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 Judge
(Seattle, No. 2:17-cv-01611-RSL)

APPELLANTS ANDREA SCHMITT'S AND ELIZABETH MOHUNDRO'S RESPONSE TO APPELLEES' PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION

The Circuit should reject Kaiser Foundation Health Plan of Washington's ("Kaiser") petition for *en banc* rehearing of the unanimous Panel decision in *Schmitt v. Kaiser Found. Health Plan of Wash.,* 2020 U.S. App. LEXIS 21902 (9th Cir. July 14, 2020). Kaiser seeks the right to discriminate with impunity in its design of health insurance benefits. But Congress specifically extended anti-discrimination protections to insureds covered by "contracts of insurance" issued by entities who voluntarily chose to accept Federal financial assistance:

> [A]n individual shall not, on the ground prohibited under … section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), 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, ***including*** credits, subsidies, or ***contracts of insurance***…

42 U.S.C. §18116(a) (emphasis added). Kaiser happily accepted federal financial assistance, but now seeks to skirt the anti-discrimination condition attendant to that choice. The Panel properly rejected its attempt to do so.

The Panel applied the canons of statutory construction and existing precedent to conclude correctly that Appellants Schmitt and Mohundro may amend their complaint to allege disability discrimination by Kaiser under the Affordable Care Act's ("ACA") Section 1557. *See id*. Kaiser's Petition ignores the plain language of the ACA, the specific context in which Section 1557 was implemented, as well

as Section 504 of the Rehabilitation Act of 1973 ("RA §504"), federal regulations and anti-discrimination caselaw. It should be rejected.

II. FACTS

Kaiser is a "health program or activity" part of which receives federal financial assistance, and is required to comply with Section 1557, 42 U.S.C. §18116(a). ER 74, ¶23. Kaiser contractually promised to follow both Section 1557 and its implementing regulations in the Appellants' plans. *See* ER 168.[1]

Kaiser provides coverage for all "outpatient medical and surgical services in a provider's office, including chronic disease management" and durable medical equipment for any illness or injury. ER 74, ¶29; ER 187, ER 205. Under the terms, if the service meets the plan's coverage standard for "medical necessity," it is covered, unless a specific exclusion applies.

Kaiser designed, marketed and administered a standard exclusion that eliminated all coverage of outpatient services and durable medical equipment when sought as treatment for hearing loss, except for cochlear implants. ER 194. On the

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[1] Kaiser misleadingly argues that "Kaiser's plan at issue" is "large group coverage," claiming that it is "exempt" from the ACA's Essential Health Benefit ("EHB") requirements and implying that Section 1557 does not govern the Kaiser plans. *See* Kaiser's Pet., p. 11, n. 3, *citing to* its belatedly-submitted ER 301. Kaiser's untested hearsay statement in an improperly-filed declaration in support of its Motion to Dismiss is irrelevant to the question before the Court. *See* ER 132, lns. 15-21. Whether Kaiser's health plans are large or small group coverage, it is undisputed that the plans are subject to Section 1557. *See* ER 168, 230.

Kaiser plan's face, coverage for "programs or treatment" for hearing loss, including disabling hearing loss, is excluded (except for cochlear implants). The exclusion is ***not,*** as Kaiser argues, simply for "certain hearing aids and services." Kaiser Pet., p. 18; *see* ER 127-128. Facially, it is a disability-based exclusion, targeted specifically at individuals with hearing loss so substantial as to require treatment for the condition.

Appellants are Kaiser enrollees with disabling hearing loss. ER 67-73, ¶¶1-2, 14-15, 20-21. Both require outpatient office visits with their audiologists and durable medical equipment (hearing aids), to treat their disability. ER 71-73, ¶¶14-15, 22; *see* ER 140-145. The ***only*** reason Appellants are denied coverage for this medically necessary treatment by Kaiser is the fact that the treatment is provided for their diagnosis of "hearing loss." But for that diagnosis, the services would be covered under the Plan when medically necessary. *See* ER 187, 205.

On September 14, 2018, the trial court granted Kaiser's motion to dismiss without leave to amend. *See* ER 16-24. Judgment was entered that same day. *See* ER 15-24. The decision by the Panel permits Plaintiffs to amend their Complaint "with details that would raise an inference of proxy discrimination or some other theory of relief." *Schmitt,* 2020 U.S. App. LEXIS 21902, *30-31.

