No. 20-1374

In The

Supreme Court of the United States

CVS PHARMACY, INC.; CAREMARK, L.L.C.; CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C.,

Petitioners,

v.

JOHN DOE, ONE; JOHN DOE, TWO; JOHN DOE, THREE; JOHN DOE, FOUR; JOHN DOE, FIVE; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND INDEPENDENT WOMEN'S LAW CENTER AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Parties have spilled much ink in this Court on whether the Patient Protection and Affordable Care Act's (ACA's) individual mandate is constitutional. But why did Congress include the individual mandate in the ACA? Another ACA provision forbids denying medical coverage because of a pre-existing condition. So Congress recognized that, without the individual mandate, insurers would go broke insuring only high-risk individuals.

High-risk individuals account for most of an insurer's costs. For prescription-drug plans, high-risk individuals use specialty drugs that can cost hundreds of thousands of dollars per year. These drugs treat conditions from asthma to AIDS. Prescription benefits managers have successfully reduced costs by negotiating lower prices for specialty drugs from some pharmacies. These deals help keep insurance prices low for all Americans.

But this efficiency angers the plaintiffs' bar. After several years of scouring the ACA, creative attorneys sued CVS for allegedly discriminating on the basis of disability by requiring patients who receive specialty drugs to pay more when filling prescriptions with other pharmacies. The plaintiffs' attorneys argue that the ACA—by incorporating Section 504 of the Rehabilitation Act of 1973's

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[*] No party's counsel authored any part of this brief. No person or entity, other than *amici* and their counsel, paid for the brief's preparation or submission. After timely notice, all parties consented to *amici*'s filing this brief.

remedies provision—permits such disparate-impact claims.

Independent Women's Law Center is a project of Independent Women's Forum, a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes policies that advance women's interests by expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for individual liberty, equal opportunity, and respect for the American constitutional order.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* in cases raising disparate-impact issues under federal law. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771 (3d Cir. 2001).

The Ninth Circuit's decision ignores Section 504's plain language, which does not recognize disparate-impact claims. Like other statutes whose remedy provisions the ACA incorporates, Section 504 does not allow these claims. Recognizing disparate-impact claims amounts to judicial policymaking. Unaccountable federal judges should not decide these important issues. Rather, the politically accountable branches should make these decisions.

Left to stand, the decision below will lead to increased costs for almost every American business that offers prescription-drug coverage for its employees. This will force companies to either cut their employees' pay or drop prescription-drug coverage. The Ninth Circuit, however, ignored these real-world impacts of its decision. This Court should intervene and answer the question it has deferred; plaintiffs cannot bring disparate-impact claims under Section 504.

STATEMENT

I. STATUTORY BACKGROUND

The ACA provides that federally financed health programs may not discriminate against a participant "on the ground prohibited under" Section 504 and other nondiscrimination statutes. 42 U.S.C. § 18116(a). Private parties may sue to enforce this right. *Id.* Section 504 bars federal-funds recipients from discriminating "solely by reason of [a person's] disability." 29 U.S.C. § 794(a). Rather than provide new enforcement tools, the ACA incorporates enforcement regimes from nondiscrimination statues—including Section 504. 42 U.S.C. § 18116(a).

This case shows the vast breadth of potential defendants under this provision. Pharmacy benefits managers, pharmacies, and employers who provide retirees prescription-drug benefits subsidized by the federal government are all fair game. *Cf. Gooden v. Batz*, No. 18-cv-302, 2020 WL 6146395, *9 (S.D. Ohio Oct. 20, 2020) (Section 18116(a) uses "extremely broad language").

II. FACTS AND PROCEDURAL HISTORY

CVS has a long list of specialty medicines. These drugs treat many conditions from psoriasis to AIDS. Plan participants prescribed specialty drugs have three options. First, they can receive the drugs by mail. Second, they can pick up the medicine at a local CVS. Finally, they can use another pharmacy and pay more.

Respondents took aim at the specialty-drug program, claiming that the specialty-drug requirements disparately impact AIDS patients. They filed a putative class action in the Northern District of California. Besides damages, Respondents sought an injunction barring CVS from requiring them to follow the specialty-drug program's terms. They did not argue that CVS discriminated against them *because* of their disability. Rather, Respondents argued that the program disproportionately affects those with AIDS.

