Nos. 18-35892

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

E.S., by and through her parents, R.S. and J.S., and JODI STERNOFF, both on their own behalf, and on behalf of all similarly situated individuals,

Plaintiffs/Appellants,

v.

REGENCE BLUESHIELD; and CAMBIA HEALTH SOLUTIONS, INC., f/k/a THE REGENCE GROUP,

Defendants/Appellees.

On Appeal from the United States District Court
for the Western District of Washington
The Honorable Richard A. Jones, U.S. District Judge
(Seattle, No. 2:17-cv-1609 -RAJ)

SUPPLEMENTAL BRIEF OF APPELLANTS

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Table of Contents

Table of Authorities

Cases

Statutes

I. INTRODUCTION

The Sixth Circuit's ruling in *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (6th Cir. 2019) ("*Doe*") should not be followed by this Court for at least three reasons:

(1) *Doe* conflicts with Ninth Circuit caselaw that disability discrimination is found where a policy denies persons with disabilities "meaningful access to benefits," even without any discriminatory intent.

(2) *Doe* is erroneously decided. It is an outlier from every other circuit when it misreads *Choate* to forbid only intentional disability discrimination.

(3) The Court need not reach whether *Doe* was decided in error. This case is factually and legally distinct from *Doe* and challenges a form of facial disability discrimination.

II. LAW AND ARGUMENT

A. Ninth Circuit Caselaw Prohibits Disparate Impact Discrimination That Unduly Burdens Persons with Disabilities.

Under long-standing Ninth Circuit caselaw, disability discrimination is demonstrated by a showing of disparate impact that results in a denial of "meaningful access" to benefits. *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013); *Crowder v. Kitigawa,* 81 F.3d 1480, 1484 (9th Cir. 1996). This standard is derived directly from *Alexander v. Choate*, 469 U.S. 287 (1985):

> Rejecting both the contention that Section 504 reaches only purposeful discrimination and "the boundless notion that all disparate-

> impact showings constitute prima facie cases under [Section] 504," the [*Choate*] Court construed Section 504 as including a "meaningful access" standard that identified which disparate-impact showings rise to the level of actionable discrimination.

K.M., 725 F.3d at 1102. *Choate* itself directed that the proper question to ask is not whether a disparate impact claim is cognizable under the Rehabilitation Act, but, regardless of intent, whether plaintiff was denied meaningful access to a benefit.

In *Crowder,* this Court recognized that under Section 504, and by extension Section 1557, Congress intended to protect disabled persons from discrimination arising out of discriminatory animus ***or*** "thoughtlessness," "indifference," or "benign neglect." *Id*., at 1484, *quoting Choate*, at 295. *Choate's* "meaningful access" standard was applied in *Crowder* to a facially neutral requirement that, although not intentionally discriminatory, denied meaningful access to visually-impaired persons, thus violating the statute. *Id.* Discrimination is found when a policy would "deny certain disabled individuals meaningful access to … services because of their unique needs, while others would retain access to the same class of services." *Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004).

B. This Court Should Reject *Doe* as Erroneously Decided.

Like the Ninth Circuit, the courts in every other circuit but the Sixth have followed *Choate's* "meaningful access" standard to determine whether a policy violates Section 504, in the absence of discriminatory motive. *Choate,* 469 U.S. at 301-02. *See Ruskai v. Pistole,* 775 F.3d 61, 78 (1st Cir. 2014) (holding it "well

established" that "proof of discriminatory animus is not always required in an action under section 504"); *Fulton v. Goord,* 591 F.3d 37, 43 (2d Cir. 2009) (plaintiffs may base discrimination claims under either the ADA or Section 504 on a disparate impact theory); *Nathanson v. Medical College of Pennsylvania,* 926 F.2d 1368, 1384 (3d Cir. 1991) (citing *Choate,* section 504 prohibits disparate impact discrimination); *A Helping Hand, LLC v. Baltimore County,* 515 F.3d 356, 361-62 (4th Cir. 2008) (disparate impact claims cognizable under both ADA and Section 504); *Frame v. City of Arlington,* 657 F.3d 215, 231, n.71 (5th Cir. 2011) (in determining whether city sidewalks provided the "meaningful access" and "meaningful accommodation" required under *Choate*, the court need not decide whether failure to make such accommodation was intentional rather than the result of disparate impact discrimination); *McWright v. Alexander,* 982 F.2d 222, 229 (7th Cir. 1992) (Disparate impact claims are cognizable under Section 504); *Robinson v. Kansas,* 295 F.3d 1183, 1187 (10th Cir. 2002) (disparate impact claims may be brought under section 504); *Berg v. Florida Dep't of Labor & Empl., Sec, Div. of Vocational Rehab.,* 163 F.3d 1251, 1254 (11th Cir. 1998) (Section 504 reaches some conduct that has an unjustifiable disparate impact on the handicapped); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D. C. Cir. 2008) (failure to include in paper currency features that were detectable to visually-impaired persons was the

