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)

APPELLEES' PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION

Appellees Kaiser Foundation Health Plan of Washington, Kaiser Foundation Health Plan of Washington Options, Inc., and their affiliates (collectively "Kaiser"), respectfully seek *en banc* rehearing of the July 14, 2020, Opinion by Gould, J., Nguyen, J., and Presnell, J. (the "Panel"), which reversed the district court's dismissal without leave to amend a complaint for disability discrimination under Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), codified at 42 U.S.C. § 18116, filed by Andrea Schmitt and Elizabeth Mohundro ("Appellants").

Rehearing *en banc* is warranted because this proceeding involves one or more questions of exceptional importance, namely whether the ACA's nondiscrimination provision imposed a radically new definition of disability discrimination mandating health insurers design their plans to cover treatments and services to address the specific healthcare needs of the disabled, even though the treatment and services at issue--certain hearing loss treatment and hearing aids--are not covered for either the disabled or the non-disabled. In reaching this result, the Panel abandoned the non-discrimination standard of Section 504 of the Rehabilitation Act of 1973, *codified* at 29 U.S.C. § 794 ("RA § 504"), which the Panel acknowledged provides the legal standard for governing disability discrimination claims under Section 1557. Opinion, p. 15. Instead, the Panel found the source of the legal standard governing

disability discrimination in benefit design under Section 1557 to be the standard applicable to the Secretary of Health and Human Services in defining Essential Health Benefits ("EHBs") under ACA Section 1302, codified at 42 U.S.C. § 18022(b)(1)(G). The Panel made this finding even though nothing in Section 1557 supports it, the health plans at issue are large group plans, which are outside the scope of the EHB requirements,[1] and the applicable state EHB regulations do not require coverage for hearing aids. *See* Washington Administrative Code § 284-43-5640(7)(c)(4).

In addition, the Panel's Opinion conflicts with the decision of the United States Supreme Court in *Alexander v. Choate*, 469 U.S. 287, 299–304 (1985), which held that plan benefits could be designed to exclude coverage for treatment of disabling conditions so long as they were not applied in a discriminatory manner. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

Finally, the Panel's Opinion confuses the theory of "proxy discrimination" with facially neutral discrimination claims based on disparate impact. If accepted, the Panel's ruling would have an enormous impact on the health insurance industry by, for the first time, prohibiting benefit designs that could disproportionally impact

[1]ER 301, Appellee's Supplemental Excerpts of Record, filed herewith.

disabled enrollees, even though all enrollees have equal and meaningful access to the plan's benefits, as required under RA §504.

II. FACTUAL AND PROCEDURAL BACKGROUND

Appellants allege they are hearing-disabled participants under their employers' large group health plans ("Plans") administered by Kaiser. ER 67–68, ER 301. They alleged "intentional discrimination" as the sole basis for their ACA discrimination claim, which in turn is based entirely on their Plans' exclusion of coverage for hearing loss treatments and hearing aids other than cochlear implants (which are covered). ER 69, 76.

The district court dismissed Appellants' second amended complaint for failure to state a claim for disability discrimination. In its Opinion, the Panel agreed that Appellants had failed to state a plausible discrimination claim, but reversed and remanded to permit Appellants to amend their complaint. The Panel reasoned as follows:

> The ACA specifically prohibits discrimination in plan benefit design, and a categorical exclusion of treatment for hearing loss would raise an inference of discrimination against hearing disabled people notwithstanding that it would also adversely affect individuals with non-disabling hearing loss. But the exclusion here is not categorical. While Kaiser's coverage of cochlear implants is inadequate to serve Schmitt and Mohundro's needs, it may adequately serve the needs of hearing disabled people as a group. Because the pleadings do not suggest otherwise, we affirm the district court's dismissal of the second amended complaint. But because amendment may not be futile, we

> reverse the district court's dismissal without leave to amend and remand so Schmitt and Mohundro have that opportunity.

