November 3, 2020

VIA CM/ECF

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *John Doe, et al. v. CVS Pharmacy, Inc., et al.,*
Case Number 19-15074

Dear Ms. Dwyer,

Appellants provide this supplemental letter brief in response to the Court's October 20, 2020 Order "regarding how—if at all—the court's opinion in *Schmitt v. Kaiser Foundation Health Plan*, No. 18-35846, affects the disposition of this appeal."

INTRODUCTION

Individuals with HIV/AIDS can, despite their disability, survive and thrive, as long as they have access to anti-viral medications and pharmacy services in a medically appropriate manner. The limitations and exclusions CVS Caremark ("CVS") imposes under the specialty medication program ("Program") as a result of Appellants' disability puts their lives at risk and denies them meaningful access to the prescription drug benefit offered by CVS.

The court's ruling in *Schmitt*, 965 F.3d 945 (9th Cir. 2020), interpreting Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116, supports Appellants' claims for several reasons:

First, *Schmitt* makes clear Section 1557, and discrimination claims thereunder, must be interpreted within the context of the entire statutory text and purpose of the ACA. *Schmitt*, 965 F.3d at 954–55.

Second, *Schmitt*, issued after the oral argument in this case, supports Appellants' argument that unlawful proxy discrimination would result from CVS's benefit design distinction between specialty and non-specialty medications. *Id*. at 958–59.[1]

Third, *Schmitt* bars discriminatory benefit plan designs, like the Program, that provide unequal access to CVS's prescription drug benefit as a result of an enrollee's disability. *Id.* at 955. In this context, *Schmitt* reaffirms caselaw requiring CVS to provide individuals with HIV/AIDS "meaningful access" to the broader

[1] To the extent proxy discrimination is deemed a form of intentional discrimination, Plaintiffs have alleged and preserved claims of intentional discrimination. *See* Opening Brief, Dkt.31 at 13 (district court "wrongly concluded Appellants' allegations are insufficient to allege an intentional discrimination claim under Section 1557"); *id.* at 39 ("district court also erred in dismissing Appellants' discriminatory treatment claims"); Reply Br., Dkt.79 at 14–15 (reviewing Plaintiffs' claims of proxy discrimination, and noting that proxy discrimination is "a form of actual or 'constructive' facial discrimination"); *id*. at 23–24 n.9 (disputing assertion that Plaintiffs waived intentional discrimination claim).

prescription drug benefit provided to other CVS enrollees, which was provided to Appellants prior to adoption of the Program. *Id.* at 954–55.

Fourth, should the Court conclude Appellants have not adequately alleged a discrimination claim, the guidance from *Schmitt*, together with the uncertainty arising from pending litigation challenging revisions to Section 1557 regulations, and the imminent U.S. Supreme Court oral argument in *California v. Texas*, No. 19-840, regarding the constitutionality of the ACA, alternatively support an order from this Court remanding this case to allow Appellants to amend their Complaint to take these developments into account.

ARGUMENT

A. *Schmitt* Acknowledges That Section 1557 Must be Applied According to the Expansive Scope of the ACA

The ruling in *Schmitt* was the first time the Ninth Circuit interpreted Section 1557. In doing so, the Court held that the protections against disability discrimination in healthcare under the ACA extend beyond the conduct traditionally prohibited under the Rehabilitation Act. 965 F.3d at 954–55.

In enacting the ACA, Congress brought about a tectonic shift in healthcare by ensuring that all Americans, including Americans with disabilities across individual and group health plans, including self-insured plans, have equal and comprehensive access to health insurance coverage. Dkt.46 at 2–5. Section 1557

complements and enforces other ACA provisions, which prohibit charging patients more as result of their disability (42 U.S.C. § 300gg), limiting coverage due to pre-existing conditions (42 U.S.C. §§ 300gg-1, 300gg-2), and discriminating on the basis of disability. 42 U.S.C. §§ 300gg-3, 300gg-4.

Appellants' allegations and arguments regarding proxy discrimination, discriminatory benefit design, and denial of meaningful access, which are discussed below, must be read in light of the ACA's dramatic expansion of rights for HIV patients. Dkt.31 at 17–19.

B. *Schmitt* Supports Appellants' Proxy Discrimination Allegations

Schmitt's holding makes clear that, if the Court believes the existing allegations are insufficient, Appellants can amend the Complaint to adequately allege proxy discrimination. Appellants have not waived an intentional discrimination claim, as CVS argues. *See supra* n.1.