This was part of a shotgun approach by Respondents' counsel. Perhaps realizing that Section 504 likely does not allow disparate-impact claims, they sued in courts across the country. The plan was simple. Find out which circuits would allow the suits and then file the remaining claims in those circuits hoping to extort settlements from less-capitalized defendants. The plan worked.

The District Court held that disparate-impact claims are allowed under the ACA and Section 504 but nonetheless dismissed Respondents' complaint because it failed to state a disparate-impact claim. Pet. App. 35a-40a, 43a-44a. The Ninth Circuit agreed

that Respondents could bring disparate-impact claims. *Id.* 15a. Yet it held that Respondents' allegations stated a claim and therefore remanded for further proceedings. *See id.* 23a. CVS filed this petition after the Ninth Circuit denied rehearing *en banc*. *See id.* 81a-82a.

SUMMARY OF ARGUMENT

I.A. Section 504's plain language bars disparate-impact claims. It requires a discriminatory intent to exclude solely because of a person's disability. If no discriminatory intent exists, a Section 504 claim fails. The statute's lack of an express disavowal of disparate-impact claims does not alter this interpretation.

B. Other nondiscrimination statutes support this plain-language reading. Plaintiffs cannot bring disparate-impact claims under the nondiscrimination statute with the closest—but still broader—remedy provision. The three statutes that allow disparate-impact claims differ substantially from Section 504. This different language, which is absent here, lends itself to disparate-impact claims.

C. The Court has recently shunned recognizing implied causes of actions. This reluctance is grounded in important separation-of-powers principles. When a court creates a cause of action, it exercises legislative—rather than judicial—power. The Court should not shrink from its fidelity to the distinction between legislative and executive power.

II. The breadth of potential disparate-impact claims under Section 504 is stunning. Almost every medical provider, college, and university could face such claims. So too could most K-12 schools and the millions of companies that received federal assistance during the COVID-19 pandemic.

Most of the American economy could face disparate-impact claims if the Ninth Circuit's decision stands. If Congress had desired that, it would have enacted such a law. But it chose instead to limit Section 504's remedies provision The Court should resolve the circuit split now to prevent an avalanche of Section 504 claims that go far beyond what Congress intended.

ARGUMENT

The ACA provides a cause of action for discrimination "on the ground prohibited under" several nondiscrimination statutes. 42 U.S.C. § 18116(a). This language shows that the ACA does not create a new cause of action. As used in the ACA, "ground" means "a basis for * * * argument." *Webster's Ninth New Collegiate Dictionary* 538 (1986). This means that the ACA incorporated the discrimination bars in those individual statutes. *See* Pet. App. 9a-11a. It did not combine the various nondiscrimination statutes. Nor did it bar a different type of discrimination.

So although Respondents sued under the ACA, the first question presented centers on how to interpret Section 504. If Section 504 allows disparate-impact claims, then plaintiffs can assert those claims in an ACA suit alleging disability discrimination. But

if disparate-impact claims are barred under Section 504, they are also barred under the ACA.

The Petition details the 4-1 circuit split the Court can resolve by granting the first question presented. Pet. 16-21. But this Court does not use a "show of hands" when deciding cases. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011) (Roberts, C.J., dissenting) (citations omitted). Here, the Sixth Circuit's minority view is correct; Section 504 does not provide for disparate-impact claims. *See Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 241-43 (6th Cir. 2019).

I. REVIEW IS NEEDED TO CLARIFY THAT SECTION 504 DOES NOT PERMIT DISPARATE-IMPACT CLAIMS.

A disparate-impact claim argues that "practices that are not intended to discriminate" still had a "disproportionately adverse effect on" a protected group. *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). The group that Section 504 protects is the disabled. The Court has not determined whether Section 504 allows disparate-impact claims. *Alexander v. Choate*, 469 U.S. 287, 299 (1985). Now that the courts of appeals have split on the question, this Court should decide the issue.

