No. 18-35846

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANDREA SCHMITT and ELIZABETH MOHUNDRO,
each on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs/Appellants,

v.

KAISER FOUNDATION HEALTH PLAN OF WASHINGTON,
KAISER FOUNDATION HEALTH PLAN OF WASHINGTON OPTIONS, INC.,
KAISER FOUNDATION HEALTH PLAN OF THE NORTHWEST, and
KAISER FOUNDATION HEALTH PLAN, INC.,

Defendants/Appellees.

On Appeal from the United States District Court for the
Western District of Washington
The Honorable Robert S. Lasnik, U.S. District Court Judge
(Seattle, Case No. 2:17-cv-01611-RSL)

KAISER APPELLEES' SUPPLEMENTAL BRIEF

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In *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (6th Cir. 2019), the Sixth Circuit affirmed the dismissal of a Section 1557 disability discrimination claim under Fed. R. Civ. P. 12(b)(6). The court announced two holdings that have a direct impact on the issues here.

First, *Doe* held that Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. §18116 ("§1557"), did not create a new legal standard of disability discrimination, and instead applied the existing, well-settled substantive standards of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§504"), to the context of health programs and activities. Rejecting the precise argument raised by Appellants here, *Doe* ruled §1557 "prohibits discrimination against the disabled in the provision of federally supported health programs under §504 of the Rehabilitation Act. In doing so, the Affordable Care Act picks up the standard of care for showing a violation of §504, not the other laws incorporated by the statute or for that matter any other statute." *Doe*, *supra* at 239.

Second, the court held that §504, and therefore §1557, does not prohibit facially neutral policies that apply equally to the disabled and the non-disabled alike, even though they may have a disparate impact on disabled persons, while recognizing that claims based on denial of a reasonable accommodation differ from

a disparate impact claim. *Id*. at 243. *Doe* provides persuasive authority for why this Court should affirm the dismissal of Appellants' claims.

1. The Legal Standard for Disability Discrimination Under §1557 is the Same as Under §504.

Doe started with the language of §1557: "an individual shall not, on the ground prohibited under title VII of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 or section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity…." *Doe*, *supra* at 238. The court observed the word "ground" in the context of §1557 "refers to the forbidden source of discrimination and when paired with 'prohibited' as in 'on the ground prohibited,'" ACA §1557 "picks up the type of discrimination--the standard for determining discrimination--prohibited under each of the four incorporated statutes." *Doe*, *supra* at 238.

The second sentence of §1557 ("The enforcement mechanisms provided for and available under such title VI, title IX, section 794 [of title 29], or such Age Discrimination Act shall apply for purposes of violations of this subsection") refers to the distinct methods for compelling compliance under the substantive requirements of each statute. *Doe supra* at 239 (emphasis added). Congress' use of

the word "or" in the sentence foreclosed the argument, made by Appellants here, that any of the enforcement mechanisms of the substantive statutes could apply. *Id*.

By incorporating the grounds and enforcement mechanisms of four different civil rights statutes in §1557, *Doe* agrees with the vast majority of lower courts on this issue, and ruled that Congress unambiguously intended that a claimant alleging §1557 disability discrimination must meet the legal standards imposed by §504. *Doe*, 926 F.3d at 240.

By referring to four statutes, Congress incorporated the legal standards that define discrimination under each one, but did not change the nature of those grounds any more than it added a new form of discrimination. *Id*. at 239. *Doe* also noted that each anti-discrimination statute "has its own highly reticulated set of enforcement rules adapted for the type of discrimination that each law targets," and "allowing plaintiffs to treat all of this as a use-what-you-wish buffet would make a hash of the underlying enforcement schemes." *Doe*, 926 F.3d at 240.

Doe correctly rejected agency comments to the contrary,[1] because the intent

[1] Ten days after the *Doe* opinion, DHHS published a notice of proposed rulemaking ("Proposed Rule"), revising the current regulations implementing ACA §1557. 84 Fed. Reg. 27846. Proposed regulation § 92.6 provides: "Insofar as the application of any requirement under this part would violate, depart from, or contradict definitions, exemptions, affirmative rights, or protections provided by [RA §504 or the other referenced civil rights statutes], such application shall not be imposed or required." 84 Fed. Reg. at 27892.

of Congress is clear, which is "the end of the matter." *Doe*, 926 F.3d at 240. "Congress made plain that it prohibited discrimination in the provision of health care by incorporating and enforcing the substantive standards of liability of the four named statutes, not changing them." *Id.*

Doe confirms Kaiser's argument that §1557 did not change the well-settled definition of disability "discrimination" under §504. It rebukes Appellants' central argument that §1557 incorporates only the "grounds" and "enforcement mechanisms" of §504, but not its "substantive law." *See* Appellants' Opening Brief, pp. 19, 32. "By referring to four statutes, Congress incorporated the legal standards that define discrimination under each one." *Doe*, 926 F.3d at 239. This holding is in line with the national trend.[2]

Doe highlighted the important fact that if a claimant seeks relief for discrimination "on the ground prohibited" by §504, she must show differential treatment "solely" by reason of disability. *Doe*, 926 F.3d at 238; 29 U.S.C. § 794(a). "Otherwise, the health insurer's actions do not amount to the kind of 'discrimination' barred by the law." *Doe*, 926 F.3d at 238. Section §504, and therefore §1557, does

[2] *See* Appellee's Brief, Dkt. 24, pp. 15-16, 27-29. See also See *Bax v. Doctors Med. Ctr. of Modesto*, Inc., 393 F. Supp.3d 1000, 1012 (E.D. Cal. 2019); *Vega-Ruiz v. Montefiore Med. Ctr.*, No. 17-cv-01804-LTS-SDA, 2019 U.S. Dist. LEXIS 117406, *7 n.3 (S.D.N.Y. July 15, 2019)

not require a health plan's benefit design to single out the disabled for special treatment or to provide a level of health care precisely tailored to their needs, and covered entities are free to define the benefits they provide, so long as they are equally accessible to the disabled and non-disabled alike. *See Alexander v. Choate*, 469 U.S. 287, 308-09 (1985).

