2021 WL 4081036 (U.S.) (Appellate Brief)
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, et al., on Behalf of Themselves and All Others Similarly Situated, Respondents.

No. 20-1374.
September 3, 2021.

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

**Brief for Petitioners**

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## *I QUESTION PRESENTED

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

## *II PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner CVS Pharmacy, Inc. is a wholly owned subsidiary of CVS Health Corporation. Petitioners Caremark, L.L.C. and Caremark California Specialty Pharmacy, L.L.C. are wholly owned indirect subsidiaries of CVS Health Corporation.

Respondents are John Doe One, Richard Roe, John Doe Three, John Doe Four, and John Doe Five. On August 30, 2021, counsel for respondents filed a suggestion of death of John Doe Three and moved to subsitute John Doe Four as John Doe Three's authorized representative.

CVS Health Corporation is a publicly traded company, but no publicly traded corporation owns 10 percent or more of its stock. CVS Health Corporation is the only publicly traded corporation that owns, directly or indirectly, a 10 percent or more interest in petitioners CVS Pharmacy, Inc., Caremark, L.L.C., or Caremark California Specialty Pharmacy, L.L.C.

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## *1 OPINIONS BELOW

The court of appeals' opinion is available at 982 F.3d 1204 (9th Cir. 2020). Pet.App.la-23a. The district court's opinion is available at 348 F. Supp. 3d 967 (N.D. Cal. 2018). Pet.App.24a-79a.

## JURISDICTION

The court of appeals' judgment was entered on December 9, 2020. Pet.App.2a. The petition for rehearing or rehearing en banc was denied on January 15, 2021. Pet.App.81a-82a. The petition for certiorari was filed on ***2** March 26, 2021, and granted on July 2, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in an appendix, *infra,* App.la-30a.

## STATEMENT

Section 504 of the Rehabilitation Act provides that no "otherwise qualified individual" shall "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" in a federally funded program or activity "solely by reason of her or his disability." 29 U.S.C. § 794(a). That prohibition applies to any recipient of federal financial assistance, such as States and cities, schools and universities, airports, hospitals, parks, and transportation districts. *See id.* § 794(b).

Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. § 18116(a), incorporates section 504 into new healthcare contexts alongside three other antidiscrimination statutes that apply to federal-funding recipients-Title VI of the Civil Rights Act of 1964 (race, color, or national origin), 42 U.S.C. § 2000d; Title IX of the Education Amendments of 1972 (sex), 20 U.S.C. § 1681; and the Age Discrimination Act of 1975 (Age Act) (age), 42 U.S.C. § 6102.

The decision below held that the Rehabilitation Act, and thus the ACA, prohibits facially neutral policies that produce disproportionate, adverse results for individuals with disabilities. That holding runs headlong into bedrock principles of statutory

interpretation. Start with the statutory text itself: section 504 focuses on federal-funding recipients' reason for acting, by prohibiting certain defendant-focused conduct "solely by reason of" an impermissible consideration, *i.e.,* disability. By contrast, ***3** when Congress intends to authorize disparate-impact claims, Congress refers to the *effects* of an action without regard for the defendant's motive. Every statute that this Court has recognized as reaching disparate impacts contains phrases like "results in" or "have the effect of"-the language of consequences. Section 504, tellingly, does not.

Implying a disparate-impact claim based on disability would be particularly perverse given that the Rehabilitation Act is Spending Clause legislation. Three other Spending Clause statutes-Title VI, Title IX, and the Age Act-ban discrimination in federally funded programs. All three of those statutes use similar language as section 504, and none of the three reaches disparate impacts. Underscoring the close relationship between these four statutes, Congress incorporated all four of them into the ACA in tandem.

It would be highly anomalous if Congress targeted disability and disability alone as the trait triggering disparate-impact liability. Health plans by their nature offer different levels of coverage for different medical treatments, so individuals with disabilities may want or even need different benefits than their plan provides. But if section 504 covered disparate-impact claims, routine disagreements about whether the health-plan terms achieve the best outcomes could implausibly trigger liability and would likely skyrocket healthcare costs for everyone. CVS unequivocally condemns disability discrimination. But this case involves no alleged discrimination. CVS, through its pharmacy-benefit-manager subsidiaries, administers drug benefit plans selected by its clients. Respondents do not dispute that those plans apply the same neutral terms to all participants regardless of disability.

***4** Section 504 serves important antidiscrimination purposes without a disparate-impact claim. Section 504's mission is to ensure equal treatment, because purposeful discrimination against people with disabilities was a serious problem in 1973 when Congress enacted section 504. Such discrimination was a serious problem when Congress enacted the Americans with Disabilities Act (ADA) in 1990. And such discrimination unfortunately remains a serious problem today.

Section 504 and the ACA put federal-funding recipients on notice that intentional discrimination is illegal. Schools cannot discipline students with attention-deficit disorder more harshly on that basis. Towns cannot target group homes for individuals with disabilities with uniquely onerous zoning requirements. Employers cannot refuse to hire someone solely because she is in a wheelchair. And health plans and anyone else subject to section 504 and the ACA cannot facially exclude patients with disabilities simply because they have disabilities. Courts do not need to rewrite section 504 and insert a non-existent disparate-impact standard to accomplish Congress' goals.

### A. Statutory Background

Section 504 of the Rehabilitation Act of 1973 is part of a package of Spending Clause statutes enacted in the 1960s and 1970s. All of those statutes operate the same way: Congress requires entities receiving federal funds to agree not to discriminate against a protected group. Similar to section 504, the other statutes-Title VI, Title IX, and the Age Act-prohibit discrimination "on the ground of" or "on the basis of" a protected characteristic. 42 U.S.C. § 2000d; 20 U.S.C. § 1681(a); 42 U.S.C. § 6102. Title VI prohibits racial discrimination; Title IX prohibits sex discrimination; and the Age Act prohibits age discrimination.

***5** In 2010, Congress expanded the universe of entities subject to section 504 and these other Spending Clause antidiscrimination statutes by incorporating all of them into the ACA. Section 1557 of the ACA provides that "an individual shall not... be excluded from participation in, be denied the benefits of, or be subjected to discrimination" under any federally funded health program or activity "on the ground prohibited" under any of these four statutes. 42 U.S.C. § 18116(a). The ACA also incorporates the "enforcement mechanisms" available under these laws. *Id.* The ACA thus imports wholesale the underlying legal standards and remedies available under these antidiscrimination statutes. *Doe v. BlueCross BlueShield of Tenn., Inc.,* 926 F.3d 235, 238-41 (6th Cir. 2019) (Sutton, J.); Pet.App.9a-lla.

  

The ACA's nondiscrimination provision applies to "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under" Title I of the ACA. 42 U.S.C. § 18116(a). Health plans offered on the federal ACA exchange are open to suit. So too are off-exchange plans that receive federal aid. As are entities receiving funding through Medicaid or certain types of Medicare, including Medicare Advantage Plans and employer-sponsored Retiree Drug Subsidy plans. Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,174 (June 19, 2020).

**B. Factual Background**

1. Petitioners CVS Pharmacy, Inc., Caremark, L.L.C., and Caremark California Specialty Pharmacy, L.L.C. (collectively, "CVS") are subsidiaries of CVS Health Corporation (CVS Health). Certain subsidiaries ***6** of CVS Health, including CVS Pharmacy, Inc., sell prescription drugs and a wide assortment of health and wellness products and general merchandise to millions of Americans through nearly 10,000 retail pharmacies nationwide. *See* CVS Health Corp., Annual Report (Form 10-K), at 2, 5 (Feb. 16, 2021), https://tinyurl.com/mc6nmmxa.

Other CVS Health subsidiaries operate one of the nation's largest pharmacy-benefit-management businesses, administering pharmacy benefit plans for clients to facilitate prescription-drug coverage and claims processing for over 100 million eligible plan members. *Id.* at 2. Those clients are primarily employers, insurance companies, unions, government employee groups, health plans, and Medicaid managed care plans. Pharmacy benefit managers administer prescription-drug plans on behalf of insurers, federal and state governments, and employers. Pharmacy benefit managers help their clients contain the high cost of prescription drugs by negotiating rebates from drug manufacturers at one end and discounts from retail pharmacies at the other. Joseph C. Bourne & Ellen M. Ahrens, *Healthcare's Invisible Giants: Pharmacy Benefit Managers,* Fed. Law., May 2013, at 50, 51. These efforts will save employers and consumers an estimated $1 trillion on prescription drugs over the next 10 years. *See The Value ofPBMs,* Pharm. Care Mgmt. Ass'n (2021), https://tinyurl.com/4auyajkm.

Pharmacy benefit managers manage drug prices in part by creating and recommending plan-design options that cover different drugs at different price points. Bourne & Ahrens, *supra,* at 50. Generic drugs are generally the least expensive for patients; more expensive drugs often require higher levels of cost-sharing. By recommending plan designs with tiered pricing, pharmacy ***7** benefit managers help clients "encourage the use of generic equivalents" and "guide members to choose lower cost alternatives." CVS Health Corp., 10-K, *supra,* at 3.