A. Section 504's Plain Language Resolves The Issue.

Section 504 provides that "[n]o otherwise qualified individual with a disability * * * shall, *solely* by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be

subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (emphasis added). Does this statutory provision allow for a disparate-impact claim? The text provides an unambiguous answer—no. The analysis should begin and end there. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted).

The phrase "solely by reason of her or his disability" shows that a plaintiff must prove that her disability was the only reason for the exclusion. *See Webster's Ninth New Collegiate Dictionary* 1122 (1986) (defining "sole" as "belonging exclusively or otherwise limited to [usually] specified individual, unit, or group"). If there is any other purpose behind exclusion, a plaintiff cannot prevail on a Section 504 claim.

The Court has interpreted other statutes in this way. For example, in *Husted v. A. Philip Randolph Inst.*, it held that "solely by reason of" means "for no reason other than." 138 S. Ct. 1833, 1842 (2018). The Ninth Circuit did not explain why the same language in Section 504 demands a different interpretation.

In other words, to state a claim under Section 504, plaintiffs must allege a discriminatory purpose. And as this Court recognized in *Pers. Adm'r of Mass. v. Feeney*, a "discriminatory purpose" does not include mere disparate impact. 442 U.S. 256, 279 (1979). Section 504's plain language therefore forecloses disparate-impact claims.

The lack of an affirmative bar on disparate-impact claims changes nothing. Congress need not anticipate—by disavowing—every conceivable extra-statutory claim the plaintiffs' bar concocts. *See United States v. Culbert*, 435 U.S. 371, 379 (1978) (the Court does not "manufacture ambiguity" in statutes "where none exists"); *see also Prestol Espinal v. Att'y Gen. of the United States*, 653 F.3d 213, 220 (3d Cir. 2011) (parties cannot "manufacture[ ] an ambiguity from Congress'[s] failure to specifically foreclose each exception that could possibly be conjured or imagined").

Section 504's language is clear and unambiguous. Congress did not authorize disparate-impact claims. Because the ACA does not independently provide for disparate-impact claims, the Ninth Circuit should have ended its analysis there. But looking beyond Section 504's language leads to the same outcome. In fact, it bolsters this reading.

B. Comparison With Similar Statutes Supports This Interpretation.

Viewing Section 504 in the broader context of nondiscrimination statutes shows why the Ninth Circuit's analysis makes no sense. Section 504, "was patterned after Title VI," *Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509 (1983), which prohibits a person's "be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination" because of membership in a protected class. 42 U.S.C. § 2000d. And this Court has held that disparate-impact claims are barred under Title VI. *Alexander*, 532 U.S. at 280-81.

Section 504's language is even clearer than Title VI's language in limiting available claims. Title VI omits the word "solely," 42 U.S.C. § 2000d, while Section 504 uses the word "solely." 29 U.S.C. § 794(a). This shows that Congress wanted to provide fewer causes of action under Section 504 than under Title VI. It makes no sense to recognize disparate-impact claims under the narrower statute when the broader statute bars such claims.

True, the Court has recognized that some other nondiscrimination statutes permit disparate-impact claims. Plaintiffs can bring disparate-impact claims under the Fair Housing Act, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533-39 (2015), Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971), and the Age Discrimination in Employment Act. *Smith v. City of Jackson*, 544 U.S. 228, 235-36 (2005). But those three statutes use different language that lends itself to disparate-impact claims.

The FHA makes it illegal "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable* or deny, a dwelling to any person" for certain reasons. 42 U.S.C. § 3604(a) (emphasis added). The Court held that "the phrase 'otherwise make unavailable'" manifests Congress's desire to recognize disparate-impact liability under the FHA. *Tex. Dep't of Hous.*, 576 U.S. at 534.

Title VII similarly makes it illegal "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual" for specific reasons. 42 U.S.C. § 2000e-2(1) (emphasis

added). The Court has held that the "otherwise discriminate" language naturally includes disparate-impact claims. *See Griggs*, 401 U.S. at 429-31.

The ADEA bars "limit[ing], segregat[ing], or classify[ing] * * * employees in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2) (emphasis added). Again, Congress employed the "otherwise adversely affect" language to signal that plaintiffs may bring disparate-impact claims under the ADEA.