CVS has asserted that Appellants are discriminated against not on the basis of their disability but on the basis of "the classification (specialty vs. non-specialty) of the medication" to treat their disability. Answering Br., Dkt.65 at 32–33; *see id.* at 4 (Complaint does not allege "impacts resulting from … disability … rather than the type of medication purchased."). Consistent with the conclusion in *Schmitt*, however, this argument must be rejected.

"Proxy discrimination occurs when a defendant discriminates based on seemingly neutral criteria that are so closely affiliated with a disfavored group that discrimination on the basis of that criteria is effectively facial discrimination against the disfavored group." *Schmitt*, 965 F.3d at 958 (internal alteration and citation omitted). Importantly, the court in *Schmitt* clarified that proxy discrimination can occur in the context of plan benefit design under Section 1557. *Id*. at 958–59; *see also id*. at 954 (clarifying the meaning of intent in benefit design claims).

Here, all Appellants are prescribed HIV/AIDS medications for their disability, which CVS designates as "specialty medication" subject to the requirements and restrictions of the Program. Consequently, access to standard pharmacy benefits others have access to has been dangerously narrowed. *See infra*; *see also* EOR 26, 32, 36–37; ¶¶ 34, 51, 62, 66. Appellants cannot obtain their HIV/AIDS medications in a medically appropriate manner. *Id*. at 41, 42, 45–46; ¶¶ 75, 77, 87, 91. Appellants' allegations are adequate to raise actual or "constructive" facial discrimination under a "proxy" discrimination theory. *Schmitt*, 965 F.3d at 949. As a direct result of CVS designating HIV/AIDS medications as "specialty medications," Appellants are provided a significantly narrower prescription drug benefit compared to other CVS enrollees, which does

not meet the needs of most, if not all, individuals with HIV/AIDS. *Cf. id*. at 959 ("If cochlear implants serve the needs of most individuals with hearing disability, that fact would tend to undermine a claim of proxy discrimination."). *Schmitt* also established that under Section 1557, CVS cannot hide behind unverified distinctions between one kind of medication or another, as CVS has done here, without any kind of actuarial or medical evidence of effectiveness and without accountability through discovery. *See id*. at 954–55, 957–59 (discussing proxy discrimination in the design of plan benefits).

CVS's argument that its design of the prescription drug benefit is not discriminatory because the Program is applied to some non-disabled insureds who may also purchase "specialty medications," Dkt.65 at 57, conflicts with *Schmitt.* 965 F.3d at 958 ("That the hearing loss exclusion also affects some non-disabled individuals does not doom" the plaintiffs' "claim per se, since 'overdiscrimination is prohibited.'") (internal citation omitted). Adoption of CVS's argument would allow companies to avoid liability by merely pointing to drug-based distinctions as a fig leaf covering worse benefits for persons with the *conditions* those drugs treat. Given the role of pharmaceuticals in treating many disabilities, such an exception would swallow the rule.

C. *Schmitt*'s Delineation of the Meaningful Access Standard in the Context of Benefit Design Supports Appellants' Discrimination Allegations

The Ninth Circuit's ruling in *Schmitt* was the first time this Court considered *Choate* in the context of a discrimination claim under Section 1557, concluding that ACA-covered entities must "provide adequate health care to as many individuals as possible," and have "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." *Schmitt*, 965 F.3d at 955.[2] "Thus, the ACA allows a claim for discriminatory benefit design notwithstanding that, under *Choate*, the Rehabilitation Act does not." *Id.*

Importantly, *Schmitt* clarified the role of intent in benefit design claims as well as the scope of the benefit at issue in the wake of the ACA. *See id*. at 954 ("The claim at issue here—that Kaiser designed its plan benefits in a discriminatory way—inherently involves intentional conduct."). Under *Schmitt*, CVS is barred from arbitrarily providing one set of benefits to Appellants based on

[2] CVS is a covered entity principally engaged in the business of providing healthcare and is a recipient of federal financial assistance in the form of Medicare funding. EOR 83; ¶143; *Callum v. CVS*, 137 F. Supp. 3d 817, 853 (D.S.C. 2015).

their HIV/AIDS disability, while providing a broader set of benefits to other CVS enrollees. Consistent with Appellants' allegations and arguments in this appeal, *Schmitt* notes that with the passage of the ACA, companies no longer have the unfettered right to adopt any plan benefit they choose. *See* 42 U.S.C. §§ 300gg-4, 18022(b)(4)(B)–(C). Congress mandated comprehensive health benefit coverage and prohibited discriminatory practices in the design of those plans.