To keep costs down, plan designs offered by pharmacy benefit managers often impose the most restrictions on "specialty" drugs. These medications have special shipping, administration, or storage requirements; treat rare conditions; or are very expensive. *See Specialty Drugs and Health Care Costs,* Pew Charitable Trs. 1 (Dec. 2016), https://tinyurl.com/48rcst96. Some run over $100,000 per year. *Id.* at 2. Pharmacy benefit managers often control the disproportionate costs and complexities of specialty drugs by contracting with specialty pharmacies that have expertise in the "unique handling, storage, and dispensing" requirements of these medications. Bourne & Ahrens, *supra,* at 50. Increasingly, pharmacy benefit managers rely on specialty pharmacies that deliver by mail. *Id.*

Prescription mail delivery originated to address the needs of individuals with disabilities. The Veterans Administration pioneered the first mail-delivery pharmacy in 1946 to ensure that bed-bound World War II veterans got their medications. Albert I. Wertheimer & James E. Knoben, *The Mail-Order Prescription Drug Industry,* 88 Health Servs. Reps. 852, 852-53 (1973). Mail delivery remains an invaluable tool for patients with mobility difficulties. *See id.* at 856. Mail delivery also became an unexpected boon during the COVID-19 pandemic. Mailorder prescriptions rose 21 percent during the pandemic, a trend expected to continue. Jared S. Hopkins, *Mail-Order Drug Delivery Rises During Coronavirus Lockdowns,* Wall St. J. (May 12, 2020), https://tinyurl.com/y2z4jnte.

  

***8** 2. Respondents are HIV-positive individuals who have prescription-drug coverage through their employers, Amtrak, Lowe's, and Time Warner, Inc. Respondents allege that the three CVS entities sued here collectively administer the employers' health plans. J.A.6, 10-11 (¶¶2, 14). Respondents require specialty medications to manage their condition. J.A.4 (¶1).

In 2018, respondents brought a putative class action in the U.S. District Court for the Northern District of California against their employers under the Employee Retirement Income Security Act (ERISA) and against CVS under section 1557 of the ACA, the ADA, ERISA, and state laws. Respondents allege that CVS, through its purported administration of these health plans, allows plan beneficiaries to receive in-network prices only if they get specialty medications by mail or at a local CVS retail pharmacy for pickup. J.A.4-5 (¶1). [1]

As relevant here, respondents allege that this facially neutral policy violates the ACA, which incorporates section 504, because "patients with HIV and AIDS are disproportionately impacted" by CVS's in-network pricing program for specialty drugs "compared to other patients." J.A.47 (¶92). Respondents allege that CVS is subject to section 1557 because its specialty and retail pharmacies receive Medicare reimbursement. J.A.99 (¶143). Disparate impact is respondents' only theory; ***9** they specifically disavowed any claim of intentional discrimination. Pet.App.35a-36a.

Respondents allege that petitioners' in-network pricing program for specialty drugs disproportionately disadvantages people with HIV/AIDS, some of whom prefer to go to neighborhood pharmacies, but would have to pay higher, out-of-network rates under their plans at those pharmacies. J.A.48 (¶93). Respondents allege that in-person consultations with neighborhood pharmacists afford better care, J.A.35-36 (¶70), whereas mail delivery risks postal delays and parcel theft, J.A.29, 41, (¶¶56, 77). Respondents acknowledge that they could avoid mail-delivery concerns by having their medications shipped to a CVS retail pharmacy. But they allege that some CVS pharmacists do not provide adequate counseling or are indiscreet in announcing when medications are ready for pickup. J.A.40 (¶¶75-76). As relief, respondents seek damages and an injunction that would require their plans to apply in-network prices to specialty HIV/AIDS medications obtained at neighborhood pharmacies. J.A.6, 128 (¶4).

Respondents do not dispute that their prescriptiondrug plans cover all of their HIV/AIDS medications at favorable, in-network prices. Nor do respondents allege that the mail or CVS retail pickup requirements are unique to HIV/AIDS drugs. Respondents' health plans impose the same conditions on the more than 300 medications classified as specialty drugs, many of which treat common conditions like psoriasis, osteoporosis, arthritis, and asthma. J.A.50-82 (¶94); *Pharmacy Distribution Drug List,* CVS Specialty (Apr. 2018), https://tinyurl.com/2p54et4h.

### ***10 C. Proceedings Below**

1. The district court dismissed respondents' complaint with prejudice. Pet.App.79a. The court concluded that section 504 reaches disparate-impact claims but held that respondents had not adequately alleged that the mail-order policy produced differential results for people with HIV/AIDS based on their condition, or that this policy denied respondents "meaningful access" to their prescription drug benefits. Pet.App.35a-44a.

2. The Ninth Circuit vacated the district court's judgment in relevant part. Pet.App.16a, 23a. Without parsing the statutory text, the Ninth Circuit held that "the unique impact of a facially-neutral policy on people with disabilities may give rise to a disparate impact claim" under section 504 and thus the ACA. Pet.App.15a.

The Ninth Circuit concluded that respondents had stated a viable disparate-impact claim. The court reasoned that respondents sufficiently alleged that CVS denied them "meaningful access" to a benefit, namely "various aspects of pharmaceutical care that [respondents] deem critical to their health." Pet.App.12a-13a.

## SUMMARY OF ARGUMENT

I. Section 504 of the Rehabilitation Act, as incorporated into the Affordable Care Act (ACA), does not impose disparate-impact liability.

A. The statutory text unambiguously forecloses disparate-impact liability. Section 504's language focuses on the funding recipient's *reason* for the differential treatment, by looking to whether an individual with a disability was "excluded," "denied ... benefits," or "subjected to discrimination" by a federal-funding recipient "solely by reason of" disability. That standard is incompatible with disparate-impact claims, which look at a practice's *effect* ***11** on the protected group, not the defendant's intent. Other textual clues reinforce the unavailability of disparate-impact claims. Section 504 requires that the discrimination be "*solely* by reason of" disability. As this Court has recognized in analogous provisions, that language imposes a sole-causation requirement. That requirement cannot be squared with regulating disparate impacts, which almost always arise from diverse causes. Section 504 also focuses on the "individual" being treated differently, not on a group experiencing disparate effects.

Section 504 does meaningful work without disparate-impact liability. The statute bans disparate treatment of people with disabilities-a serious and ongoing problem. Disparate-treatment claims reach beyond mere animus. Facial classifications based solely on actual or regarded disabilities are unlawful. And failure-to-accommodate claims may be available in other cases.

B. While the Court in *Alexander v. Choate,* 469 U.S. 287, 299 (1985), "assume[d] without deciding" that a limited class of disparate-impact claims might exist under section 504, that decision's near-exclusive focus on legislative history and policy is outdated and was misplaced in any event. Other statutes, most significantly the ADA, speak to the specific policy issues *Choate* raised.

Similarly, Department of Health, Education, and Welfare regulations purporting to engraft a disparate-impact standard onto section 504 do not overcome the plain language of the statute. Those regulations are avowedly atextual and, if anything, highlight the lack of disparate-impact liability in section 504 itself.

C. Related provisions reinforce that section 504 does not bar facially neutral policies with disparate effects. The ACA packages together four antidiscrimination provisions, including section 504. Section 504 incorporates ***12** the remedies provision of and was consciously modeled on one of these statutes, Title VI of the Civil Rights Act. Title VI unequivocally does not reach disparate-impact claims, and any contrary result for section 504 would be highly anomalous. The other two statutes (Title IX and the Age Act) also exclude disparate-impact liability. It would be bizarre to make individuals with disabilities the one class of plaintiffs who can sue healthcare programs over facially neutral policies. Further, all of these provisions are Spending Clause statutes, an area where the Court demands absolute clarity before imposing private liability. That clarity is missing here.

D. The ADA, not section 504, expressly addresses disparate-impact liability. That landmark civil-rights statute shows that Congress knows how to impose disparate-impact liability when it wants to. The ADA also illustrates the complicated policy choices involved in coupling a disparate-impact standard with the guardrails necessary to ensure that every minor difference in out-comes does not lead to liability. Reading disparate-impact liability into section 504 would upset the careful scheme Congress crafted in both statutes.

E. Section 504 tellingly omits any mention of the *effects* a challenged policy has on a protected group. Every disparate-impact statute uses effects-based language. Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Fair Housing Act, the Voting Rights Act, and the Emergency School Aid Act of 1972 all refer to effects. The absence of any such language in section 504 speaks volumes.

II. Disparate-impact liability would also produce adverse policy consequences that Congress surely did not intend. The consequences would be especially dire for health plans. Every decision plans make has a disparate ***13** effect on some group of individuals with a medical condition that meets section 504's definition of disability. If plaintiffs with a disability dissatisfied with a plan's network can sue to access out-of-network services at innetwork prices, healthcare networks as we know them will

  

collapse and costs will rise for everyone. Patients will face higher premiums to cover the cost of allowing everyone to get any covered drug through any method they prefer, all at the same in-network prices.