unintended result of "thoughtlessness or indifference" that still denied meaningful access to the currency in violation of Section 504).[1]

In *Choate,* Justice Marshall went to great lengths to underscore that the legislative intent behind Section 504 was to protect the handicapped from ***unintentional*** discriminatory practices:

> Discrimination against the handicapped ***was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect….*** Federal agencies and commentators on the plight of the handicapped similarly have found that ***discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus***.

Choate, 469 U.S. at 295-96 (emphasis added). The Justice continued:

> ***[M]uch of the conduct that Congress sought to alter*** in passing the Rehabilitation Act ***would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.***

Id., at 296-97 (emphasis added). *Doe*, however, ignored this strong legislative intent to protect persons with disabilities even when discrimination was not intentional.[2]

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[1] We found no Eighth Circuit decision addressing this issue. District courts in that circuit have cited favorably to *Crowder* in holding that proof of discriminatory motive is not required to maintain an action under the Act. *See, e.g., A.P. v. Anoka-Hennepin Indep. Sch. Dist. No. 11,* 538 F. Supp. 2d 1125, 1141 (D. Minn. 2008).

[2] The Ninth Circuit has rejected the concept, adopted by *Doe,* that cost is a nondiscriminatory justification for disproportionately burdening the disabled to the point of denying them meaningful access to benefits. *Compare Doe,* 926 F.3d at 241, *with Rodde,* 357 F.3d at 997-998.

Choate recognized the need to balance the burden imposed if the Act reached all actions disparately impacting disabled persons with Congress's intent to reach disparate impact claims. It confirmed that the balance is struck when handicapped individuals are provided meaningful access to benefits. *Id.*, at 301. Contrary to the Supreme Court's holding, *Doe* effectively held that there need be no balance – plaintiffs who cannot prove intentional discrimination have no claim under Section 504 and consequently under Section 1557.

Doe reached this outcome with a sleight-of-hand reliance on *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). In *Sandoval*, the Court held there is no claim for disparate impact discrimination under Title VI of the Civil Rights Act, 42 U.S.C. §2000d. The Sixth Circuit claimed Title VI was Section 504's "twin" such that interpretations of Title VI should apply equally to the Rehabilitation Act. *Doe*, at 242. But in passing the ACA's Section 1557, Congress identified Section 504, not Title VI. Had Congress intended Title VI to apply, that standard would have been adopted.

Choate held "there were reasons to pause" before adopting Title VI standards into Section 504. *Id.,* 469 U.S. at 294. The legislative history, cited above, made clear that Section 504 was intended to address unintentional discrimination. *Id*., at 295. Moreover, in 1973, when Congress enacted the Rehabilitation Act, Title VI had been consistently interpreted to reach disparate impact discrimination. *Id*., at 294,

n.11. At the time, Congress had rejected a proposed amendment that would have limited Title VI to intentional discrimination. *Id*. As *Choate* reasoned, in light of that history, Congress chose not to limit Section 504 to prohibit only intentional discrimination, tacitly approving the disparate impact standard. *Id*.; *see Robinson v. Kansas,* 295 F.3d at 1187 (Rejecting the argument that *Sandoval* prohibited disparate impact claims under Section 504). *Doe* minimizes *Choate's* extensive discussion about the reasons the Title VI standard should not be incorporated into Section 504 as mere "words of caution." *Doe*, 926 F.3d at 242. The Sixth Circuit makes no attempt, however, to explain why those words of caution do not still apply today.