But Section 504 lacks any similar language supporting disparate-impact claims. Rather, Congress chose to use language more restrictive than Title VI—which bars disparate-impact claims. Thus, other nondiscrimination statutes—both those recognizing disparate-impact claims and those that do not—show that the Ninth Circuit misconstrued Section 504.

C. Courts Should Not Imply New Causes Of Action.

"In the mid-20th century, the Court" thought it was "a proper judicial function to" recognize claims "necessary to make effective a statute's purpose." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (cleaned up). During this time the Court recognized many implied causes of action.

But the Court has since abandoned that "*ancien regime*." *Alexander*, 532 U.S. at 287. Now the Court charts a "far more cautious course before

finding implied causes of action." *Ziglar*, 137 S. Ct. at 1855.

This change is grounded in the Constitution. "When a party seeks to assert an implied cause of action * * * under a federal statute, separation-of-powers principles" must "be central to the analysis." *Ziglar*, 137 S. Ct. at 1857. The Court's old practice of recognizing implied causes of action created "tension" with "the Constitution's separation of legislative and judicial power." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020).

The Constitution vests "All legislative Powers" with Congress. U.S. Const. art. I, § 1; *see Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-76 (2018). The Judiciary, on the other hand, exercises judicial power. U.S. Const. art. III, § 1. The distinction between the legislative power and the judicial power disappears when courts imply causes of action that Congress did not create.

Congress chose not to recognize disparate-impact claims under Section 504. As described above, Congress decided to model Section 504 after Title VI rather than Title VII, the ADEA, or the FHA. It therefore made a policy decision to bar disparate-impact claims.

This policy choice arose from the complex legislative process. Congress sought to "stamp out" disability discrimination. *See Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). But "because" some congressmen likely "differ[ed] sharply on the means for effectuating that intent, the final language of" Section 504 "reflect[s] hard-fought compromises." *See id.* Thus Congress

"enact[ed] a provision that * * * prohibits specified conduct" but did "not wish to pursue the provision's purpose" by permitting disparate-impact claims. *See Hernandez*, 140 S. Ct. at 742.

Yet the Ninth Circuit disapproved of that policy decision and tried to "fix" Section 504, reading into it a disparate-impact cause of action that Congress rejected. If the Ninth Circuit was trying to "exercise[] a degree of lawmaking authority" as a common-law court, that attempt fails because there is no federal common law. *Hernandez*, 140 S. Ct. at 742 (citations omitted).

As an Article III court, members of the Ninth Circuit panel could not morph "into policymakers choosing what the law should be." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Rather, they were constrained "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This Court should grant review to remind the Ninth Circuit, again, that it cannot legislate from the bench.

But Congress's policy decision also stands up to scrutiny. "[M]any neutral (and well-intentioned) policies disparately affect the disabled—the point of such laws most often is to ease the burden of having a disability." *Doe*, 926 F.3d at 242. Allowing disparate-impact claims would "lead to a wholly unwieldy administrative and adjudicative burden." *Id.* (quoting *Choate*, 469 U.S. at 298). This was a rational policy decision that courts may not second-guess.

* * *

Section 504's language is simple. It provides a straightforward claim for those subject to

discrimination solely because of a disability. But it does not create a cause of action to challenge nondiscriminatory policies the burdens of which may fall more heavily on the disabled. The Court's interpretation of other nondiscrimination statutes and its recent trend away from implied causes of action bolster this interpretation. The Ninth Circuit's contrary holding is wrong and deserves this Court's review.

II. ALLOWING A DISPARATE-IMPACT CAUSE OF ACTION UNDER SECTION 504 WOULD BE COSTLY.

It is hard to overstate the disastrous and costly effects of recognizing disparate-impact claims under Section 504. The statute covers *any* entity that receives federal financial assistance. This Court should not permit the lower federal courts to impose such high costs without Congress's express authorization.