Beyond health plans, disparate-impact liability would produce unjustified litigation and upset Congress' careful policy choices in the ADA. Federal-funding recipients would struggle to identify which facially neutral policies open them to suit and whether any limitations apply. And the exact defendants Congress chose to exempt from ADA liability, including the Executive Branch, religious institutions, and small employers, would be subject to suits based on judicial fiat instead of a deliberate choice by Congress.

## ARGUMENT

### I. The Rehabilitation Act and the Affordable Care Act Do Not Encompass Disparate-Impact Claims

Section 504 provides that "[n]o otherwise qualified individual" may "be excluded from the participation in,... denied the benefits of, or ... subjected to discrimination under any program or activity receiving Federal financial assistance"-but only if those adverse actions occur "*solely by reason of* her or his disability." 29 U.S.C. § 794(a) (emphasis added).

All agree that section 504 bans disparate treatment, *i.e.,* all types of intentional discrimination. Disparate treatment is the "most easily understood type of discrimination," because it happens when the defendant "simply treats some people less favorably than others because of" ***14** a protected characteristic. *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977). Statutes that forbid disparate treatment share a key defining feature: they tie statutory prohibitions to the defendant's motive. The plaintiff must show that "the defendant had a discriminatory intent or motive" for the adverse action. *Ricci v. DeStefano,* 557 U.S. 557, 577 (2009) (citation omitted). The plaintiff can show that a policy facially treats people differently on the basis of a protected trait or that the defendant gave a pretextual neutral reason for an adverse decision but actually acted out of animus. *Id.* at 579-80; *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511 (1993); *see Ricci,* 557 U.S. at 596 (Alito, J., concurring).

By contrast, statutes that encompass disparate-impact claims authorize challenges to "practices that are not intended to discriminate but in fact have a disproportionately adverse effect on" a protected group. *Ricci,* 557 U.S. at 577. The "very premise" of disparate-impact liability is that the defendants' motivations are completely benign. *Meacham v. Knolls Atomic Power Lab.,* 554 U.S. 84, 96 (2008). So "[p]roof of discriminatory motive ... is not required under a disparate-impact theory." *Teamsters,* 431 U.S. at 336 n.15.

As long as plaintiffs can prove that the challenged policy produces differential *outcomes* for protected and unprotected groups, those plaintiffs have made out a prima facie disparate-impact case. *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 650 (1989); *Ricci,* 557 U.S. at 578. Thus, statutes imposing disparate-impact liability share a common feature: they "refer[] to the consequences of actions and not just to the mindset of actors," and disparate-impact liability must be "consistent with statutory purpose." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* 135 S. Ct. 2507, 2518 (2015).

#### *15 A. Section 504's Text Forecloses Disparate-Impact Liability

1. Under the foregoing principles, section 504 is a quintessential statute that does *not* impose disparate-impact liability. Three features of the statutory text demonstrate that section 504 refers "just to the mindset of actors," not "the consequences of actions," *id.,* and accordingly does not reach disparate impacts.

a. **Motive-Focused Language.** Section 504 focuses on *why* federal-funding recipients act. Section 504 zeroes in on three types of actions that funding recipients might take vis-à-vis "otherwise qualified individual[s]": those individuals may "be excluded," "denied ... benefits," or "subjected to discrimination" by funding recipients. 29 U.S.C. § 794(a). All three actions focus on the funding recipient's "actions with respect to the targeted individual." *See Smith v. City of Jackson,* 544 U.S. 228, 236 n.6 (2005)

(plurality opinion); *see id.* at 243 (Scalia, J., concurring in part and in the judgment). Section 504's prohibitions signal that the statute addresses *why* the funding recipient acts, not simply the existence of disparate burdens on a protected class.

One of those prohibited actions-"discrimination"-particularly underscores that section 504 is motive-focused. To "discriminate" means to "act on the basis of prejudice" or to "make a difference in treatment or favor (of one as compared with others)." *American Heritage Dictionary of the English Language* 376 (1969); *Webster's New International Dictionary of the English Language* 745 (2d ed. 1951). Thus, "the normal definition of discrimination is differential treatment." *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 174 (2005) (cleaned up). Prohibiting "discrimination" presumptively does *not* bar facially neutral policies that disproportionately affect a particular group.

***16** Section 504's use of "by reason of" again focuses on motives. "[B]y reason of" indicates that exclusions, benefits denials, and discrimination are prohibited only if federal-funding recipients act for the prohibited reason of the individual's disability. "Reason" means "[t]he basis or motive for an action, decision, or conviction." *American Heritage* 1086. The phrase "by reason of" thus translates to "[b]ecause of." *Husted v. A. Philip Randolph Inst.,* 138 S. Ct. 1833, 1842 (2018) (quoting *American Heritage Dictionary of Idioms* 67 (2d ed. 2013)). So "by reason of" (or "because of") "links the forbidden consideration" (disability) to each prohibited action (excluding someone, denying benefits, or discriminating). *See EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S. Ct. 2028, 2032 (2015). Liability turns upon whether the protected characteristic (here, disability) "was the 'reason' that the [funding recipient] decided to act." *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167,176 (2009).

This Court's cases confirm the focus on motive. The Court's first section 504 case, *Southeastern Community College v. Davis,* held that section 504's "solely by reason of" language prohibits federal-funding recipients from acting based on the assumption that "mere possession of a handicap" translates into "an inability to function in a particular context." 442 U.S. 397, 405 (1979). Since the college there acted based on "legitimate academic policy," not by reason of "animus," the college was not liable. *Id.* at 413 & n.12.

Similarly, *Bowen v. American Hospital Ass'n,* 476 U.S. 610 (1986), observed that a hospital's denial of care to a child with a disability is not *per se* unlawful. Instead, the Court asked *why* the hospital denied care, explaining that when hospitals deny care because the child's parents refuse consent for treatment, that denial is not "solely by reason of" the child's disability. 476 U.S. at 630 & n.15 ***17** (plurality opinion). Again, the funding recipient's *motive* determines whether covered conduct is prohibited or permissible. That notion is fundamentally incompatible with disparate impact's focus on consequences alone.

b. **Sole Causation.** Section 504 targets adverse actions that occur "*solely* by reason of" an individual's disability. 29 U.S.C. § 794(a) (emphasis added). That language establishes a sole-causation standard. "Solely" means "alone" or "exclusively." *American Heritage* 1220; *Webster's Second* 2393; *Husted,* 138 S. Ct. at 1842. "Solely by reason of" disability thus means the federal-funding recipient acted "for no reason other" than the individual's disability, *i.e.,* that disability was the "sole factor" in the challenged decision. *See Husted,* 138 S. Ct. at 1842-43. If any other factor besides disability plays any role whatsoever, section 504 is not implicated. Because section 504 uses "solely," "actions taken 'because of the confluence of multiple factors do not violate the law." *See Bostock v. Clayton County,* 140 S. Ct. 1731, 1739 (2020); *accord Price Waterhouse v. Hopkins,* 490 U.S. 228, 241 (1989).

*Traynor v. Turnage* thus rejected a section 504 challenge to a regulation limiting benefits for veterans disabled as a result of "willful misconduct," including alcoholism. 485 U.S. 535, 549 (1988). Even though the policy facially excluded all individuals with willful alcoholism, these individuals were not "denied benefits solely by reason of their handicap, but because they engaged with some degree of willfulness in the conduct that caused them to become disabled." *Id.* at 549-50 (cleaned up).

That sole-causation standard is inconsistent with a disparate-impact prohibition. Perhaps tellingly, Congress has never written a statute that tries to marry the two, so it is not even clear how the inquiry would work. Must the protected trait (disability) be the sole cause of the disparate result (*e.g.,* fewer people with disabilities ***18** getting hired)? Or must the challenged policy (*e.g.,* a written multiple-choice test) be the sole cause of that disparate result? Some disparate-impact statutes take the latter view of

  

causation, but use a lesser standard than sole causation. Title VII, for example, requires plaintiffs to prove that the defendant "uses a particular employment practice that *causes* a disparate impact on the basis of" a protected trait. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (emphasis added); *accord Inclusive Cmtys.,* 135 S. Ct. at 2523 (Fair Housing Act).

If plaintiffs must show that the practice in question was the one and only cause of the disparity, virtually no disparate-impact case could succeed. Showing causation in disparate-impact cases ordinarily involves "specifically showing that each challenged practice has a significantly disparate impact on" outcomes for people inside and outside the protected class. *Wards Cove,* 490 U.S. at 657. Typically, the plaintiff does this by demonstrating a statistically significant difference in outcomes for the two groups under the challenged policy-the "statistical disparities must be sufficiently substantial that they raise... an inference of causation." *Watson v. Fort Worth Bank & Tr.,* 487 U.S. 977, 995 (1988) (plurality opinion).

But it is hard to conceive of statistical evidence that could not only show that the challenged policy *did* play a causal role, but also rule out *every single other possible contributingfactor.* In every real-world disparate-impact case, innumerable social and economic conditions combine to produce disparate effects. *Cf. Brnovich v. DNC,* 141 S. Ct. 2321, 2343 (2021). Under a sole-causation standard, those other factors would foreclose liability. Congress presumably did not write a disparate-impact standard into section 504 that would likely never apply.