Opinion, p.5.

III. AUTHORITY AND ARGUMENT

The Panel erred by conflating ACA Section 1302's agency requirement for defining Essential Health Benefits with Section 1557's nondiscrimination provision. Section 1557 expressly incorporates the legal standards for disability discrimination under Section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794 ("RA § 504"). 42 U.S.C. §18116(a). The Panel acknowledged that "The parties agree, and we can assume, that the case law construing the Rehabilitation Act generally applies to claims under section 1557 for disability discrimination by a health care insurer." Opinion, p. 15. However, the Panel then abandoned the discrimination standards applicable under RA § 504, as required by Section 1557, because the Panel erroneously determined that RA § 504 did not prohibit disability discrimination in plan benefit design. This was error, and contrary to the ruling in *Choate* and other cases interpreting RA § 504. From this erroneous premise, the Panel reasoned that ACA Section 1557 created a new prohibition for plan benefit design discrimination untethered from the standards under RA § 504, and informed by the ACA's Essential Health Benefits provision applicable to individual and small group plans under Section 1302.

A. The Panel Erred in Ruling that the Rehabilitation Act Does Not Cover Discriminatory Plan Benefit Design.

The Panel's first misstep was its conclusion that "the ACA allows a claim for discriminatory benefit design notwithstanding that, under *Choate*, the Rehabilitation Act does not." Opinion, p. 18. This is a misreading of *Choate*.

In *Choate*, Medicaid recipients claimed Tennessee's proposed restriction of inpatient treatment coverage to 14 days a year violated RA § 504 because it discriminated against the disabled who would need longer periods of treatment. The Court rejected the argument noting the 14-day coverage limitation "does not exclude the handicapped from or deny them the benefits of the 14 days of care the State has chosen to provide[,]" and ruled that the policy did not amount to discrimination. *Choate*. 469 U.S. at 302. The Court explained:

> To the extent respondents further suggest that their greater need for prolonged inpatient care means that, to provide meaningful access to Medicaid services, Tennessee must single out the handicapped for more than 14 days of coverage, the suggestion is simply unsound. At base, such a suggestion must rest on the notion that the benefit provided through state Medicaid programs is the amorphous objective of "adequate health care." *But Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs*. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered-not "adequate health care."

Id. at 302–03 (emphasis added). The Rehabilitation Act does not require a health

plan to single out the disabled for special treatment, and covered entities are free to define the benefits they will provide, so long as they provide "meaningful access" to such benefits, e.g. they are provided equally to both the disabled and the non-disabled. *Id*. at 308–09.

The Supreme Court later clarified that it is not discriminatory to offer differing benefits to persons with different disabilities. The central purpose of RA § 504 is to assure that disabled individuals receive "evenhanded treatment" in relation to non-disabled individuals, and there "is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped person also be extended to all other categories of handicapped persons." *Traynor v. Turnage*, 485 U.S. 535, 548–49 (1988).

The Supreme Court has never ruled that the Rehabilitation Act does not cover "discriminatory plan benefit design," as the Panel ruled. Opinion, p. 17. Rather, *Choate* and *Traynor* held that it is not "discrimination" where every plan participant has equal access to the selected benefits. If that test is met, whether the benefits offered are "adequate" for the disabled or for a particular disability, is not a basis for a discrimination claim. Although the cases did not use the term "benefit design" (a term which also appears nowhere in Section 1557), benefit design, i.e. the design of the program that the defendants offered, is precisely what they addressed.

Likewise, other cases interpreting RA § 504 and the ADA[2] have acknowledged that the Rehabilitation Act covers discrimination in plan benefit design. In doing so, those case have uniformly held that plan benefit designs that exclude specific treatments, services or devices, are not "discriminatory" as long as the benefit package is equally accessible to both disabled and non-disabled persons, even though a particular exclusion may disproportionately affect individuals with a particular disability. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 608 (3d Cir. 1998); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677–78 (8th Cir. 1996); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1015 (6th Cir. 1997); *Doe v. Mutual of Omaha*, 179 F.3d 557, 558 (7th Cir. 1999); *Modderno v. King*, 82 F.3d 1059, 1061 (D.C. Cir. 1996).

