No. 20-1374

In the Supreme Court of the United States

CVS PHARMACY, INC., ET. AL.,

Petitioners,

v.

JOHN DOE, ONE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF LOUISIANA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Louisiana and the States of Arkansas, Florida, Georgia, Indiana, Mississippi, Nebraska, South Carolina, Tennessee, Texas, and Utah write in support of Petitioner CVS. Federal anti-discrimination statutes pose unique dangers for States. They risk rewriting valid state policies "rather than solely 'remov[ing] . . . artificial, arbitrary, and unnecessary barriers.'" *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). "And that, in turn, would" not only "set our Nation back in its quest to reduce the salience of [disabilities] in our social and economic system," *id.*, but would oust States from their constitutionally appointed position as dual sovereigns, *see Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

That risk is especially salient in this case. The plain text of Section 504 of the Rehabilitation Act—and by extension the Affordable Care Act—prohibits any recipient of federal financial assistance from

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[1] Counsel for Petitioner, CVS Pharmacy, Inc., has consented to the filing of this brief. While *amici* notified Counsel for Respondent, Doe, of their intent to file this brief at least ten days prior to its due date, *see* Rule 37.2(a), he had not indicated whether he consented as of the time of filing. As States, *amici* need not seek leave to file this brief. *See* Rule 37.4. In accordance with Rule 37.6, *amici* are excepted from the author and funding disclosures.

discriminating against individuals with disabilities in any activity or program. Because nearly all state programs and activities receive federal funds, the sheer scope of Section 504 invites the Court into the inner workings of States. In the absence of a clear mandate from Congress, the Court should not expand the scope of Section 504 to include disparate-impact claims.

SUMMARY OF THE ARGUMENT

As written, Section 504 applies to nearly every state action—no matter how inconsequential. Section 504 prohibits the recipients of federal funds from discriminating against disabled individuals in any activity or program. 29 U.S.C. § 794(a). It defines "program or activity" as all of the operations of a State; a state agency; a State and state agency when a State passes federal funds to an agency; or a state school, university, or trade school. *Id.* § 794(b). It also removes many of the traditional protections States have against liability. *See* 42 U.S.C. § 2000d-7(a)(1),(2).

Every State and nearly every state agency receives federal funds and is therefore subject to Section 504. Its definition of "program or activity" includes everything a State does, even down to how a police department internally categorizes its arrests. *See Disability Advocs., Inc. v. McMahon*, 124 F. App'x 674, 675 (2d Cir. 2005).

In a seminal 1985 case, *Alexander v. Choate*, this Court declined to resolve whether Section 504 provides a disparate-impact cause of action in part

because of the burden it would impose on States. 469 U.S. 287 (1985). In *Choate*, a group of disabled Medicaid recipients brought a Section 504 class action challenging their State's plan to avoid a budget deficit by limiting a Medicaid benefit available to all recipients. *Id.* at 289. To satisfy their prima facie burden, they presented evidence that the change had a discriminatory effect on disabled Medicaid recipients. *Id.* at 289–90.

The Court reasoned that disparate-impact liability would require States to consider how each of their facially neutral actions would affect the disabled and whether the costs would outweigh the benefits. *Id.* at 299. The Court compared that burden with NEPA's requirement that federal agencies prepare impact statements for every agency action affecting the environment. *Id.* at 298–99. But ultimately, the Court applied neither an intentional or disparate-impact discrimination, opting instead to apply a "meaningful access" standard. *Id.* at 301.

The Ninth Circuit has repeatedly applied disparate-impact liability to the meaningful access standard, including in the decision below. *See, e.g.*, Pet. App. 15a; *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996).

Grafting disparate-impact liability onto Section 504's already broad reach—will have grave consequences for States. Doing so will impose a burden on States similar to the requirement under the National Environmental Policy Act (NEPA) that

federal agencies prepare environmental impact studies before taking any action affecting the environment. And it will expose States to improper attacks on their valid policies in federal court.

Congress did not intend for Section 504 to impose NEPA-like requirements on States. Congress knows how to clearly impose that type of regime. It did so in NEPA. Section 504 uses none of NEPA's language.

Disparate-impact liability under Section 504 also goes beyond eliminating discrimination to allow attacks on valid state policies in federal court. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015). In *Choate*, the plaintiffs' disparate-impact claim was an attempt at rewriting a State's facially neutral budget decision. If the Court now recognizes disparate-impact liability under Section 504, it will throw wide the federal courthouse doors to similarly improper attacks. To chart a path free of these ills, the Court should interpret Section 504 to prohibit only intentional discrimination.