Unsurprisingly, then, this Court has consistently interpreted statutes or regulations containing a sole- ***19** causation standard to exclude disparate-impact liability. For instance, the Federal Unemployment Tax Act mandates that "no person shall be denied compensation under [a state unemployment] law *solely on the basis of* pregnancy." 26 U.S.C. § 3304(a)(12) (emphasis added).

This Court has interpreted that language to foreclose a disparate-impact challenge to a facially neutral state policy barring unemployment benefits to anyone who quits for a non-work-related reason. *Wimberly v. Labor & Indus. Rels. Comm'n,* 479 U.S. 511, 513 (1987). The Court explained that "solely on the basis of pregnancy" focuses on "the basis for the State's decision, not the claimant's reason for leaving her job." *Id.* at 516. Thus, the statute does not bar a "neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group." *Id.* at 517.

Likewise, the Court has foreclosed disparate-impact liability under a federal regulation requiring state welfare plans to guarantee that benefits "will not be prorated or otherwise reduced *solely because of* the presence in the household of a non-legally responsible individual." 45 C.F.R. § 233.20(a)(2)(viii) (emphasis added).

In *Anderson v. Edwards,* respondents challenged a state policy that did not scale benefits proportionately for non-siblings living with a single caregiver. 514 U.S. 143, 147 (1995). The effect of that rule was that adding children receiving assistance to the household reduced everyone's per capita benefits. *Id.* at 148. Nonetheless, the Court upheld this state rule, reasoning that it "was not *solely* the presence of" other people that triggered the decrease in assistance; it was their "presence *plus* their application" for benefits that triggered the change. *Id.* at 151. The fact that the policy had the effect of disproportionately burdening households with non-legally responsible individuals was of no moment.

***20** This case further illustrates the difficulties of applying a sole-causation standard to disparate-impact claims. Respondents allege that their health plans' policy of limiting in-network prices to specialty drugs obtained by mail or picked up at CVS retail pharmacies causes people with HIV/AIDS to not receive "full and/or equal enjoyment" of their prescription-drug benefits. J.A.101 (¶147). To make out an ordinary prima facie disparate-impact case, respondents would need to show (1) that people with HIV/AIDS get less out of their prescription-drug plans than people without HIV/AIDS and (2) that the mail-order policy is a significant cause of that disparity. *See Wards Cove,* 490 U.S. at 657. Under section 504's solecausation standard, though, respondents would presumably need to isolate the mail-order policy as the one and only cause of people with HIV/AIDS not enjoying their prescription-drug benefits as much as people without HIV/AIDS.

Respondents' complaint demonstrates the impossibility of such a showing. Respondents themselves acknowledge that numerous potential causes are afoot. Respondents allege that they rely on neighborhood pharmacies because their own doctors cannot

  

review all of the many drugs people with HIV/AIDS take during a routine visit. J.A.42-43 (¶80). Respondents also allege that people with HIV/AIDS often have other medical conditions. J.A.43 (¶81). But that just highlights that overlapping medical needs likely play a role. Respondents allege experiencing long telephone hold times and complicated websites when attempting to use their benefits. J.A.102 (¶147(b)). But that just suggests customer-service frustrations are partially to blame.

Even setting aside these external causes, respondents do not allege that mail-order drug delivery *on its own* disadvantages people with HIV/AIDS. To the contrary, ***21** mail-order prescriptions do not work as well for people with HIV/AIDS, respondents claim, because of nosy neighbors, negligent mail carriers, parcel thieves, and indiscreet pharmacists. J.A.39-40 (¶¶74-75). It is unclear why, say, parcel theft is uniquely problematic for people with HIV/AIDS, as opposed to individuals without this condition. Regardless, parcel-theft concerns only underscore that the mail-order policy alone does not lead to the alleged disparity. At best, the policy is one of many causes; respondents cannot allege that the policy is the sole cause.

c. **"Individual" Plaintiff.** Section 504 looks to federal-funding recipients' actions with respect to an "otherwise qualified *individual."* 29 U.S.C. § 794(a) (emphasis added). That language tracks the Court's disparate-treatment cases, which ask whether a defendant "treated a particular person less favorably than others because of a protected trait." *Ricci,* 557 U.S. at 577 (cleaned up).

By contrast, disparate-impact liability examines whether a facially neutral policy disproportionately burdens a *group.* Thus, disparate-impact statutes ordinarily include group-focused language. *See Smith,* 544 U.S. at 236 n.6 (plurality opinion). For instance, Title VII prohibits classifying "employees or applicants for employment" writ large based on their race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(2); *accord* 29 U.S.C. § 623(a)(2) (similar for age). Congress' choice in section 504 to focus on how particular actions affect an "otherwise qualified individual" is yet further confirmation that Congress excluded disparate-impact liability.

2. Despite excluding disparate-impact liability, section 504 still does significant work. To start, section 504 plainly prohibits federal-funding recipients from treating someone worse solely because she has a disability. Those ***22** claims are not just confined to animus; if a policy facially discriminates, the federal-funding recipient's "ultimate aim," however "well intentioned or benevolent," is irrelevant. *See Ricci,* 557 U.S. at 579; *accord Int'l Union, UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199 (1991).

Differential treatment-including purposeful discrimination against individuals with disabilities-was a problem in 1985. *Choate,* 469 U.S. at 295 n.12. "[P]rejudiced attitudes" were a problem in 1987. *Sch. Bd. of Nassau Cnty. v. Arline,* 480 U.S. 273, 284 (1987). "[O]utright intentional" discrimination remained a problem in 1990 when Congress passed the ADA. *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 589 (1999) (quoting 42 U.S.C. § 12101(a)(5)). And unfortunately, even today, "[n]egative attitudes and bias" against people with disabilities persist. Jasmine E. Harris, *The Aesthetics of Disability,* 119 Colum. L. Rev. 895, 899 (2019).

Section 504 plays an important role in ferreting out discrimination, as recent cases illustrate. A student with severe cerebral palsy survived a motion to dismiss with allegations that teacher's aides bit him, used "militarystyle" restraints, and poured cold water on his genitalia. *Saunders ex rel. R.S. v. USD 353 Wellington,* 2021 WL 1210019, at *2, *11 (D. Kan. Mar. 31,2021). A group home won summary judgment in challenging a city ordinance that singled out residences for persons with disabilities for especially onerous zoning rules. *Hansen Found., Inc. v. City of Atlantic City,* 504 F. Supp. 3d 327, 336-37 (D.N.J. 2020). And a woman with Parkinson's survived a motion to dismiss on allegations that she was demoted after her boss told her she could not succeed in her job due to her disability. *Hand v. Univ. of Ala. Bd. of Trs.,* 304 F. Supp. 3d 1173, 1177, 1181 (N.D. Ala. 2018). Section 504 is hardly defunct without disparate-impact liability.

***23** Section 504 also bars federal-funding recipients from discriminating based on disability even if the individual is "regarded" as being impaired in major life activities but is not in fact disabled. 42 U.S.C. § 12102(1)(C), (3); *see* 29 U.S.C. § 705(20)(B).

That expansive definition "combat[s] the effects of erroneous but nevertheless prevalent perceptions about" individuals with disabilities. *Arline,* 480 U.S. at 279.

Further, this Court in *Fry v. Napoleon Community Schools* noted that "courts have interpreted § 504 as demanding certain 'reasonable' modifications to existing practices in order to 'accommodate' persons with disabilities." 137 S. Ct. 743, 749 (2017). And in the employment context, this Court interpreted section 504's "otherwise qualified individual" language to require "reasonable accommodation[s]" if doing so would allow an individual with a disability to perform the "essential functions" of the job and would not impose "undue financial and administrative burdens" on the employer or require "a fundamental alteration in the nature of the program." *Arline,* 480 U.S. at 287 n.17 (cleaned up).

Reasonable-accommodation claims differ from disparate-impact claims because the former are inherently "individualized," focusing on the nature of the plaintiffs disability and how it can be accommodated. *Id.* at 287; *see also* Brief for the United States as Amicus Curiae at 11, *Wis. Cmty. Servs., Inc. v. City of Milwaukee,* 465 F.3d 737 (7th Cir. 2006) (*en banc*) (No. 04-1966) ("The United States has consistently taken the position that disparate treatment, disparate impact, and failure to make reasonable accommodations are separate theories of liability under Title II [of the ADA] and its implementing regulations."). Here, respondents do not challenge the Ninth Circuit's holding that respondents failed to plead a failure-to-accommodate claim. Pet.App.16a n.1; *see* Br. in ***24** Opp. 32-33 (acknowledging that this claim is distinct). But that door remains open in other cases.

### B. *Choate* and Section 504 Regulations Do Not Support a Contrary Reading

*Choate* "assume[d] without deciding" that section 504 reaches some disparate-impact claims. 469 U.S. at 299. Likewise, 1977 regulations promulgated by the Department of Health, Education, and Welfare (HEW) purported to impose a disparate-impact standard under section 504. But neither *Choate* nor those regulations addressed section 504's text. They provide no basis for reading section 504 to create disparate-impact liability.