The concurring opinion by Justince Ginsburg in *Modderno* aptly explains the definition of "discrimination" under RA § 504 for plan benefit designs as follows:

> only by providing less coverage to some or all of the persons who are currently disabled does an insurance plan contravene [the Rehabilitation Act] §504 . . . . In this case the same insurance coverage was made available to all regardless of handicap; there is no indication and no claim

[2] The Ninth Circuit has held that Title II of the ADA and RA § 504 are substantially similar and Title II "extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to all actions of state and local governments[.]" *City of L.A. v. AECOM Servs.*, 854 F.3d 1149, 1153–54 (9th Cir. 2017) (quoting H.R. Rep. No. 101-485(II), at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367). Thus, "[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999); *see also Weinreich v. L.A. County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).

> that the benefits were only formally but not meaningfully available to the handicapped. *See Alexander v. Choate*, 469 U.S. 287, 302, 83 L. Ed. 2d 661, 105 S. Ct. 712 (1985) (disabled must "benefit meaningfully from the coverage they will receive"). Unless some coverage is denied to persons who currently have a disabling condition while at the same time granted to those who do not currently have a disabling condition, or denied to persons with a particular disability but not to persons with a different disability, there is no discrimination on account of disability. Equal coverage for all is non-discriminatory.

Modderno v. King, 82 F.3d 1059, 1065-66 (D.C. Cir. 1996) (Ginsberg, J., concurring).

Nothing in *Choate* or any other case supports the Panel's conclusion that the Rehabilitation Act permits discriminatory benefit designs. *See, e.g., Choate*, 469 U.S. 287. That conclusion led the Panel to erroneously abandon the text of ACA Section 1557 which bases the prohibition on disability discrimination "on the ground prohibited under . . . section 794 of title 29" (e.g. RA §504), and to create a new standard for disability discrimination in plan benefit design that is inconsistent with the standard that already exists in RA §504. 42 U.S.C. §18116(a).

The Panel's creation of a new benefit design non-discrimination standard also contradicts the implementing regulations and the Office of Civil Right's (OCR's) preamble to the final rule and responses to comments that the Section 1557 legal standard for disability discrimination in benefit design follows longstanding civil rights law under RA §504:

> [W]e did not propose to require plans to cover any particular benefit or service, but we provided that a covered entity cannot have coverage that operates in a discriminatory manner. For

> example, the preamble stated that a plan that covers inpatient treatment for eating disorders in men but not in women would not be in compliance with the prohibition of discrimination based on sex. Similarly, a plan that covers bariatric surgery in adults but excludes such coverage for adults with particular developmental disabilities would not be in compliance with the prohibition on discrimination on disability.

81 Fed. Reg. 31375-1, 31429 (May 18, 2016). The above example is exactly the type of discrimination in plan benefit design that RA §504 prohibits. *see also id.* at 31434 (DHHS "recognizes that covered entities have discretion in developing benefit designs and determining what specific health services will be covered [and declines to prohibit] categorical exclusions of all coverage related to certain conditions" other than gender transition). Moreover, the momentous change in longstanding disability discrimination standards adopted by the Panel is directly contrary to OCR's explanation of the final rule implementing Section 1557. Noting that "we will evaluate whether a particular exclusion is discriminatory based on the application of longstanding nondiscrimination principles to the facts of the particular plan or coverage" and that:

> It is important to note that this final rule, except in the area of sex discrimination, applies pre-existing requirements in Federal civil rights laws to various entities, the great majority of which have been covered by these requirements for years. Because Section 1557 restates existing requirements, we do not anticipate that covered entities will undertake new actions or bear any additional costs in response to the issuance of the regulation with respect to the prohibition of race, color, national origin, age, or disability discrimination[.]

