ER 313, 318 (Compl. ¶¶ 10, 13, 38).)

Second, the Hearing Loss Exclusion does not deny Plaintiffs meaningful access to the benefit Regence provides. The standard articulated in *Choate* is that "an otherwise qualified handicapped individual must be provided with meaningful access *to the benefit that the grantee offers*." 469 U.S. at 301 (emphasis added). As the Eighth Circuit held in *Krauel v. Iowa Methodist Medical Center*, "[i]nsurance distinctions that apply equally to all insured employees, that is, to individuals with disabilities and to those who are not disabled, do not discriminate on the basis of disability." 95 F.3d 674, 678 (8th Cir. 1996) (quoting EEOC: Interim Enforcement Guidance on Application of ADA to Health Insurance (June 8, 1993), *reprinted in* Fair Empl. Prac. Man. at 405:7117) (Addendum O). Because Regence's Hearing Loss Exclusion applies equally to the hearing-disabled, those with mild or temporary hearing loss, and the non-disabled seeking routine hearing examinations or other treatment, it does not deny the disabled meaningful access to the benefits that the non-disabled receive.

III. CONCLUSION

For the reasons above, Appellees respectfully request that the Court affirm the judgment of the district court.

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Respectfully submitted,

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