1. *Choate* assumed that some class of disparate-impact claims might be cognizable under section 504 in order to "give effect to the statutory objectives," which the Court derived from individual legislators' floor statements. 469 U.S. at 299; *id.* at 295-97. But the Court has long since "sworn off the habit of venturing beyond Congress's intent" by interpreting statutes according to their perceived purpose as opposed to the text itself. *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001). Today, statutory interpretation proceeds from the premise that "even the most formidable argument concerning the statute's purposes" cannot overcome clear statutory text. *Kloeckner v. Solis,* 568 U.S. 41, 56 n.4 (2012); *accord BP P.L.C. v. Mayor & City Council of Balt.,* 141 S. Ct. 1532, 1542 (2021). But "[b]y any conventional measure, the text [of section 504] leaves no room" for disparate-impact liability. *BlueCross,* 926 F.3d at 243.

*Choate's* assumption that Congress intended to prohibit some disparate impacts also rests on a dubious use of legislative history. Section 504's actual legislative history sheds no light; the Court recognized the "lack of debate devoted to § 504." 469 U.S. at 296 n.13. The Court ***25** instead pointed to individual legislators' comments about differently worded predecessor bills as "a primary signpost on the road toward interpreting the legislative history of § 504." *Id.* Because individual legislators condemned "neglect" of individuals with disabilities, *Choate* reasoned that those predecessor bills must have reached beyond "invidious animus" against individuals with disabilities. *Id.* at 295-96. And, because other floor statements purportedly showed that the "intent of the original bill had been carried forward into § 504," *id.* at 296 n.13, *Choate* concluded that the legislative history of those earlier bills captured section 504's meaning. That roundabout approach to divining congressional intent has no place in modern statutory interpretation.

Further, *Choate* spotlighted individual floor statements about predecessor bills, but ignored that the key bills unambiguously *excluded* disparate-impact liability. Those bills would have merely amended Title VI, which prohibits discrimination in federally funded programs "on the ground of race, color, or national origin," 42 U.S.C. § 2000d, to extend to "physical or mental handicap." *Choate,* 469 U.S. at 295 n.13; 118 Cong. Rec. 526 (1972). But Title VI does not reach disparate impacts. *Sandoval,*

532 U.S. at 280-81; *see also infra* pp.28-29. By focusing on floor statements and ignoring the text of section 504 and its predecessor provisions, *Choate* reached an inaccurate conclusion about Congress' putative aims in section 504.

In a footnote, *Choate* floated another theory based on the fact that multiple agency regulations as of section 504's enactment imposed a disparate-impact standard under Title VI. *Choate* thus suggested that Congress "could be thought" to have engrafted disparate-impact liability onto section 504 by "adopt[ing] virtually the same language for § 504 that had been used in Title VI." ***26** 469 U.S. at 295 n.11. But the Court infers that Congress incorporated that sort of background understanding only when Congress reenacts statutory language "without change" against the backdrop of a "broad and unquestioned" consensus (usually in judicial decisions) on the meaning of particular language. *Jama v. ICE,* 543 U.S. 335, 349 (2005).

No basis exists for thinking that Congress incorporated Title VI regulations into section 504. Title VI prohibits discrimination "on the ground of" a protected characteristic, 42 U.S.C. § 2000d, but section 504 prohibits discrimination "solely by reason of" disability. The Title VI regulations also reflected no broad consensus: they rather "provoked some controversy in Congress," *Choate,* 469 U.S. at 295 n.11, and erroneously imposed a disparate-impact standard that this Court has rejected, *see Sandoval,* 532 U.S. at 280-81. Congress did not ratify nonexistent (and at a minimum unsettled) disparate-impact liability under Title VI by imposing an even *higher* causation standard ("solely by reason of") in section 504.

Finally, *Choate* expressed the view that section 504 would not reach "much of the conduct" that individual legislators mentioned, like "elimination of architectural barriers," if section 504 did not "rectify the harms resulting from action that discriminated by effect as well as by design." 469 U.S. at 296-97. But that concern sells section 504's accomplishments short. *Supra* pp.21-24.

Regardless, other statutes tackle virtually all of the specific concerns that *Choate* mentioned. *Choate* worried about "access to public transportation" and "architectural barriers." 469 U.S. at 297 (citation omitted). But the Architectural Barriers Act of 1968, 42 U.S.C. § 4151 *et seq.,* addressed architectural barriers in federally funded buildings. And Congress built on those architectural requirements and addressed access to public transportation ***27** in exacting detail in the watershed Americans with Disabilities Act. 42 U.S.C. § 12141 *et seq.; id.* §§ 12182(b)(2)(A)(iv), 12183; *infra* pp.33-37. *Choate* also mentioned "special educational assistance for handicapped children." 469 U.S. at 297 (cleaned up). But the Education for All Handicapped Children Act of 1975 and Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1400 *et seq.,* address this issue in detail as well.

2. HEW's 1977 section 504 regulations expressly adopt a disparate-impact standard by prohibiting practices that "*have the effect of* subjecting qualified handicapped persons to discrimination on the basis of handicap." 45 Fed. Reg. 22,676,22,679 (May 4,1977) (emphasis added). [2] But those atextual regulations cannot supply the missing disparate-impact language that Congress omitted in section 504. *Sandoval,* 532 U.S. at 291.

The regulations make no pretense of interpreting the statute. When reciting section 504's prohibitions on exclusions, denials of benefits, and discrimination, the regulations inexplicably change the statutory phrase "*solely* by reason of" to merely "on the basis of." *See* 45 Fed. Reg. at 22,678. And the regulations do not attempt to tie their "have the effect" language to section 504's text. HEW acknowledged that the "very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance." *Id.* at 22,676. Rather than treating statutory silence as a red ***28** flag, HEW justified the regulations as an "effective and workable program for ending discrimination against handicapped persons." *Id.* But an "agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regul. Grp. v. EPA,* 573 U.S. 302, 328 (2014). HEW's perceived need to weave a disparate-impact standard out of whole cloth underscores that Congress did no such thing in section 504 itself.

### C. Other Spending Clause Statutes Materially Identical to Section 504 Exclude Disparate-Impact Liability

Congress enacted four Spending Clause antidiscrimination statutes in close succession: Title VI (1964), Title IX (1972), section 504 (1973), and the Age Act (1975). *See* 42 U.S.C. § 18116(a). All four apply to the same actors: federal-funding recipients. All four target the same conduct: an individual must "be excluded from [the] participation in, be denied the benefits of, or be

subjected to discrimination under" a federally funded program. 20 U.S.C. § 1681(a); 29 U.S.C. § 794(a); 42 U.S.C. §§ 2000d, 6102. And all four prohibit that conduct only if the federal-funding recipient acted for prohibited reasons. Section 504 prohibits those acts if done "solely by reason of" disability, 29 U.S.C. § 794(a); Title VI "on the ground of race, color, or national origin," 42 U.S.C. § 2000d; Title IX "on the basis of sex," 20 U.S.C. § 1681(a); and the Age Act "on the basis of age," 42 U.S.C. § 6102. Further underscoring the close relationship among these statutes, the ACA incorporates all four as a package. The three other statutes exclude disparate-impact liability. It makes no sense for section 504 to be the one outlier that reaches disparate impacts.

1. This Court has already construed similar language in Title VI of the Civil Rights Act not to create disparateimpact liability. *Sandoval,* 532 U.S. at 280-81. Title VI ***29** examines whether federal-funding recipients took prohibited acts against an individual, by looking to whether the individual was "excluded from participation in,... denied the benefits of, or ... subjected to discrimination" in any federally funded program "on the ground of race, color, or national origin." 42 U.S.C. § 2000d. *Choate* recognized that "Title VI itself directly reache[s] only instances of intentional discrimination." 469 U.S. at 293. And *Sandoval* held that private litigants cannot bring disparate-impact lawsuits under Title VI because the statutory text omits any such right. 532 U.S. at 285, 291-92. Section 504's and Title VI's motive-focused language mirrors each other. Like "solely by reason of... disability" in section 504, "on the ground of race, color, or national origin" in Title VI puts the focus on the funding recipient's motive for excluding, denying benefits to, or discriminating against the individual plaintiff. 42 U.S.C. § 2000d.

Given that Title VI excludes disparate impacts, section 504 should not include them either. Section 504 was consciously "patterned after Title VI." *Cmty. Television ofS. Cal. v. Gottfried,* 459 U.S. 498, 509 (1983). That decision is "evident in the language of the statute." *Arline,* 480 U.S. at 278 n.2. Indeed, the Rehabilitation Act incorporates the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(a)(2). The remedies are "coextensive" under both statutes, *Barnes v. Gorman,* 536 U.S. 181,185 (2002), and as a matter of plain text, the "rights" are too, 29 U.S.C. § 794a(a)(2).