81 Fed. Reg. at 31446; *see also* 81 Fed. Reg. at 31378 ("Most of the requirements

of Section 1557 are not new to covered entities, and 60 days should be sufficient to come into compliance with any new requirements").

Kaiser's Plans at issue limit coverage based not on a disability, but on specific devices and services for a medical condition – hearing loss – which affects both those with substantially limiting hearing loss (who are disabled) and those who have hearing loss that is not disabling. See Opinion, p. 24. While the Panel correctly ruled that Kaiser's Plans do not contain a categorical exclusion of coverage for a disability, the Panel erred by failing to apply the non-discrimination standard already existing under RA § 504, and instead creating a brand new standard fashioned on Essential Health Benefit provisions.

B. Section 1302's Essential Health Benefits Provisions do Not Inform the Legal Standards for Non-Discrimination under ACA 1557.

The Panel determined that Section 1557's non-discrimination standards are governed by the requirement that the Department of Health & Human Services must follow for defining EHB. The Panel misunderstood Kaiser's position when it stated that "Kaiser assumes that an insurer's compliance with the essential health benefits in a state's benchmark plan was sufficient to comply with the ACA's nondiscrimination requirement." Kaiser never made that argument. Rather, Kaiser pointed out that the hearing aids that Appellants desire are not listed as an EHB, in furtherance of the position that Appellants were not denied meaningful access to benefits, in compliance with RA § 504.

Under the ACA, only individual and small group insured health plans[3] are required to cover the 10 categories of EHBs. Opinion, p. 6, *citing* 42 U.S.C. §300gg-6(a). The ACA charged the Secretary of Health & Human Services with defining EHBs in each category and outlined the "required elements for consideration" by the agency for that purpose. One such consideration was to "take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups." 42 U.S.C. §18022(4)(C). Subsequently, the Secretary deferred the task to the states and Washington adopted EHB rules which, like those of many other states,[4] require individual and small group insured plans to cover cochlear implants but not hearing aids. WAC § 284-43-5640(7)(b)(1), (c)(4).

Section 1557, which applies broadly to all qualified health plans, not just insured individual and small group plans, makes no mention of EHBs. The Office of Civil Right ("OCR") which promulgated the Section 1557 regulations, specifically rejected the notion that Section 1557 applies to EHBs. Noting that "some commenters requested that OCR address a number of issues that are not within the purview of OCR or Section 1557, including the scope of essential health

[3] Notably, Kaiser's plan at issue is a large group plan which is exempt from EHB requirements. ER 301.

[4] ER 245.

benefit coverage and establishing minimum network adequacy requirements," OCR responded: "CMS[5] is statutorily responsible for establishing and regulating the scope of essential health benefits and network adequacy requirements for health insurance issuers. *Absent any allegation that a covered entity has discriminated on a basis prohibited by Section 1557, OCR lacks authority to address the terms of these CMS regulations.*" (emphasis added). 81 Fed. Reg. 31375, 31431 (May 18, 2016). The Panel states: "OCR explained that compliance with federal and state law regarding essential health benefits did not guarantee compliance with ACA's non-discrimination provision," citing the preamble to the Section 1557 regulations, 81 Fed. Reg. at 31377. However, that section makes no mention of "essential health benefits," but instead refers to whether a covered insurer's own benefit design, such as prescription drug formularies designed by a pharmacy and therapeutics committee, would comply with Section 1557, if it complied with CMS regulations. *Id.*

Likewise, nothing in the EHB requirements refers to Section 1557. The regulation promulgated by CMS pertaining to EHB provides that a covered insurer "does not provide EHB if its benefit design or the implementation of its benefit design, discriminates on an individual's . . . present or predicted disability[.]" 45

[5] "CMS" is the Centers for Medicare & Medicaid Services, which is part of the Department of Health and Human Services.