Doe also precludes Appellants' argument that Kaiser's Plan is "facially discriminatory." The health plan at issue in *Doe* contained blanket restrictions on obtaining HIV in-network medications at pharmacies. *Doe*, 926 F.3d at 237-38. Although the disabled may disproportionately use specialty medications, the court ruled that the list was "neutral on its face." *Doe*, 926 F.3d at 241. Like Kaiser's coverage exclusion for certain hearing services, there is no disability-based distinction because the exclusion applies equally to the disabled and the non-disabled.

2. §1557 Does Not Prohibit Disparate Impact Disability Discrimination.

Doe observed that *Choate v. Alexander*, 469 U.S. 287, at 298-99 (1985), rejected the "boundless notion" that all disparate impact showings give rise to an actionable claim under §504, and "assume[d] without deciding" that Section 504 reached "at least some conduct that has an unjustifiable disparate impact upon the

[disabled,]." *Doe* resolved what *Choate* did not and concluded that §504 does not prohibit disparate-impact discrimination." *Doe*, 926 F.3d at 241. The court's logic is unassailable and consistent with Ninth Circuit precedent.

Doe relied on the express language of §504 which bars discrimination "*solely* by reason of" disability. *Doe*, 926 F.3d at 242 (emphasis added), *quoting* 29 U.S.C. §794(a). In contrast, disparate impact discrimination has been based on statutes that refer to the consequences of an action rather than the actor's intent, noting "otherwise adversely affect" (Title VII) or "otherwise make unavailable" (Fair Housing Act) as examples. *Id*.; *accord*, *Joyner v. Dumpson*, 712 F.2d 770, 775 (2d Cir. 1983). Further, since §504 applies only to individuals who are "otherwise qualified" for the benefit at issue, it allows the disabled to be disparately affected by the benefit itself. *Doe*, 926 F.3d at 242.

The court also cited *Alexander v. Sandoval*, 532 U.S. 275, 280-81 (2001), which held that Title VI does not reach disparate-impact discrimination, noting that §504 was patterned after Title VI.[3] *Doe*, 926 F.3d at 242, *citing Community Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509 (1983). "By any conventional measure, the text [of §504] leaves no room for the statute to prohibit disparate-

[3] *Doe's* reference to "Title VII" is an obvious typographical error.

impact discrimination." *Doe*, 926 F.3d at 243.

Doe did recognize the limited instance where unintentional discrimination under §504 is actionable: "Under the Rehabilitation Act, a disabled person is 'otherwise qualified' for a program if he could meet its requirements with a reasonable accommodation. And when that holds true, a denial of the requested accommodation may amount to unlawful discrimination." *Doe*, at 243, *citing Kaltenberger v. Ohio Coll. Of Pod. Med.*, 162 F.3d 432, 435-36 (6th Cir. 1998) (relying on "meaningful access" language in *Choate*).

The Ninth Circuit is in accord. The Ninth Circuit has never held that §504 prohibits the type of disparate impact discrimination which Appellants now belatedly claim. It has, like the Six Circuit, ruled that §504 prohibits the denial of "meaningful access" by an otherwise "qualified" disabled person to the program or service at issue and that the failure to provide a remedial reasonable accommodation "solely by reason of disability" is actionable. *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008). *See also Ability Ctr. Of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 909 (6th Cir. 2004) (what the Rehabilitation Act ultimately requires "was that otherwise qualified disabled individuals be provided with meaningful access to the benefit that the grantee offers").

Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996), did not hold that disparate

impact claims are cognizable under RA §504, or even under Title II of the ADA. Rather than get bogged down in semantics, *Crowder* explained the ruling in *Choate* as follows: "Rather than attempt to classify a type of discrimination as either 'deliberate' or 'disparate impact,' the Court determined it would be more useful to assess whether disabled persons were denied 'meaningful access' to state provided services." *Crowder*, 81 F.3d at 1484, *citing Choate*, 469 U.S. at 302. That is the standard that *Crowder* then applied to the ADA claim before it, to find that the quarantine requirement denied the disabled meaningful access to state services, such as public transportation, public parks, and government buildings and facilities, which are open to the non-disabled.

Doe also preserves the "meaningful access" standard, but correctly rejects a disparate treatment claim that would require a substantive change to the health benefit itself, which *Choate* itself rejected ("Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs").[4] Appellants do not seek meaningful access to any Kaiser Plan benefit. They seek to rewrite the plan to provide a benefit that is not provided to anyone. Appellants' appeal should be denied.

[4] *Choate*, 469 U.S. 287, at 303.

Respectfully submitted this 28th day of October, 2019.

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UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I, Medora A. Marisseau, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to this action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104.

On this day, I electronically filed the foregoing Appellees' Brief with the Clerk of the Court and caused it to be served upon the below counsel of record using the CM/ECF system.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

Dated this 28th day of October, 2019, at Seattle, Washington.

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