*Choate* "pause[d]" before extending Title VI's lack of disparate impact to section 504, 469 U.S. at 294, but *Choate's* concerns do not hold up as a matter of text or policy. *Supra* pp.24-27. If anything, disparate-impact liability is even more inconsistent with section 504, which contains the uniquely high causation standard of "solely by reason ***30** of" rather than Title VI's "on the ground of." *See supra* pp.17-21. Where, as here, two statutes have materially similar language and the same purpose, the Court "presume[s] that Congress intended that text to have the same meaning in both statutes." *Smith,* 544 U.S. at 233 (plurality opinion).

Title IX and the Age Act present no basis for a different conclusion as to disparate-impact liability, because those statutes are textually of a piece with Title VI. Again, given that the Court has repudiated disparate-impact liability under Title VI, it is difficult to fathom how nearly identical language could give rise to disparate-impact liability under these statutes.

Title IX examines whether federal-funding recipients took prohibited acts against an individual, by looking to whether the individual was "excluded from participation in,... denied the benefits of, or ... subjected to discrimination under any" federally funded education program "on the basis of sex." 20 U.S.C. § 1681(a). Every circuit to address the question since *Sandoval* has agreed that this language does not cover disparate impacts.[3] The United States likewise agrees that, "under *Sandoval,* Title IX's prohibition in Section 1681 prohibits only intentional sex discrimination." Brief for the United States at 18, ***31** *Jackson,* 544 U.S. 167 (No. 02-1672), 2004 WL 1900496. This Court, too, has suggested that the only available private right of action under Title IX is "to enforce [Title IX's] prohibition on intentional sex discrimination." *Jackson,* 544 U.S. at 173.

The Age Act similarly asks whether federal-funding recipients took prohibited acts such that an individual was "excluded from participation in,... denied the benefits of, or ... subjected to discrimination under" any federally funded program "on the basis of age." 42 U.S.C. § 6102. The Act further authorizes federal-funding recipients to take an otherwise prohibited action if "the differentiation made by such action is based upon reasonable factors other than age." *Id.* § 6103(b)(1)(B).

In *Smith,* a plurality read similar language in the Age Discrimination in Employment Act (ADEA)-namely, the statutory reference to a "reasonable factor [] other than age"-as supporting disparate-impact liability there. 544 U.S. at 239-40. But the

  

*Smith* plurality rested on different features of the ADEA that mirror Title VII's disparate-impact provision. *Id.* at 235-38. That reasoning does not support reading the Age Act to encompass disparate impacts. As then-Judge Ginsburg explained, Congress modeled the ADEA on Title VII, and the Age Act on Title VI. *Action All. of Senior Citizens of Greater Phila. v. Heckler,* 789 F.2d 931, 935 n.1 (D.C. Cir. 1986) (R.B. Ginsburg, J.). For these reasons, the two circuits to consider the question since *Sandoval* have concluded that the Age Act does not create disparate-impact liability. *See Kamps v. Baylor Univ.,* 592 F. App'x 282, 285 (5th Cir. 2014) (holding that the Age Act lacks disparate-impact liability); *BlueCross,* 926 F.3d at 240 ("[T]here is no reason to think the Age Discrimination Act of 1975 picks up" disparate impacts.).

In sum, in the ACA, Congress logically incorporated four textually similar antidiscrimination provisions. Title ***32** VI, Title IX, and the Age Act all exclude disparate-impact liability. It would be odd to allow individuals with disabilities to bring disparate-impact claims when other plaintiffs cannot. Indeed, the paradoxical result of the decision below is that individuals with disabilities are the one class of plaintiffs that can bring disparate-impact claims under the ACA. That result is strange given that the ACA is a healthcare statute and all health programs by their very nature produce different outcomes for people with different medical needs. That result becomes particularly backwards when section 504 is the one statute of the four that imposes the highest causation standard known to law. And that result defies explanation when two of the other prohibited classifications-race and sex-are constitutionally suspect.

2. The fact that Congress enacted section 504 and its three statutory cousins pursuant to the spending power makes the absence of disparate-impact liability especially obvious. Because Spending Clause legislation is "'much in the nature of a contract,"' the Court requires Congress to afford "clear notice" of any obligations before enforcing those obligations against funding recipients. *Arlington Cent. Sch. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006) (quoting *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981)). "[P]rivate damages actions," in particular, "are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue." *Jackson,* 544 U.S. at 181 (citation omitted).

Thus, unless Congress "'speak[s] with a clear voice"' in Spending Clause legislation, funding recipients, including private parties, cannot be liable. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 280 (2002) (quoting *Pennhurst,* 451 U.S. at 17). But "[d]isparate impact cases, by their nature, do not involve clear-cut violations of the law." Jennifer C. ***33** raceras, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests,* 55 Vand. L. Rev. 1111, 1193 (2002). That is especially true in the disability context, where varying needs mean that "many neutral (and well-intentioned) policies disparately affect the disabled." *BlueCross,* 926 F.3d at 242. One would think Congress would be extra clear about imposing such uncertain liability.

To recap: section 504 asks for the sole reason for the federal-funding recipient's action. This Court has never interpreted any other statute employing such sole-causation language to impose disparate-impact liability. Section 504 is consciously modelled on and incorporates the remedies of Title VI, a provision that funding recipients *know* does not provide disparate-impact liability. On top of that, Congress omitted the kind of effects-based language this Court has read to reach disparate impacts in other statutes. *Infra* pp.37-40. Looking at section 504's text, no reasonable funding recipient could think that Congress clearly gave notice that by agreeing to federal funds, the recipient opened itself to a parade of disparate-impact claims with no guardrails in sight.

### D. The ADA's Express Prohibition of Specific Disparate Impacts Confirms the Absence of Disparate-Impact Liability Under Section 504

The Americans with Disabilities Act of 1990 (ADA) is America's landmark disability-rights statute. Congress in passing the ADA recognized that section 504 and other laws were "inadequate to address the discrimination faced by people with disabilities." H.R. Rep. No. 101-485, pt. 2, at 29 (1990). Thus, the ADA marked a new "independence day" for individuals with disabilities, as President Bush put it. *See* Remarks on Signing the Americans with Disabilities Act of 1990, 2 Pub. Papers 1067, 1068 (July 26, ***34** 1990). The ADA "stepped up earlier measures" and marked Congress' "most ... extensive endeavor" into tackling disability discrimination. *Olmstead,* 527 U.S. at 589 n.1, 599. The ADA illustrates that Congress knows how to impose a disparate-impact standard for individuals with disabilities when it wants to, and purposefully took a different course in section

504. Creating a disparate-impact standard under section 504 would negate that choice and enmesh courts in policymaking that only Congress can undertake.

1. The ADA imposes disparate-impact liability in defined contexts, using language that markedly contrasts with section 504. The ADA contains three substantive titles. Title I covers employment, Title II covers public entities, and Title III covers public accommodations. Titles I and III reach disparate impacts. *See Raytheon Co. v. Hernandez,* 540 U.S. 44, 53 (2003). Both bar "standards, criteria, or methods of administration ... that *have the effect* of discrimination on the basis of disability." 42 U.S.C. § 12112(b)(3)(A) (emphasis added); *accord id.* § 12182(b)(1)(D)(i). And both bar criteria that "screen out or *tend to screen out* an individual with a disability or a class of individuals with disabilities" unless necessary for other legitimate goals. *Id.* §§ 12112(b)(6), 12182(b)(2)(A)(i) (emphasis added). Further, Title III prohibits certain facially neutral practices, for instance by requiring the removal of "architectural barriers" in existing facilities where "readily achievable," and by requiring new facilities to be "readily accessible" unless "structurally impracticable." *Id.* §§ 12182(b)(2)(A)(iv), 12183(a)(1). [4]

***35** Using language that targets the effects of various policies is a classic way for Congress to impose disparate-impact liability. *See infra* pp.39-40. And Congress' decision to refer to effects in the ADA, but not in section 504, is all the more evidence that section 504 excludes disparate-impact liability. That is particularly true given that section 504 and the ADA both address disability discrimination. Complementary statutes should be read "to give effect to both." *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1624 (2018) (citation omitted).

Here, Congress imposed different standards in section 504 and the ADA using different words. Backfilling section 504 with the ADA's disparate-impact language would impermissibly rewrite section 504. *Cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 357 (2013) (reasoning that given detailed antiretaliation language in the ADA but not Title VII, Congress declined to impose the same antiretaliation standard in Title VII). Under respondents' view, all of the ADA's disparate-impact ***36** provisions recited above are redundant. Rather than enacting new provisions that expressly target disparate effects, Congress (in respondents' view) could have simply extended section 504 to entities that do not receive federal funding.

2. Reading disparate-impact liability into section 504 would also upend Congress' carefully calibrated choices. The ADA's breadth allays any policy concerns with excluding disparate-impact claims under section 504. But, although the two statutes overlap, they apply to some different entities. Section 504 covers the Executive Branch and federally funded religious colleges; the ADA does not. 29 U.S.C. § 794(a); 42 U.S.C. §§ 12131(1), 12187. Conversely, the ADA covers all places of public accommodation, but section 504 reaches only those receiving federal funding. 29 U.S.C. § 794(a); 42 U.S.C. § 12182(a). Respondents' reading collapses these differences and imposes a uniform disparate-impact standard on anyone who happens to fall under either statute.