ARGUMENT

I. AS WRITTEN, SECTION 504 APPLIES TO PRACTICALLY EVERYTHING A STATE DOES.

A. Section 504 Applies to Every State and Nearly Every State Agency.

Section 504 of the Rehabilitation Act of 1973 provides, "No otherwise qualified individual with a

disability . . . shall, solely by reason of his or her 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).

In relevant part, Section 504 defines "program or activity" as "*all* of the operations of": (1) "a department, agency, special purpose district, or other instrumentality of a State"; (2) a State "entity . . . that distributes such assistance *and* each such department or agency (*and* each other State or local government entity) to which the assistance is extended"; or (3) colleges, universities, post-secondary institutions, public higher-education systems, technical or career educational systems, or "other school system[s]." *Id.* § 794(b) (emphasis added).

Section 504 removes many protections against liability for States. *See* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . ."); *id.* § 2000d-7(a)(2) ("In a suit against a State for a violation of [Section 504], remedies . . . at law and in equity . . . are available . . . to the same extent as such remedies are available . . . in the suit against any public or private entity other than a State."); *see Lane v. Pena*, 518 U.S. 187, 200 (1996) (finding 42 U.S.C. § 2000d-7 to be "the most express language" of congressional waiver of Eleventh Amendment immunity).

Every State and nearly every state agency receives federal funds and is therefore subject to Section 504. Each year, States receive hundreds of billions of dollars in federal financial assistance to help support a broad range of services like "health care, education, social services, infrastructure, and public safety." U.S. Government Accountability Office, Federal Grants to State and Local Governments, https://www.gao.gov/federal-grants-state-and-local-governments. In 2011 alone, the federal government granted $607 billion—4 percent of GDP—to state and local governments. Congressional Budget Office, *Federal Grants to State and Local Governments* 1 (March 2013), www.cbo.gov/sites/default/files/113th-congress-20132014/reports/43967federalgrants.pdf.

"The bulk of [that] money"—approximately eighty percent—"goes directly to states, typically (but not always) to the state agency equivalent to the federal agency awarding the grant." Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 Yale L.J. 248, 267 (2014) (footnote omitted).

In 2013, "[e]very cabinet-level agency except the State Department made such grants." *Id.* at 251. The Department of Homeland Security "regularly" grants money to States through the Federal Emergency Management Agency (FEMA) for preparedness and non-disasters. *Id.* at 263 n.70 (collecting federal agency sources). The Department of Justice grants States money for law enforcement. *Id.* The Department of Commerce grants States money for broadband. *Id.* The Department of Energy

grants States money for energy development. *Id.* The Department of Defense's Office of Economic Adjustment grants States money for defense. *Id.* The Department of Interior's sub-agencies—the Bureau of Land Management, Office of Surface Mining, Bureau of Reclamation, Fish and Wildlife Service, National Park Service, and Office of Insular Affairs—grant States money for environmental projects. *Id.* The Department of Veterans Affairs grants States money for extended-care facilities. *Id.*

Federal grants make up about thirty percent of state budgets and fall into several categories. Iris J. Lav & Michael Leachman, *At Risk: Federal Grants to State and Local Governments* 2 (March 13, 2017), https://www.cbpp.org/sites/default/files/atoms/files/3-13-17sfp.pdf. States use social-service grants for programs like Medicaid and health insurance for children just above the Medicaid cutoff, free and reduced school meals, Supplemental Nutrition Assistance Program ("food stamps"), child-support enforcement programs, childcare for low income families, adoption and foster care, and cash assistance for needy families. *Id.* at 3–4.

States use so-called "discretionary" federal grants for projects like transportation (including highways, airports, and mass transit), education (including support for low-income and special-needs students), and housing programs for low-income families and seniors. *Id.* at 2. States use "criminal justice" grants for prosecution and court programs; corrections and community-corrections programs; drug treatment and enforcement programs; crime victim and witness programs; and mental health,

behavior, and crisis intervention programs. 34 U.S.C. § 10152(a)(1).

And "[e]very State . . . accepts federal funding for its prisons." *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005). States even use federal money for their temporary correctional facilities on military bases, prison barges, and boot camps. *See* U.S. Department of Justice, *Streamlining of Administrative Activities and Federal Financial Assistance Functions in the Office of Justice Programs and the Office of Community Oriented Policing Services* 47 (Aug. 1, 2003), https://oig.justice.gov/sites/default/files/legacy/reports/plus/a0327/final.pdf.

B. Section 504 Applies to Nearly Every State Action.

Section 504's definition of "program or activity" is "extremely broad in scope and includes anything a public entity does." *Furgess v. Pa. Dep't of Corr.*, 933 F.3d 285, 289 (3d Cir. 2019) (quoting *Disability Rights N.J., Inc. v. Comm'r, N.J. Dep't of Human Servs.*, 796 F.3d 293, 301 (3d Cir. 2015)).