Under 42 U.S.C. § 300gg-4, for example, CVS cannot "establish rules for eligibility (including continued eligibility) … or coverage based on any" health-related factors, including medical condition, claims experience, or disability. In a similar vein, the ACA mandates coverage, on a nondiscriminatory basis, of ten categories of essential health benefits, including prescription drugs. The ACA also prohibits covered entities from "marketing practices or benefit designs that have the effect of discouraging the enrollment in such plan by individuals with significant health needs," among other protections. 42 U.S.C. § 18031(c)(1)(A). *Schmitt* recognizes that in light of these protections, the ACA permits claims for discriminatory benefit design. 965 F.3d at 954–55. "The ACA," the Court explained, "imposes an affirmative obligation not to discriminate in the provision of healthcare—in particular, to consider the needs of disabled people *and not*

design plan benefits in ways that discriminate against them." *Id*. at 955 (emphasis added).

In this context, *Schmitt* also reaffirms long-standing Ninth Circuit caselaw holding that a failure to design a program to meet the needs of disabled people violates Section 504. *Id*. at 954 (citing *Mark H. v. Lemahieu*, 513 F.3d 922, 936–37 (9th Cir. 2008)). "[T]he focus of the prohibition in § 504 is whether disabled persons were denied meaningful access" to the benefit. *Mark H.*, 513 F.3d at 937 (quoting *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996)).

Appellants' allegations of deprivation of meaningful access to the prescription drug benefit offered by CVS are equal to or more severe than in previous Ninth Circuit cases finding a loss of meaningful access. *See* Dkt.31 at 45–49. *Schmitt* supports this Court rejecting CVS's argument that Appellants have not been "'deprived' of any right 'offered …'" by CVS under the prescription drug benefit, Dkt.65 at 23, and concluding that Appellants have adequately alleged a claim for disability discrimination.

Here, the prescription drug benefit—*as a whole*—is the benefit at issue. Appellants allege they are denied meaningful access to the broader prescription drug benefit that they previously had, and other CVS enrollees still have access to. In fact, CVS has established two *separate* and *unequal* pharmacy benefits, giving

rise to a classic claim under Section 504. *See Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004).

First, Appellants no longer have access to pharmacists or related services under the Program that other CVS enrollees have access to, even though pharmacists are a critical part of the care team that "provide a number of vital services" essential to HIV/AIDS patients' survival. Dkt.39-2 at 8–9. For example, personnel with whom CVS permits Appellants to interact with by telephone or in CVS stores are not pharmacists and/or do not have sufficient knowledge concerning HIV/AIDS medications or Appellants' disability to provide critical counseling services. EOR 41, 45, 46; ¶¶ 75, 85, 91. And unlike other CVS enrollees, Appellants are not provided any monitoring of potentially life-threatening drug interactions associated with medications for their disability. Dkt.31 at 41.[3]

Second, the Program jeopardizes Appellants' health. As HIV/AIDS medications are not prepared at CVS stores, missed dosages of life-sustaining medications due to delivery delays are unavoidable, whether patients receive their medications at home or pick them up at a CVS store. EOR 26, 32–33, 36–37, 41–

[3] *Schmitt* recognized that at the pleading stage a plaintiff need only allege sufficient factual matter, accepted as true, to state a claim that is plausible on its face. 965 F.3d at 959 n.8.

42; ¶¶ 34, 51, 62, 66, 75. Routine delivery delays and missed dosages result in increased viral load for HIV/AIDS patients, threatening serious health consequences. EOR 32–34, 36–37, 42, 46; ¶¶ 51, 55, 62–63, 66, 77, 90.

Third, mandatory mail-delivery of HIV/AIDS medications to the home or drop-shipment to a CVS store for pick-up threatens Appellants' privacy and reinforces deep-seated societal stigma associated with HIV/AIDS that can have broad ranging psychological, economic, and health effects. EOR 40–42; ¶¶ 74–76.