Reading disparate-impact liability into section 504 would produce further anomalies. The ADA expressly includes defenses and limitations on disparate-impact liability. Title I, for example, prohibits employment criteria that "tend to screen out" individuals with disabilities but makes it a defense that the criterion was "job-related and consistent with business necessity." 42 U.S.C. §§ 12112(b)(6), 12113(a). And Title III establishes different accessibility standards for existing and new buildings-only if "readily achievable" versus unless "structurally impracticable"-reflecting the fact that it is cheaper and easier to include accessibility features in new construction. *Id.* §§ 12182(b)(2)(A)(iv), 12183(a)(1). Those detailed prescriptions reflect Congress' considered policy judgments. Legitimate business decisions often disproportionately burden people with disabilities. Some ***37** burdens are small; others are large. Some fixes are simple; others are expensive. Congress' bailiwick is deciding where to draw those lines.

Yet section 504 unsurprisingly included no contours to the scope of liability, much less guardrails. Under respondents' view, blue-penciling section 504 to impose disparate-impact liability would beget more blue-penciling, insofar as respondents think the ADA's defenses and limitations should also translate. Or section 504 would provide totally unbounded disparate-impact liability unlike any other statute. Were that the case, entities subject to both the ADA and section 504 could face different

  

standards for disparate-impact liability arising from the same conduct. Either way, the far more likely conclusion is that section 504 does not impose disparate-impact liability at all.

### E. Section 504 Omits All of the Effects-Based Language Congress Employs to Reach Disparate Impacts

Section 504 lacks the kind of effects-based language this Court has read to create disparate-impact liability in other statutes. If "Congress wished to create such liability," it would have "had little trouble doing so." *Pinter v. Dahl,* 486 U.S. 622, 650 (1988). The absence of such language in section 504 speaks volumes.

Start with Title VII of the Civil Rights Act, which, unlike section 504, looks to consequences. Title VII's "'disparate-impact' provision" makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment 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 race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (emphasis added); *Abercrombie,* 135 S. Ct. at 2031-32. ***38** The key language is "otherwise adversely affect," which "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Inclusive Cmtys.,* 135 S. Ct. at 2518 (quoting *Smith,* 544 U.S. at 236 (plurality opinion)).

Likewise, the Age Discrimination in Employment Act (ADEA) creates disparate-impact liability by mirroring Title VII's key language. The ADEA makes it unlawful for an employer "to limit, segregate, or classify his 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). As with Title VII, the "otherwise adversely affect" language creates disparate-impact liability because it "focuses on the *effects* of the action." *Smith,* 544 U.S. at 236 (plurality opinion). The ADEA's focus on the employer's actions towards employees as a group rather than the individual plaintiff reinforces that meaning. *Smith,* 544 U.S. at 236 n.6 (plurality opinion).

The Court pointed to analogous language in the Fair Housing Act of 1968 when finding disparate-impact liability under that statute. The Fair Housing Act makes it unlawful to "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 because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (emphasis added). The Court identified the phrase "otherwise make unavailable" as of "central importance" because, like "otherwise adversely affect" in Title VII and the ADEA, that phrase "refers to the consequences of an action rather than the actor's intent." *Inclusive Cmtys.,* 135 S. Ct. at 2518. And the Court stressed the "crucial importance" of other contextual clues unique to the Fair ***39** Housing Act, such as statutory exemptions that appeared to "assume the existence of disparate-impact claims" and Congress' apparent ratification of nine courts of appeals' interpretation that the statute reached disparate impacts. *Id.* at 2519-20.

Other effects-based statutory formulations abound, but Congress eschewed those phrases in section 504 as well. For instance, Congress could have referred to "results" directly, as Congress did in section 2 of the Voting Rights Act. That provision prohibits any voting practice "which *results in* a denial or abridgement of the right... to vote on account of race or color," 52 U.S.C. § 10301(a) (emphasis added), and thus reaches beyond "discriminatory purpose," *Brnovich,* 141 S. Ct. at 2332.

Similarly, the Emergency School Aid Act of 1972 prohibits federal aid to an educational agency which "had in effect any practice, policy, or procedure which *results in* the disproportionate demotion or dismissal of instructional or other personnel for minority groups." 20 U.S.C. § 1605(d)(1)(B) (1976) (emphasis added). That provision "clearly speaks in terms of effect or impact." *Bd. of Educ. of City Sch. Dist. v. Harris,* 444 U.S. 130, 138-39 (1979).

Or Congress could have simply mentioned "effects" directly, just as Congress did in the ADA. Specific ADA titles reach disparate impacts by prohibiting actions which "have the effect of" discriminating or "tend to screen out" individuals with disabilities. 42 U.S.C. §§ 12112(b)(3)(A), (6), 12182(b)(1)(D)(i), (2)(A)(i); *see Raytheon,* 540 U.S. at 53. But again, no similar language appears in section 504.

  

In sum, every phrase this Court has ever held to produce disparate-impact liability-"otherwise adversely affect," "otherwise make unavailable," "results in," "have ***40** the effect of," "tend to screen out"-is missing from section 504. Given the sheer multitude of examples in the U.S. Code, that omission is presumably intentional. *See, e.g., Marx v. Gen. Revenue Corp.,* 568 U.S. 371,384 (2013).

The Department of Justice has made just this point in interpreting the Immigration Reform and Control Act, which prohibits employment discrimination "because of ... national origin." 8 U.S.C. § 1324b(a)(1). The Department has construed this provision to reach only intentional discrimination. 28 C.F.R. § 44.200(a)(1). As the Department observed: "If Congress had wanted to use an 'effects' standard, it certainly could have done so, either directly or by incorporating language analogous to [Title VII], which has been repeatedly construed ... to provide for such a standard. It chose not to do so." Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,401, 37,404 (Oct. 6, 1987). Exactly right.

## II. Disparate-Impact Liability Under the Rehabilitation Act and the Affordable Care Act Would Carry Adverse Policy Consequences

Even when a statute refers to consequences, this Court will only recognize disparate-impact liability if doing so is "consistent with statutory purpose." *Inclusive Cmtys.,* 135 S. Ct. at 2518. No such conclusion is permissible here. Disparate-impact liability would eviscerate the contracting arrangements that underpin America's healthcare sector. For other industries, the result would be unjustifiable litigation and disregard for Congress' careful choices in the ADA.

1. The benefits-plan context vividly illustrates why Congress did not impose disparate-impact liability in section 504. In this case, respondents do not allege that their health plans treat them differently from any other plan participant. They can get the same drugs, at the same ***41** prices, in the same manner as other plan participants. What respondents allege is that their plan does not work as well for them because of their unique medical needs. But section 504 guarantees equal opportunity, not "equal results." *Choate,* 469 U.S. at 304. All section 504 requires is that a plan make the same package of benefits available to participants regardless of their disability status-just as respondents' plans do.

Any health or prescription-drug plan is a better fit for certain people. Some people need more care and might prefer an expensive plan with expansive coverage. Others are young and healthy and might accept more limited coverage in exchange for lower rates. Some people care more about cheap generic drugs. Others prefer discounts on brand names. Every decision a client makes in selecting the appropriate coverage for its members-from what doctors are in network to what drugs are covered at what price-will inherently affect people with different medical needs differently. Had Congress wanted to impose disparate-impact liability on the basis of disability, this industry is the last place one would expect to find it.

Respondents' theory would upend the economic scaffolding on which our healthcare system rests. Section 504 incorporates the ADA's expansive definition of disability, *see* 29 U.S.C. § 705(20)(B), and courts have found that a huge range of conditions can qualify, from a chronic runny nose (allergic rhinitis) to razor bumps (pseudofolliculitis barbae). *Homeyer v. Stanley Tulchin Assocs., Inc.,* 91 F.3d 959, 962 (7th Cir. 1996); *Dehonney v. G4S Secure Sols. (USA), Inc.,* 2017 WL 4310214, at *2 (W.D. Pa. Sept. 28, 2017); *see* Chamber of Commerce Cert. Amicus Br. 14 (collecting similar examples). Disparate-impact liability in this context, as the United States has explained, would "invite challenges to virtually every exercise of... discretion with respect to the allocation of benefits amongst an ***42** encyclopedia of illnesses." Brief of Appellee at 9-10, *Modderno v. King,* 82 F.3d 1059 (D.C. Cir. 1996) (No. 94-5400), 1995 WL 17204324 (citation omitted).