III. LAW AND ARGUMENT

A. Section 1557 Incorporated Only the "Grounds" and "Enforcement Mechanisms" of RA §504 And Applied Them In a New Context, Health Insurance.

Kaiser begins its argument from a false premise. It argues that "Section 1557 expressly incorporates the legal standards for disability discrimination under Section 504 of the Rehabilitation Act of 1973…." Kaiser Pet., p. 4. From this errant beginning, it then argues that the Panel's conclusion that ***Section 1557*** prohibits discrimination in an insurer's benefit design is in error because ***RA §504*** would permit such discrimination. Kaiser's argument ignores the plain language of Section 1557, and its important distinctions from RA §504.

It is true that RA §504's anti-discrimination protections do not apply to insurance companies or private insurance benefits. Under RA §504, the definition of "federal financial assistance" ***excludes*** contracts of insurance.[2] *See* 45 C.F.R. §84.3(h) ("Federal financial assistance means any grant, loan, contract (***other than … a contract of insurance***") (emphasis added); *United States v. Baylor Univ. Med. Ctr.*, 564 F. Supp. 1495, 1500 (N.D. Tex. 1983), *aff'd in part by United States v.*

[2] None of the RA §504 cases cited by Kaiser involve insurance companies. *See* Kaiser Pet., pp. 6-7, *citing to Choate, Traynor v. Turnage,* 485 U.S. 535, 548 (1988), *Modderno v. King,* 82 F.3d 1059 (D.C. Cir. 1996).

Baylor Univ. Med. Ctr., 736 F.2d 1039 (5th Cir. 1984).[3] This legal fact is at the heart of Kaiser's misconception of the requirements of Section 1557 – it simplistically claims that because RA §504 would not recognize such a claim, Section 1557 would not either.

Kaiser ignores the express language of Section 1557. In contrast to RA §504's ***exclusion*** of insurance contracts from its ambit, Congress specifically ***included*** insurance contracts within Section 1557's definition of entities that would be bound not to discriminate because of the receipt of "federal financial assistance." *See* 42 U.S.C. §18116(a). For the first time, private health insurers that accepted federal financial assistance, broadly described in the statute, were subject to federal anti-discrimination law.

Additionally, Congress did not adopt RA §504 *in toto*. The ACA's text reveals that only the "grounds" and "enforcement mechanisms" from RA §504 are incorporated into Section 1557. *Schmitt,* 2020 U.S. App. LEXIS 21902, *13. As the Panel noted, Section 1557 differs from RA §504 in at least two important ways:

> ***First,*** they differ in scope. Section 1557 is both broader and narrower than the Rehabilitation Act. It is broader because the Rehabilitation Act addresses only disability discrimination, and section 1557 concerns discrimination based on several additional grounds. It is narrower because the Rehabilitation Act addresses disability discrimination

[3] *Baylor University* describes how the public benefit programs subject to RA §504 (such as Medicaid in *Choate* and veterans' benefits in *Traynor*) are vastly different from insurance contracts. *See Baylor,* 564 F. Supp. at 1500.

> generally whereas section 1557 is limited to discrimination in the context of health programs or activities.
>
> ***Second***, the Rehabilitation Act prohibits discrimination "***solely*** by reason of [an individual's] disability," 29 U.S.C. §794(a), while section 1557 prohibits discrimination "on the ground prohibited under … [the Rehabilitation Act]," 42 U.S.C. §18116(a), *i.e.*, on the ground of disability…. [S]ection 1557's omission of the modifier "solely" could point to a less strict causal standard than under the Rehabilitation Act….

Id., *12-13 (emphasis in original and added). Based upon the statutory language, the Panel concluded that the caselaw interpreting the Rehabilitation Act generally applies to Section 1557, but in a new context – health insurance. *See also Huffman v. Univ. Med. Ctr. Mgmt. Corp.,* 2017 U.S. Dist. LEXIS 180999, at *5-*6 (E.D. La., Oct. 31, 2017) ("Section 1557 of the ACA extends the protections of Section 504 of the Rehabilitation Act … in the context of the ACA.").[4] The Panel's decision recognized the key textual differences between RA §504 and Section 1557, and then properly applied the anti-discrimination requirements to health insurance contracts, just as Congress directed.