Similarly, the Sixth Circuit dismissed the agency interpretation of the ACA's Section 1557, affording it no deference and claiming that the agency attempted to re-write the statute when it recognized that disparate impact discrimination claims could be brought under Section 1557. *Id.,* at 240. The agency was on solid ground when it adopted this reading of Section 504. Before *Doe,* every federal appellate court to consider whether Section 504 could prohibit some forms of disparate impact discrimination had concluded that it does. *Doe* further failed to consider the legislative history and purpose of the ACA, which was particularly focused on ending insurance discrimination against people with disabilities. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547 (2012).

C. *Doe* Differs Significantly on the Facts and Legal Claims from this Case.

1. This Case Involves a Significantly Different Factual Framework from *Doe.*

Here, Regence excluded all coverage needed by Appellants to treat their disability. Their outpatient office visits and durable medical equipment needs were not covered because the services were provided to treat their disability, hearing loss. The Exclusion was based solely on their disabling trait by the very terms of the policy. Appellants received no meaningful access to benefits that were needed to treat their disability. The Hearing Loss Exclusion is facial disability discrimination.

In comparison, the *Doe* plaintiff had access to all benefits provided by the insurer. The insurer did not exclude coverage for HIV, or the medications to treat HIV. *Doe* challenged the method by which benefits were delivered (i.e., mail-order or in-person) but not an exclusion of his benefits. *Id.,* 926 F.3d at 237. In *Doe,* the "magnitude" of the discrimination is smaller, but could still plausibly exist.[3] *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983). While *Doe* presented a claim for disparate impact discrimination had it been filed in the Ninth Circuit, it is a much closer case.

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[3] For example, if discovery in *Doe* showed that the insurer required HIV patients participate in the mail-order program so that the contracted local pharmacies could avoid serving HIV patients, prohibited discrimination might be demonstrated.

2. The Legal Claims Are Different.

This case also raises different legal claims. Appellants allege that the Hearing Loss Exclusion is a form of facial or proxy discrimination. The Exclusion references a condition that is a disability under Section 504. *See Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Outpatient office visits, surgery, and other treatment is excluded when provided to treat hearing loss. The same class of services are covered for others without disabilities. Thus, the Exclusion eliminates coverage for a class of services designed to treat disabled. *See Rodde*, 357 F.3d at 998. At the very least, the Hearing Loss Exclusion is a form of proxy or over-discrimination. *See Pac. Shores Props., Ltd. Liab. Co. v. City of Newport Beach* ("*Pacific Shores"),* 730 F.3d 1142, 1160, n.23 (9th Cir. 2013).

In *Doe,* the plaintiffs did not allege facial discrimination. *See Doe,* 926 F.3d at 241. They conceded that the "mail-order pharmacy" program was facially neutral, but they asserted that the insurer's justification (the cost of the prescriptions) was a pretext for discrimination. *Id.,* at 241, 243. *Doe* dismissed the notion that an insurer might engage in over-discrimination in order to avoid liability, complaining that the plaintiffs failed to explain "why that is so." *Id.* at 243.[4] This Court has explained,

[4] Insurers have long sought to exclude or limit benefits to people with HIV and other disabilities. *See e.g. Doe v. Mut. Of Omaha Ins. Co.,* 179 F.3d 557 (7th Cir. 1999). Ending such practices in certain health policies was a primary purpose of the ACA. *See e.g.,* 42 U.S.C. §§300gg-1; 300gg-2; 300gg-4.

however, that the principle of proxy discrimination undergirds all of anti-discrimination law but is often unacknowledged. *Pacific Shores,* 730 F.3d at 1160. That Regence's Hearing Loss Exclusion might, in theory, apply to non-disabled insureds does not immunize the insurer from liability. Hearing loss is a proxy for disabling hearing loss, such that this case must be allowed to proceed. *See id.,* n.23, *citing to McWright,* 982 F.2d at 228.

RESPECTFULLY SUBMITTED this 28th day of October, 2019.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Certificate of Compliance for Briefs

9th Cir. Case Number: 18-35892

I am an attorney for Appellants in this matter.

This brief contains 1,999 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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DATED: October 28, 2019.

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CERTIFICATE OF SERVICE

I hereby certify on October 28, 2019, I electronically filed this motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: October 28, 2019, at Seattle, Washington.

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