Consider the effect on prescription-drug plans. Pharmacy benefit managers negotiate lower prices from pharmacies by promising to include them in a network where plan participants will buy their medications. *Supra* pp.6-7. But if plaintiffs can just assert that the in-network pharmacies do not serve their medical needs-and section 504 permits them to fill prescriptions at any pharmacy at the same price-then the system of incentives that keeps drug prices in check will collapse. The consequences for patients and health plans will be monumental. Americans spent $369.7 billion on prescription drugs in 2019. *Frequently Asked Questions*

*About Prescription Drug Pricing and Policy,* Cong. Res. Serv. 4 (May 6, 2021), https://tinyurl.com/3s6wadsk. If accepted, respondents' disparate-impact theory would deprive insurers and pharmacy benefit managers of common tools that can reduce costs by 30 to 35%. Joanna Shepherd, *The Fox Guarding the Henhouse: The Regulation of Pharmacy Benefit Managers by a Market Adversary,* 9 Nw. J.L. & Soc. Pol'y 1, 22 n.143 (2013).

Take also pharmacy mail delivery, the service that respondents allege is inadequate to meet their medical needs. The Department of Veterans Affairs dispenses 80% of its outpatient prescriptions by mail. *See VA Mail Order Pharmacy,* U.S. Dep't of Veterans Affairs (Aug. 21, 2020), http://tinyurl.com/s92t38w7. The Department of Defense also relies on mail-order pharmacies to distribute medications to military members and their families. *See* Andrew W. Mulcahy, *Balancing Access and Cost Control in the TRICARE Prescription Drug Benefit,* RAND Corp. Rsch. Rep. 2 (2021). If these drug-delivery methods are upended, costs will go up for everyone. Patients will ***43** likely be forced to pay higher premiums to cover the cost of allowing everyone to get any covered drug through whatever delivery method they prefer, all at the same innetwork prices.

Likewise, health benefit plans rely on exclusive contracting. The very premise of a health maintenance organization (HMO) or preferred provider organization (PPO) is that some providers are in network and some providers are out of network. HMOs and PPOs together cover 60% of American workers. *2020 Employer Health Benefits Survey,* Kaiser Family Found. (Oct. 8, 2020), https://tinyurl.com/2a3fcx62. Substantial empirical research shows that managed care plans like these have "lowered the prices that both insurers and patients pay for health care." Joanna Shepherd, *Pharmacy Benefit Mangers, Rebates, and Drug Prices: Conflicts of Interests in the Market for Prescription Drugs,* 38 Yale L. & Pol'y Rev. 360, 365 (2020). With disparate-impact liability, a plan could never promise its providers true exclusivity. Dissatisfied patients could sue to access out-of-network providers at in-network prices. Providers would have less incentive to join the plan-reducing options and raising prices for patients. As the district court concluded, "the basis of the HMO/PPO model would be undermined." Pet.App.43a.

2. Other federal-funding recipients could likewise face unpredictable disparate-impact suits targeting facially neutral policies. All sorts of public and private sector actors are subject to liability under section 504: school districts, universities, state Medicaid plans, hospitals, and prisons. Although many disparate-impact claims against these entities would fail, the suits would nonetheless take time and money to defend.

Many of these entities are already subject to the ADA, but notable omissions remain. Title III of the ADA ***44** expressly exempts entities controlled by religious organizations. 42 U.S.C. § 12187. But if those entities accept federal funding, they are subject to section 504. 29 U.S.C. § 794(a). If the entity is a school or principally engaged in providing certain services, including health care, education, and housing, the entire organization becomes subject to section 504 if any component accepts federal funding. *Id.* § 794(b)(2), (3)(A)(ii).

Say the graduate biology department at a religious university accepts federal funding for its research. If the school believes beards are inconsistent with its faith and bans undergraduates from growing facial hair, can men who experience razor bumps sue? Or suppose a Sikh preschool that accepts federal funding serves only vegetarian lunches. Can a student with chronic anemia sue because she would be better off with a meat-rich diet?

Section 504, unlike the ADA, also applies to the Executive Branch. While the federal government has not waived its sovereign immunity for money damages in section 504 cases, plaintiffs can still seek injunctive relief. *See Lane v. Pena,* 518 U.S. 187,196-97 (1996). The federal government does countless things that have disparate impacts on people with disabilities. As noted above, the Departments of Defense and Veterans Affairs deliver drugs by mail, just like CVS. The Transportation Security Administration uses metal detectors that people with artificial joints set off. *Cf. Ruskai v. Pistole,* 775 F.3d 61 (1st Cir. 2014). The Treasury prints paper money that blind people have difficulty differentiating. *Cf. Am. Council of the Blind v. Paulson,* 525 F.3d 1256 (D.C. Cir. 2008). The Department of Housing and Urban Development decides not to review federal-funding recipients for their compliance with the Rehabilitation Act as frequently as plaintiffs would like. *Cf.* ***45** *Am. Disabledfor Attendant Programs Today v. U.S. Dep't of Hous. & Urban Dev.,* 170 F.3d 381 (3d Cir. 1999). Even if these lawsuits ultimately

fail, Congress could not have intended to subject taxpayers and courts to the burdens of defending and resolving cases about every disparate effect a federal policy creates.

Section 504 also applies to any employer that accepts federal funding, regardless of size. 29 U.S.C. § 794(a); *cf.* 42 U.S.C. § 12111(5)(a) (15-employee minimum for Title I of the ADA). Small businesses could face "a wholly unwieldy administrative... burden" under section 504-one they are uniquely ill-suited to bear. *Choate,* 469 U.S. at 298. While few small businesses might have been subject to section 504 in the past, coronavirus aid has ballooned the pool of potentially covered federal-funding recipients. *See* 13 C.F.R. § 113.3.

Consider a local coffee shop that accepted a coronavirus paycheck-protection loan. With only one barista on duty, that cafe cannot function with an employee who is chronically late. But if the shop fires an insomniac who always oversleeps, can he sue on the theory that the strict attendance policy disparately impacts people with sleeping disorders? Never mind that the store might ultimately be able to justify the policy. Even ultimately meritless disparate-impact suits can involve costly discovery and several rounds of briefing that few small businesses can afford. *See, e.g.,* Michael Selmi, *Was the Disparate Impact Theory a Mistake ?,* 53 UCLA L. Rev. 701, 737 n.149 (2006).

Opening the door to disparate-impact liability will only beget more litigation. Federal-funding recipients will struggle to discern all the ways their facially neutral policies could expose them to the risk of losing federal aid. Courts will struggle to identify what guardrails, if any, to impose on an otherwise-boundless theory. All of this goes to show why Congress uses clear, effects-based language ***46** when statutes are supposed to encompass disparate-impact liability-and why section 504 is the antithesis of a statute imposing such liability.

## *47 CONCLUSION

The judgment of the court of appeals should be reversed.

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**Appendix not available.**

## Footnotes

1 The district court dismissed the ERISA claims against the employers, Pet.App.73a-79a, and the Ninth Circuit affirmed. Pet.App.18a19a. The district court also dismissed the ADA, ERISA, and statelaw claims against CVS. Pet.App.44a-70a. The Ninth Circuit affirmed except insofar as the state unfair-competition claim was predicated on an ACA violation. Pet.App.16a-22a. That claim remains pending before the district court.

2 The President later instructed the Justice Department to coordinate section 504 enforcement, and DOJ adopted the HEW regulations as its own. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); Redesignation and Transfer of Section 504 Guidelines, 46 Fed. Reg. 40,686 (Aug. 11, 1981). The disparate-impact provision is now codified at 28 C.F.R. § 41.51(b)(3)(i). Every agency distributing federal funds has its own regulations, which must be consistent with DOJ's. *Id.* § 41.4(a).

3 *E.g., Poloceno v. Dall. Indep. Sch. Dist.,* 826 F. App'x 359, 363 (5th Cir. 2020) ("A plaintiffs Title IX claim must be based on intentional discrimination, not disparate impact."); *Haidak v. Univ. of Mass.-Amherst,* 933 F.3d 56, 75 (1st Cir. 2019) ("We have never recognized a private right of action for disparate-impact discrimination under Title IX."); *BlueCross,* 926 F.3d at 240 ("It's unlikely that Title IX, which was patterned on Title VI," prohibits disparate-impact discrimination); *Parker v. Franklin Cnty. Cmty. Sch. Corp.,* 667 F.3d 910, 919-20 (7th Cir. 2012) (implying that *Sandoval's* holding applies to Title IX).

4 Title II (the public-entities chapter) protects qualified individuals with disabilities from being "excluded," "denied the benefits," or "subjected to discrimination" "by reason of" disability. 42 U.S.C. § 12132. Congress instructed the Attorney General to promulgate Title II regulations "consistent with" the rest of the ADA, *id.* § 12134(b), and the Attorney General has imposed a disparate-impact standard on public entities. *See, e.g.,* 28 C.F.R. §§ 35.130(b)(3)(i), (8).

The ADA also has a provision applicable to all three substantive titles instructing that, "[e]xcept as otherwise provided..., nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) *or the regulations issued by Federal agencies pursuant to such title."* 42 U.S.C. § 12201(a). In other words, the ADA sets the section 504 regulations as a floor, arguably incorporating the disparate-impact standard in those regulations into Title II whether or not those regulations validly interpret section 504. Accordingly, many lower courts have interpreted Title II to reach disparate impacts. *See A Helping Hand, LLC v. Baltimore County,* 515 F.3d 356, 362 (4th Cir. 2008) (collecting citations).