[4]*See also CONRAIL v. Darrone*, 465 U.S. 624 (1984) (Section 504's incorporation of the "remedies, procedures, and rights" set forth in Title VI of the Civil Rights Act of 1964 did not mean that Section 504 incorporated Title VI's substantive limitations on actionable discrimination).

B. The Panel Interpreted Section 1557 Consistently with its Purpose and Context.

The purpose and context of the ACA matter when interpreting Section 1557. "A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell,* __ U.S. __, 135 S. Ct. 2480, 2496 (2015); *id.,* at 2493 ("We cannot interpret federal statutes to negate their own stated purposes"). The ACA was enacted to ensure that people with serious health conditions or disabilities could have meaningful access to health coverage. "In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of pre-existing conditions or other health issues." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547 (2012). Members of Congress intended that the legislation end unfair discrimination on the basis of disability and other serious health conditions. *See* Appellants' Opening Brief, *Addenda C-E*; 81 Fed. Reg. 31379.

Congress not only intended to make it easier for people with disabilities and health conditions to purchase health coverage, it also intended to end disability discrimination in the covered benefits offered. The ACA's focus on non-discriminatory benefit design appears throughout the legislation. *See* 42 U.S.C. §§300gg-6; 18022(b)(4)(B); 18116(a); 45 C.F.R. §§156.110(d); 156.125(a); 92.207(2). The ACA specifically targeted a few of the most pernicious forms of benefit design discrimination, including lifetime and annual dollar caps on benefits and exclusions of mental health and substance use treatment. *See, e.g.,* 42 U.S.C.

§§300gg-11; 18022(b)(1)(E); 45 C.F.R. §156.115(a)(3). With Section 1557, Congress also included, for the first time, a general prohibition of other forms of disability discrimination that occur in the design of health insurance benefits. *See* 42 U.S.C. §18116(a).

Kaiser faults the Panel's decision for its discussion of Essential Health Benefits ("EHBs"). Kaiser Pet., p. 11. But, as noted above, the ACA's statutory framework ***as a whole*** must inform how courts apply Rehabilitation Act caselaw to Section 1557. Congress described how all health plans, including those which are required to provide EHBs, must be designed in a non-discriminatory manner. *See* 42 U.S.C. §§18116; 18022(b)(4)(B)–(C). Specifically, non-discriminatory benefit design must "take into account the health care needs of diverse segments of the population, including…persons with disabilities" and "not make coverage decisions … in ways that discriminate against individuals because of their … disability." *Id.* The Panel properly concluded that Congress intended that the same approach be applied to intentional disability discrimination under Section 1557. *See Schmitt,* 2020 U.S. App. LEXIS 21902, *18.

Kaiser's apparently preferred interpretation – that individual and small group health insurance plans subject to EHB requirements cannot employ discriminatory benefit design, while large group health plans are allowed to do so – makes no sense. *See* Kaiser Pet., p. 13. The ACA was intended to make sure that all people with

disabilities and serious health conditions have meaningful access to health coverage, whether through individual, small or large group plans. *See* Appellants' Opening Brief, *Addenda C-E*. Section 1557, by its plain terms, extends anti-discrimination requirements to ***all*** health insurers that receive federal financial assistance.

C. Kaiser Misinterprets Both *Choate* and the Panel's Decision.

To manufacture a conflict between the Panel's decision and other caselaw, Kaiser argues that the Panel's decision conflicts with *Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712 (1985). Kaiser Pet., pp.5-8. To the contrary, the decision is entirely consistent with *Choate*.