A. Respondents claim that CVS must comply with Section 504 because it receives Medicare reimbursements even though those reimbursements are not at issue. *See* Am. Compl. ¶ 143, *Doe v. CVS Pharm., Inc.*, 348 F. Supp. 3d 967 (N.D. Cal. 2018) (No. 18-cv-1031). Under this theory, which the Ninth Circuit refused to rebuke, plaintiffs can sue almost any medical provider under Section 504. *See* Nancy Ochieng *et al.*, *How Many Physicians Have Opted-Out of the Medicare Program?* (Oct. 22, 2020), https://tinyurl.com/nb9sufc4 (over 99% of doctors are Medicare participants).

Again, Respondents' theory is that it would be irrelevant whether a patient personally paid for services received. So long as Medicare paid the doctor to see one patient, she must comply with Section 504 for all of her patients. This theory expands the statute far beyond what its text can bear.

So permitting disparate-impact claims under Section 504 would cause great upheaval in the medical field. Doctors, hospitals, and others might refuse to accept Medicare or Medicaid to limit their liability. Today, our medical professionals are spread thin because of the COVID-19 pandemic. Increased strain on the industry could cause it to crack in already struggling rural areas.

But even with a narrower interpretation of the federal-financial-assistance requirement, plaintiffs can sue under many prescription-drug plans. Over seven million Americans participate in federally subsidized employer-sponsored plans. *See* Kaiser Family Found., *An Overview of the Medicare Part D Prescription Drug Benefit* (Oct. 14, 2020), https://tinyurl.com/n3tpj5wc. These plan participants can sue their employers under the ACA.

Allowing disparate-impact claims would change the calculus for companies deciding whether to offer such plans. The increased risk of suits for unintentional conduct will lead to fewer companies offering prescription-drug plans. This benefits no one.

The effect on our economy would be profound. Recently, America's healthcare spending has skyrocketed. In 2019, U.S. healthcare spending exceeded $3.8 trillion—17% of gross domestic

product. *See* Ctrs. for Medicare & Medicaid Servs., *National Health Expenditures 2019 Highlights*, https://tinyurl.com/46pxehn5. With the COVID-19 pandemic, that number was higher last year.

Although this case applies Section 504 in the medical context, other sectors will face large costs if plaintiffs can bring disparate-impact claims under Section 504.

B. Colleges and universities that receive federal assistance must comply with Section 504. *See* 29 U.S.C. § 794(b)(2)(A). There are almost four thousand American colleges and universities. Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. News & World Report (Feb. 15, 2019), https://tinyurl.com/49y9waz4. Yet fewer than two dozen do not accept federal funds. *See* Dean Clancy, *A List of Colleges That Don't Take Federal Money* (Aug. 10, 2020), https://tinyurl.com/2272duz2. If the Ninth Circuit's decision stands, almost all colleges and universities could be sued under a disparate-impact theory.

Allowing disparate-impact claims against colleges and universities will lead to fewer opportunities for all students, including those with a disability. Two examples prove the point. Assume three identical dorms on campus. The dorms are old, so the college makes the centrally located dorm accessible to those in wheelchairs. But most of the chemistry labs are near one of the other dorms.

Under Respondents' theory, chemistry students in wheelchairs could sue the college alleging that the college's policy has a disproportionate

negative effect on students who use wheelchairs. The Sixth Circuit's correct construction of Section 504 bars those disparate-impact claims.

Or assume a French-culture course has wine tastings every class. Students could sue and argue that this practice has a disparate impact on students who suffer from alcoholism. Given the pressure to drink, the students do not take the course. Under the Ninth Circuit's interpretation of Section 504, there is no limit to the possible suits against colleges and universities.

This too affects a large chunk of the economy. In the 2017-18 school year, colleges and universities spent $604 billion—or about 3% of GDP. *See* Natl. Cen. For Educ. Statistics, *Postsecondary Institution Expenses* (May 2020), https://tinyurl.com/b2ymzt7u. Either spending will have to increase or educational opportunities will suffer if the Ninth Circuit's decision stands.

C. Most K-12 schools also must comply with Section 504. *See* 29 U.S.C. § 794(b)(2)(B). And this is where a lot of Section 504 litigation occurs. This achieves laudable goals like ensuring children receive a free and appropriate education. But allowing disparate-impact claims will impose increased costs on struggling schools.