Prisoner litigation is a prime example. *See, e.g.*, *Wright v. N.Y. State Dep't of Corrs.*, 831 F.3d 64, 72 (2d Cir. 2016) (holding that Section 504 "undoubtedly" applies "to state prisons and their prisoners"). Prison programs and activities include things as routine as showers, meals, and exercise equipment. *See, e.g.*, *Jaros v. Ill. Dep't of Corr.*, 684 F.3d 667, 672 (7th Cir. 2012) ("Although incarceration is not a program or activity, the meals and showers made available to

inmates are."); *Norfleet v. Gaetz*, 820 F. App'x 464, 469–70 (7th Cir. 2020) (affirming the district court's grant of summary judgment under Section 504 because the disabled inmate presented insufficient evidence of needing free weights and a sports wheelchair).

Section 504 casts an equally broad net over the programs and activities of state hospitals and law enforcement departments. *See, e.g.*, *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 491–92 (3d Cir. 2004) (applying Section 504 to a state hospital); *Disability Advocs., Inc. v. McMahon*, 124 F. App'x 674, 675 (2d Cir. 2005) (same for state police). In *McMahon*, for example, the plaintiff challenged a state police department's practice of "recording as an arrest (*for strictly internal purposes*) a mental health detention." 124 F. App'x at 675 (emphasis added).

The scope of Section 504 for programs and activities of state schools and universities is no different. *See, e.g.*, *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017) (stating that Section 504 "cover[s] both adults and children with disabilities, in both public schools and other settings"); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 491 (4th Cir. 2005) (applying Section 504 to "all the operations of a university or other postsecondary institution" in a suit against a public university). If Section 504 applies to prison menus, exercise equipment, and internal police-department labels, surely it also applies to a school's lunch menu, playground equipment, and art supplies.

In short, the text of Section 504 touches practically every aspect of what States do—the State itself and its prisons, schools, universities, police and criminal investigation units, hospitals, Medicaid and other low-income programs, public transit—and on and on. And when a plaintiff alleges discrimination against a state program or activity, Section 504 holds liable both the state agency administering the program or activity and the State. *See* 29 U.S.C. § 794(b)(1)(B).

II. GRAFTING EXTRA PROTECTIONS ONTO SECTION 504 WILL IMPOSE STAGGERING CONSEQUENCES ON STATES.

In *Alexander v. Choate*, this Court's seminal decision interpreting Section 504, the Court "decline[d] the parties' invitation" to define Section 504 in terms of either intentional discrimination or disparate-impact liability. 469 U.S. 287, 299 (1985). Instead, the Court held Section 504 to "require[] that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." *Id.* at 301.

The Ninth Circuit, however, has applied disparate-impact liability to *Choate*'s meaningful access standard. *See, e.g.*, Pet. App. 15a ("The fact that the benefit is facially neutral does not dispose of a disparate impact claim based on lack of meaningful access."); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013) ("We have relied on *Choate*'s construction of Section 504 . . . and have held that to challenge a facially neutral government policy on the ground that it has a

disparate impact on people with disabilities, the policy must have the effect of denying meaningful access to public services." (citing *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996))).

For States, the "costs" of disparate-impact liability under Section 504 are "far from minimal." *Choate*, 469 U.S. at 308. Section 504 imposes unintended NEPA-like requirements on States and exposes them to improper attacks on their valid policies in federal court.

A. Disparate-Impact Liability Imposes NEPA-Like Requirements on States that Congress Did Not Intend.

In *Choate*, a group of disabled Medicaid recipients challenged as discriminatory a State's proposal to decrease by six the number of annual inpatient days covered by Medicaid. *Id.* at 289. The State proposed the change to avoid a $42 million dollar budget deficit. *Id.* To satisfy their prima facie burden of proof, the plaintiffs presented evidence that the change would have a discriminatory effect on all disabled Medicaid recipients. *Id.* The Court ultimately did not interpret Section 504 in terms of intentionality, instead "requir[ing] that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." *Id.* at 301.

The Choate Court declined to recognize a disparate-impact cause of action under Section 504 in part because of the burden it would impose on States. *Id.* at 299, 308 (stating that disparate-impact liability

will "impose a virtually unworkable requirement on state Medicaid administrators"). Because individuals with disabilities "typically are not similarly situated" to non-disabled individuals, disparate-impact liability will require States and their agencies to consider the effect of their every action on the disabled. *Id.* at 298. States will have to break down their analysis by "class" of disability to determine whether "the change at issue . . . might be significantly less harmful" to some disabilities than others. *Id.* at 308. "[T]he State [will] then have to balance the harms and benefits to various groups to determine, on balance, the extent to which the action disparately impacts [those with disabilities]." *Id.* The Court concluded "that § 504 does not impose a general NEPA-like requirement on federal grantees." *Id.* at 307.