First, *Choate* held that a Medicaid benefit exclusion based upon a protected trait may be a form of disability discrimination. *Id.* at 301. This is the precise claim asserted here. ***Second,*** the Supreme Court confirmed that an exclusion that applied only to disabling conditions, or that prevented disabled individuals from receiving needed, covered treatment, could violate RA §504 by denying "meaningful access" to health care benefits. *Id.* at 302. Again, this is consistent with Plaintiffs' claims. ***Third,*** *Choate* made clear that "meaningful access" must be defined in relation to the purpose of the statute at issue. *Id.* at 303. Unlike the Medicaid Act, the ACA was enacted with an express anti-discrimination purpose: to ensure that all Americans, including people with disabilities, have meaningful access to coverage for the health care they need. *See id.*

The Panel carefully followed the *Choate* framework, properly recognizing that the purpose of the ACA is different from that of the Medicaid Act:

> [The ACA] attempts to provide adequate health care to as many individuals as possible by requiring insurers to provide essential health benefits. And it imposes an affirmative obligation not to discriminate in the provision of health care—in particular, to consider the needs of disabled people and not design plan benefits in ways that discriminate against them.

Id. at *19. The significantly different purpose of the Medicaid Act and the ACA results in a different outcome within the existing *Choate* framework.

Kaiser goes so far as to argue that in *Choate,* the Supreme Court concluded that a claim for discriminatory benefit design is ***never*** allowed under RA §504.[5] *See* Kaiser Pet., pp. 5-6. That is simply untrue. *Choate* confirmed that benefit design can be a form of disability discrimination: "The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.,* 469 U.S. at 301; *see Rodde v. Bonta*, 357 F.3d 988, 997 (9th Cir. 2004) (County facially discriminated against disabled Medicaid enrollees under RA §504 by eliminating the benefit of a

[5] Kaiser takes a sentence in the Panel's decision out of context. *See* Kaiser Pet., p. 5, *citing Schmitt,* 2020 U.S. App. LEXIS 21902, *19. The Panel's opinion compares the application of the *Choate* anti-discrimination framework to the Medicaid Act, with the same analysis when applied to the ACA. *See id.,**17-19. Because the purposes of the two programs are different, the outcome of the analysis is different. *Id.*

specialized rehabilitation hospital that disproportionately served patients with disabilities); *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002) (Hawaii's Medicaid program facially discriminated against disabled enrollees under RA §504 when it excluded them from a managed care benefit). The Panel properly applied the *Choate* framework in the new context of the ACA.

Kaiser ignores *Choate's* actual principles, instead citing to certain Americans with Disabilities Act ("ADA") and RA §504 cases that followed. *See* Kaiser Pet., p. 7 (*citing cases).* As explained above in Section III.A., none of the RA §504 cases apply to private insurance. Kaiser's ADA cases are irrelevant since Congress did not incorporate the ADA into Section 1557. Congress, in fact, made a specific choice not to include the ADA, perhaps recognizing that the ADA's "insurance safe harbor," 42 U.S.C. §12201(c), could undermine the ACA's anti-discrimination efforts. *See* Blake, Valarie K., *An Opening for Civil Rights in Health Insurance After the Affordable Care Act,* 36 B.C. J.L. & SOC. JUST. 235, 279 (June 2016).

D. Proxy Discrimination is a Form of Intentional Discrimination.

The Panel correctly concluded that an exclusion of coverage for treatment of hearing loss, except for cochlear implants, could be a form of proxy discrimination.[6] *Schmitt,* at *27. "Proxy discrimination" occurs when a defendant enacts a policy that treats individuals differently on the basis of seemingly neutral criteria that are so closely associated with the protected group that imposition of the criteria is, constructively, discrimination against the protected group. *Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach*, 730 F.3d 1142, 1160, n. 23 (9th Cir. 2013). As the Seventh Circuit explained, "technically neutral classifications" may not be used to covertly discriminate:

> An example is 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. Similarly, ***discrimination "because of" handicap is frequently directed at an effect or manifestation of a handicap rather than being literally aimed at the handicap itself.*** Thus, a school's exclusion of a service dog has been held to be discrimination "because of" handicap, and no doubt a policy excluding wheelchairs would be such discrimination, even if the stated purpose of the policy were a benign one. The point is that the distinction between disparate

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[6] Kaiser erroneously claims that appellants raised "proxy discrimination" for the first time on appeal. *See* Kaiser Pet., p. 14. Both facial and disparate impact discrimination were briefed and argued before the trial court. ER 50-52, 126-131. Kaiser concedes that "proxy discrimination" is a form of disability discrimination, whether it is characterized as facial or disparate impact discrimination. *See* Appellee's Brief, pp. 41-42. It is not a new legal theory (and even if it were, the Panel correctly considered it). *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

> treatment and disparate impact becomes fuzzy at the border, and [the plaintiff] might conceivably be able to show that this is one of those "proxy" situations where a case may be made for "constructive" disparate treatment, if not actual disparate treatment.

McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992) (internal quotations omitted, emphasis added). For example, a Bellevue, Washington ordinance that excluded "group facilities" was found to facially discriminate on the basis of disability, despite the seemingly neutral language in the ordinance, because the effect of the ordinance disproportionately burdened individuals with disabilities. *See Children's All. v. City of Bellevue,* 950 F. Supp. 1491, 1496-97 (W.D. Wash. 1997).

Under proxy discrimination, Appellants need not prove that Kaiser's Exclusion only applies to hearing-disabled insureds. *See Pac. Shores,* 730 F.3d at 1159. If that were the only way to prove discrimination, a defendant could "openly admit[ ] its intent to discrimination, so long as the defendant (a) relies on a facially neutral law or policy and (b) is willing to "over discriminate" by enforcing the facially neutral law or policy even against similarly-situated individuals who are not members of the disfavored group." *Id.* Such an approach would result in a "grotesque scenario" in which a defendant may "immunize" itself from liability for discrimination, so long as some other persons are also harmed. *Id., citing Abdu-Brisson v. Delta Air Lines, Inc.,* 239 F.3d 456, 468 (2d Cir. 2001).

> Discriminatory laws, policies, or actions will often have negative effects (whether intended or not) on individuals who do not belong to the disfavored group. This does not, however, change the fact that such

> laws, policies, or actions are discriminatory when they are undertaken for the purpose of harming protected individuals.

Pac. Shores, 730 F.3d at 1160.

Appellants need only demonstrate that the "fit" between the Hearing Loss Exclusion and disabled insureds with hearing loss is close. *Schmitt,* at *28 ("[T]he crucial question is whether the proxy's 'fit' is 'sufficiently close' to make a discriminatory inference plausible"). On remand, appellants will show that few, if any, non-disabled insureds have claims denied under the Hearing Loss Exclusion.[7] Even if those claims exist, they would likely be denied as not "medically necessary" if the Exclusion were removed and the claims reprocessed. The overwhelming impact of the Exclusion is to eliminate coverage of medically necessary treatment for disabled insureds with hearing loss.[8]

Kaiser objects to the Panel's discussion of proxy discrimination, claiming it disregards cases interpreting RA §504 and the Ninth Circuit's rules on proxy discrimination. *See* Kaiser Pet., p. 18. The Panel's decision hews closely to both.

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[7] Under the current RA §504 definition of "disability," all insureds who are prescribed medically necessary treatment for hearing loss are likely disabled. *See* 29 U.S.C. §705(9), *incorporating* 42 U.S.C. §12102(4)(A); 29 C.F.R. §1630.2(1)(i) (As amended in 2009, "disability" is "construed in favor of broad coverage").

[8] Kaiser asserts that "no case has ever applied proxy discrimination to a claim under Section 1557." *See* Kaiser Pet., p. 18. This is unsurprising, since only a handful of Section 1557 benefit design discrimination cases have been filed, and this is only the second case to reach a federal appellate court.

See Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 734 (9th Cir. 1999) (RA §504 claims properly asserted facial/proxy discrimination on the basis of disability when a challenged zoning ordinance excluded methadone clinics); *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002) (Hawaii's exclusion of Medicaid enrollees who were aged, blind or disabled from managed care benefits was facial discrimination under RA §504); *Children's Alliance,* 950 F. Supp. at 1496-97.

Kaiser also argues that proxy/facial discrimination has "never been whether the alleged discriminatory act or practice 'predominantly affects disabled persons.'" Kaiser Pet., p. 19. Kaiser is wrong. In *Rodde v. Bonta,* 357 F.3d 988, 998 (9th Cir. 2004), the Ninth Circuit stated that "state action that ***disproportionately burdens*** the disabled because of their unique needs remains actionable" after *Choate.* The Ninth Circuit's reasoning in *Rodde* did not rest on a disparate impact analysis. Instead, this Court found such disproportionate burdens to be a form of ***facial discrimination***:

> Eliminating entirely the only hospital of six that focuses on the needs of disabled individuals (because the County earlier decided to consolidate such services at that hospital) and that provides services disproportionately required by the disabled and available nowhere else in the County is simply *not* the sort of facially neutral reduction considered in *Alexander*. *Alexander* may allow the County to step down services equally for *all* who rely on it for their health-care needs, but it does not sanction the wholesale elimination of services relied upon disproportionately by the disabled because of their disabilities.