C.F.R. §156.125(a). In the preamble to the regulation, CMS explained that it promulgated the above regulation to prohibit discrimination "that will have the effect of discouraging enrollment of individuals with significant health needs." 78 Fed. Reg. 12833, 12846. The EHB non-discrimination provision was not intended to mandate benefits or require issuers to step into the shoes of the Secretary under Section 1302.

The EHB non-discrimination regulation also does not provide a private right of action. Enforcement is governed by Section 2723 of the PHS Act, which looks first to states and then to the Secretary. *Id.* The reason for this is to permit states to develop "analytic tools to test for discriminatory plan benefits" which include identification of "significant deviations from typical plan offerings." *Id*. The goal of EHB was to level the playing field between individual and small group insurers in the marketplace, while maintaining affordability.

The Panel's opinion that Section 1557 imports the EHB nondiscrimination requirements (only applicable to individual and insured group plans) to compel all health plans to take into account the needs of the disabled in offering plan benefits is without support.

C. The Panel's Opinion Conflates "Proxy Discrimination" with Disparate Impact Discrimination to create obligations not required under RA § 504.

The Panel adopted Appellants' argument (raised for the first time on appeal)[6] that the Kaiser Plans' exclusion of coverage for certain hearing aids and services may provide a basis for a plausible claim of "proxy discrimination." Opinion, p. 24. The Panel, quoted *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013), for its "example of using gray hair as a proxy for age: there are young people with gray hair (a few), but the 'fit' between age and gray hair is sufficiently close that they would form the same basis for invidious classification." *Id.* Unlike the gray hair proxy example (where those with gray hair and those without gray hair are treated differently), in this case the disabled and non-disabled are treated the same. In any event, no case has ever applied proxy discrimination to a claim under Section 1557.

The Panel found that the "fit" for proxy discrimination can be shown by a facially neutral exclusion (such as the one at bar) which "predominantly affect(s) disabled persons." Opinion, p. 26, note 8. Not only does this disregard the cases interpreting RA § 504 as the basis for analyzing discrimination under Section 1557,[7] but it also misapplies this Court's rulings on proxy discrimination. Proxy discrimination is "a form of facial discrimination [and] arises when the defendant

[6] *See* Appellee's Brief, Dkt. No 24, p.41.

[7] The Panel acknowledged that whether Section 504 permits a claim for disparate impact, following the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), is in doubt. Opinion, p. 14.

enacts a law or policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination." *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013); *McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992*). The test has never been whether the alleged discriminatory act or practice "predominately affects disabled persons."

By permitting Appellants to amend their Complaint to assert that the neutral limitation on hearing aids (which applies to the disabled and the non disabled) may predominantly affect the hearing disabled in order to state a claim of discrimination under Section 1557, the Panel has engaged in a radical expansion of benefit mandates under the guise of a "new" standard for disability discrimination applicable to "plan benefit design." If Congress intended such a result, it would have drafted the ACA to distinguish the well-established limits of discrimination under RA § 504. Such expansion would have been the subject of vigorous national debate. Instead, the statute, the regulations and the caselaw are consistent: ACA § 1557 simply incorporates RA § 504 and exactly mimics its discrimination prohibitions.

This court should grant Kaiser's request for rehearing *en banc*, given the exceptionally important issues and conflict between the Panel's Opinion and the Supreme Court's decisions in *Choate* and *Traynor*. The district court's decision to

dismiss Appellants' Second Amended Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and its denial of leave to file an amended complaint, should be affirmed.

Respectfully submitted this 28th day of July, 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 18-35846

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[X] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

E.S., et al v. Regence Blueshield, et al., No. 18-35892, may be a related case because it raised the same or closely related issues, although the case involves different appellants and respondents.

Signature *s/Medora A. Marisseau* **Date** July 28, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

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 July, 2020, at Seattle, Washington.

/s/ Medora A. Marisseau
Medora A. Marisseau, WSBA #23114