Schmitt also confirms that the "meaningful access" standard determines whether a policy violates Section 504, which can occur with or without a discriminatory motive. *Schmitt*, 965 F.3d at 954 n.5; *see also Crowder*, 81 F.3d at 1483–84 (relying on *Choate* and legislative history of Section 504 and ADA, not Title VI, to conclude a disparate impact claim is cognizable). Although the Court did not reach the issue of disparate impact under Section 504 because the *Schmitt* plaintiffs did not allege a disparate impact claim, *Schmitt* recognized that *Choate* directed the proper question to ask is whether the plaintiff was denied meaningful access to a benefit. Like the Supreme Court in *Choate*, *Schmitt* acknowledged that Congress intended Section 504 to address discrimination that is "most often the product … of thoughtlessness and indifference." *Schmitt*, 965 F.3d at 954 n.5. Thus, "while a plaintiff must show intentional discrimination under the statutes

modeled after Title VI," the Ninth Circuit "interpret[s] this requirement 'somewhat more broadly'" for Rehabilitation Act claims because of that statute's purpose. *Id.* at 954 (quoting *Mark H.*, 513 F.3d at 937); *see also Choate*, 469 U.S. at 293 n.7 ("[T]oo facile an assimilation of Title VI law to § 504 must be resisted."); *CONRAIL v. Darrone,* 465 U.S. 624 (1984) (Section 504 did not incorporate Title VI's substantive limitations).

Furthermore, the Ninth Circuit already examined the impact of *Alexander v. Sandoval*, 532 U.S. 275 (2001), on Section 504, and concluded that under Section 504, a failure to design a benefit program so as to meet the needs of both disabled and nondisabled people comparably is a violation of Section 504. *Mark H.*, 513 F.3d at 936. Every Court of Appeals except the Sixth Circuit has followed *Choate*'s "meaningful access" standard, and many of these cases were decided after *Sandoval*. *See* Dkt.79 at 14–15.[4]

As noted above, Appellants allege they are not provided meaningful access to the broader prescription drug benefit (pharmacy services and the ability to obtain medications in a medically appropriate manner) offered by CVS to other

[4] In addition to the decisions cited in Appellants' Reply Brief, Fourth and Eleventh Circuit decisions also embrace the "meaningful access" standard. *See A Helping Hand, LLC v. Baltimore Cty.*, 515 F.3d 356, 361–62 (4th Cir. 2008); *Berg v. Florida Dep't of Labor & Empl., Sec, Div. of Vocational Rehab.*, 163 F.3d 1251, 1254 (11th Cir. 1998).

enrollees, and that was available to Appellants prior to the adoption of the Program. On identical allegations in *Doe v. Coventry Health Care, Inc.*, No. 15-CIV-62685 (S.D. Fla. May 5, 2016), the court concluded the benefit at issue was the broader prescription drug program, not "preferred pricing," as the District Court concluded here. Dkt.79 at 18. CVS's only rebuttal to these allegations—that the Program "does not restrict Appellants' access to any medications" Dkt.65 at 44—cannot be reconciled with the requirements of *Schmitt*. Under *Schmitt,* CVS cannot impose discriminatory benefit designs that undermine meaningful access to coverage and services. 965 F.3d at 954–55; *see also Katie A. v. Los Angeles Cty.*, 481 F.3d 1150, 1158–59 (9th Cir. 2007) (The meaningful access standard requires that the benefit offered be provided in an "effective manner.").

D. *Schmitt* Supports an Order to Remand the Case to Allow Appellants to Amend the Complaint

Should this Court conclude Appellants have not pled a plausible claim of disability discrimination, *Schmitt* supports reversing the District Court's decision refusing to allow Appellants to amend the Complaint. *Schmitt*, 965 F.3d at 960. Here, Appellants are able to amend the Complaint pursuant to *Schmitt* with additional details that would raise an inference of proxy discrimination, discriminatory benefit design, and loss of meaningful access based on CVS's intentional conduct

designing the Program. *See supra* Sections B–C.

Respectfully submitted,

s/ Daniel Sternberg
Consumer Watchdog

s/ Jerry Flanagan
Consumer Watchdog

Daniel L. Sternberg
Jerry Flanagan
Benjamin Powell
CONSUMER WATCHDOG
6330 San Vicente Blvd., Suite 250
Los Angeles, CA 90048
Tel: (310) 392-0522
Fax: (310) 392-8874
danny@consumerwatchdog.org
jerry@consumerwatchdog.org
ben@consumerwatchdog.org

Alan M. Mansfield
WHATLEY KALLAS, LLP
16870 W. Bernardo Dr. Suite 400
San Diego CA 92127
Tel: (858) 674-6641
Fax: (855) 274-1888
amansfield@whatleykallas.com

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

1. This letter brief complies with the type-volume limitation of the panel's Order of October 20, 2020, Dkt. No. 121, because it contains 2,740 words, excluding the items exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Dated: November 4, 2020

Respectfully submitted,

/s/ Daniel L. Sternberg

Daniel L. Sternberg