Id. at 997 (emphasis in original).

E. The Panel's Decision Does Not Conflict with Section 1557's Final Rules and Commentary.

Kaiser claims that the Panel's decision "contradicts" the Office of Civil Rights' ("OCR") preamble to the final rule and OCR's implementing regulations. Kaiser Pet., pp. 13-14. The Panel decision and the federal implementing rules at the time of the decision are consistent.[9] The federal regulations specifically prohibit the "***benefit designs*** that discriminate on the basis of … disability in a health-related insurance plan or policy." 45 C.F.R. §92.207(b)(2) (emphasis added). OCR specifically concluded that "categorical exclusions of all coverage related to certain conditions could raise significant compliance concerns under Section 1557." 81 Fed. Reg. 31433. Arbitrary exclusions based upon protected traits, including disabilities, are prohibited. 81 Fed. Reg. 31408; 31434. OCR even recognized the possibility of proxy discrimination: "Covered entities will be expected to provide a

[9] OCR recently promulgated new rules, which are the subject of extensive litigation. *See* 85 Fed. Reg. 37160 (June 19, 2020); *Walker v. Azar,* 2020 U.S. Dist. LEXIS 148141 (E.D.N.Y. August 17, 2020); *Washington v. United States HHS,* 2020 U.S. App. LEXIS 147033 (W.D. Wash. August 14, 2020).

neutral nondiscriminatory reason for the denial or limitation that is not a pretext for discrimination."[10] 81 Fed. Reg. 31433 (emphasis added).

F. The Panel's Decision is Consistent with the ACA's Intent and Purpose.

Kaiser claims that if Congress intended to regulate the benefit design of health insurers, it would have been "the subject of vigorous national debate." Kaiser Pet., p. 19. The ACA's anti-discrimination provisions were well-known and vigorously debated. *See* Appellants' Opening Brief, *Addenda C-E; see also* 81 Fed. Reg. 31379 ("[A] fundamental purpose of the ACA is to ensure that health services are available broadly on a nondiscriminatory basis to individuals throughout the country"); 81 Fed. Reg. 31386 (A central purpose of the ACA is "ensuring that entities principally engaged in health services, health insurance coverage or other health coverage do not discriminate in any of their programs or activities, thereby enhancing access to services and coverage"). Even the Supreme Court recognized that a key function of the ACA was to ensure meaningful access to health insurance coverage to people with disabilities and other serious health conditions. *See Nat'l Fed'n of Indep. Bus.*,

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[10] Kaiser points to OCR commentary that the Section 1557 requirements were not new to many (***but not all***) covered entities. Kaiser Pet., p. 9. As noted above, while medical providers receiving federal financial assistance were already subject to Section 504, ***contracts of insurance were not.*** OCR anticipated that insurers might have to change benefit restrictions and exclusions to comply with Section 1557. *See* 81 Fed. Reg. 31430.

567 U.S. at 547. The Panel's unanimous decision confirms that Congress meant what it said when enacting the ACA – health insurers that receive federal money must provide meaningful access to health coverage for enrollees with disabilities.

IV. CONCLUSION

The Panel properly concluded that Section 1557 of the ACA permits claims of disability discrimination based upon health insurance benefit design that facially discriminates on the basis of disability. It further concluded that claims for proxy discrimination could be brought against health insurers that impose exclusions that disproportionately impact disabled enrollees. The Court should reject Kaiser's request for *en banc* review.

RESPECTFULLY SUBMITTED this 20th day of August, 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance for Briefs

9th Cir. Case Number 18-35846

I am an attorney for Appellants.

This brief contains 4,177 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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DATED: August 20, 2020.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants Andrea Schmitt and Elizabeth Mohundro state that *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.

CERTIFICATE OF SERVICE

I hereby certify on August 20, 2020, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: August 20, 2020, at Seattle, Washington.

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