Having to conduct a cost-benefit analysis for things as inconsequential as the strictly internal labels an agency gives to its decisions, *see McMahon*, 124 F. App'x at 675, is an astounding administrative burden for States. The *Choate* Court compared that "virtually unworkable" burden on States with NEPA's requirement that federal agencies prepare environmental-impact statements before taking any action affecting the environment. 469 U.S. at 298–99, 308.

Despite the *Choate* Court's outdated approach to statutory interpretation, it was right that, "[h]ad Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring the preparation of 'Handicapped Impact Statements' before any action was taken by a grantee that affected the handicapped," Congress would have

said so. *Id.* at 298–99. Congress knows how to impose "NEPA-like" requirements. The text of NEPA lays bare Congress' intent to require federal agencies to carefully study and report the environmental impacts of their proposed actions. NEPA's relevant provisions state: "The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government," when considering "major Federal actions significantly affecting the quality of the human environment[,] . . . *shall* . . . include a detailed statement." U.S.C. 42 § 4332 (emphasis added); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004) (describing Section 4332 as "the heart of NEPA").

Section 4332 further directs agencies to "include" five topics in their environmental-impact statements: (1) "the environmental impact of the proposed action"; (2) "any adverse environmental effects which cannot be avoided should the proposal be implemented"; (3) "alternatives to the proposed action"; (4) "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity"; and (5) "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." U.S.C. 42 § 4332(C).

Section 504 of the Rehabilitation Act, on the other hand, simply prohibits recipients of federal financial assistance from discriminating against an "otherwise qualified individual with a disability . . . solely by reason of his or her disability." 29 U.S.C. § 794(a). Unlike NEPA, Section 504 does not explicitly "authorize" or "direct" States or their agencies to do

anything. Nor does it make mention of detailed statements analyzing (1) a proposed action's effect on disabled individuals, (2) alternatives to the action, or (3) the relationship between the action's pros and cons.

Congress knows how to clearly impose NEPA-like requirements. Had it intended to impose similar requirements under Section 504, it would have said so. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

B. Disparate-Impact Liability Exposes Valid State Policies to Improper Attacks in Federal Court.

"Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."[2] *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)). In *Choate*, the State placed greater value on its interest in avoiding a budget deficit than on its interest in providing six additional days of inpatient hospital coverage to Medicaid recipients. 469 U.S. at 289. Because the State's decision on its face equally applied to all Medicaid recipients irrespective of their disability status, the State imposed no "artificial, arbitrary, [or] unnecessary barrier[]" on individuals with disabilities. *See*

[2] Of course, intentionally discriminatory state policies are not "valid" policies. *See Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 544 (2015).

Inclusive Communities Project, 576 U.S. at 544 (quoting *Griggs*, 401 U.S. at 431). Whatever barrier the State's decision may have imposed applied equally to all Medicaid recipients—disabled or not. The State's decision did not impede the plaintiffs' access any more than it impeded everyone else's. Plaintiffs merely wanted the federal court to rewrite the State's valid policy decision.

Recognizing a disparate-impact cause of action under Section 504 will open the doors to similar attempts at rewriting valid state policy through federal litigation. Consider prisoner litigation—fertile ground for Section 504 claims. *See* Betsy Ginsberg, *Out with the New, in with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 Fordham Urb. L.J. 713, 717 (2009) (explaining that Section 504 applies in "most" disability cases brought by prisoners and that "the population of incarcerated people with disabilities is disproportionately large and growing"). Under disparate-impact liability, a group of prisoners with ambulatory disabilities could bring a Section 504 challenge against a drought-prone State's decision to conserve water by shaving a minute or two off prisoner shower times. Or a group of prisoners with dyslexia could challenge the prison's decision to pause reading programs until qualified instructors are hired. Federal courts should not be in the business of deciding which of two facially neutral state policies—*e.g.*, budget deficit over inpatient hospital days, water conservation over extra shower time, effective over ineffective reading programs—is the better choice. *See Inclusive Communities Project, Inc.*, 576 U.S. at 544; *Choate*, 469 U.S. at 308.

In sum, the text of Section 504 touches nearly every state action. Grafting disparate-impact liability onto Section 504's already broad consequences for States imposes an unintended and unworkable requirement on them and exposes their valid policies to federal court rewriting. To avoid these ills, the Court should conclude that Section 504 prohibits only intentional discrimination.

CONCLUSION

The Court should reverse the Ninth Circuit's decision and hold that Section 504 of the Rehabilitation Act—and by extension the Affordable Care Act—does not provide a disparate-impact cause of action for plaintiffs alleging disability discrimination.

Respectfully submitted,

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