Unfortunately, educational achievement gaps, including gaps between those with learning disabilities and those without them, are real. *See* 20 U.S.C. § 6301 (subchapter meant to "close educational achievement gaps"). Some commentators have theorized that this shows discrimination. *See* Sarah

Albertson, *The Achievement Gap and Disparate Impact Discrimination in Washington Schools*, 36 SEATTLE U. L. REV. 1919, 1925 (2013).

If permitted to stand, the Ninth Circuit's decision would allow disparate-impact claims against schools because of existing educational gaps. To avoid this liability, schools might be forced to eliminate nondiscriminatory practices such as tests and letter grades. They would have to spend exorbitant amounts of money to try to close the gap. This would mean fewer opportunities for all students. And even if the educational gap were to close, the absolute value of education likely would drop for disabled students. This would be a big cost to allowing disparate-impact claims against schools.

Schools' athletic programs must also comply with Section 504. *See*, *e.g.*, *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 460, 463 (6th Cir. 1997) (*en banc*). In *McPherson*, a plaintiff who suffered from ADHD challenged a rule that barred students from participating in sports for more than eight semesters. The Sixth Circuit held that the rule did not violate Section 504. *Id.* at 463. But, under the Ninth Circuit's rule, the Sixth Circuit may have reached a different outcome had the plaintiff brought a disparate-impact claim; the rule arguably had a disparate impact on students with ADHD because they must repeat grades more often. So schools would bear substantial costs by creating and implementing procedures to create exceptions to rules for students Section 504 protects.

America spends more on K-12 public education than it spends on post-secondary education. In the

2017 school year, schools spent $739 billion—over 3% of GDP. *See* Natl. Cen. For Educ. Statistics, *Public School Expenditures* (Apr. 2020), https://tinyurl.com/23wsmyrb. During these trying times, schools are fighting to balance their budgets. A decision making them vulnerable to disparate-impact claims under Section 504 is the last thing they need.

D. Section 504's scope is probably at its apex today. Over the past 14 months, the Small Business Administration has distributed over $746 billion in Paycheck Protection Program funds. Thomas Wade, *Tracker: Paycheck Protection Program Loans* (Apr. 7, 2021), https://tinyurl.com/2z224cc7. One court has held that PPP recipients must comply with Section 504. *See Beverly R. on behalf of E.R. v. Mt. Carmel Acad. of New Orleans, Inc.*, No. 20-cv-2924, 2021 WL 1109494, *7 (E.D. La. Mar. 23, 2021).

The SBA has given over five million PPP loans. Wade, *supra*. Under the Ninth Circuit's rule, companies from professional sports teams to local hardware stores face potential disparate-impact liability. *See* KDKA, *Pittsburgh Penguins Received $4.8M PPP Loan To Pay Rent* (Jan. 5, 2021), https://tinyurl.com/4ynn7e8v; CNN, *Biden visits DC hardware store to highlight Paycheck Protection Program* (Mar. 9, 2021), https://tinyurl.com/3kbuyn9e.

The Pittsburgh Penguins, for example, might have to offer sign language interpreters on the jumbotron at all home hockey games. Doing otherwise would have a disparate impact on deaf fans. And mom and pop stores with fewer than 15 employees—who are exempt from the Americans with Disabilities Act,

42 U.S.C. § 12111(5)(A)—might have to comply with similar requirements under Section 504.

It is impossible to know exactly how many companies otherwise not covered by Section 504 must now comply with it because they accepted PPP loans. But it is reasonable to assume that many of the over five million PPP loans went to business that otherwise do not receive federal assistance. Although these companies agreed to comply with nondiscrimination laws, they did not foresee having to dodge disparate-impact claims drummed up by the plaintiffs' bar. Yet that is what will happen if the Ninth Circuit's decision stands.

* * *

This case therefore has ramifications far beyond the ACA. Because the ACA incorporates Section 504, recognizing claims like Respondents' will open the courts to a flood of Section 504 suits against other entities; plaintiffs will flock to the circuits that recognize disparate-impact claims to file these suits. This Court should grant certiorari to prevent these suits Congress did not authorize.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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