

LAW OFFICES

WILLIAMS & CONNOLLY LLP

725 TWELFTH STREET, N.W.

WASHINGTON, D. C. 20005-5901

(202) 434-5000

FAX (202) 434-5029

CRAIG D. SINGER

(202) 434-5964

csinger@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

June 16, 2020

Via CM/ECF

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

**Re: *John Doe, et al. v. CVS Pharmacy, Inc., et al.*, No. 19-15074
Oral argument held June 12, 2020**

Dear Ms. Dwyer:

The CVS Appellees respond to Appellants' June 14, 2020 letter.

For the reasons discussed in the CVS Appellees' June 5 letter, Dkt. 111, the Final Rule, 45 C.F.R. §§ 92.2, 92.5, makes clear that Section 1557 "adopts the enforcement mechanisms for these four statutes and their implementing regulations *respectively*, each for its own statute." Appellants' Ex. B, Dkt. 115, at 159–61 (emphasis in original). While Appellants' June 5 response, Dkt. 112, emphasized that the then-Proposed Rule was not entitled to *Chevron* deference, the Final Rule is.

Appellants' letter evidently aims not to emphasize the Final Rule that undermines their case, but rather to revise their answers to unrelated oral argument questions. That is both impermissible, *cf. Feinberg v. Comm'r of Internal Revenue*, 916 F.3d 1330, 1337 n.2 (10th Cir. 2019) (disapproving Rule 28(j) letter's "tactical shift" following oral argument), and unavailing.

As Appellants' counsel conceded at argument, this Court has followed *Alexander v. Choate*, 469 U.S. 287 (1985), in *assuming* that Section 504 permits "disparate impact" claims and has never so held where, as here, that issue was contested. Dkt. 116 at 13:40–14:13. *Choate* concluded that *if* such a claim exists, it does not ensure "adequate health care" or "equal results" for the disabled, but only equal access to the benefit the plan provides. 469 U.S. at 302–04. Because the plaintiffs in *Choate* had equal access to the State's 14-day inpatient hospital benefit, they could not state a claim despite alleging (with statistical support) that disabled persons disproportionately were harmed by the 14-day limit. *Id.* at 289, 309.

WILLIAMS & CONNOLLY LLP

June 16, 2020

Page 2

So too here: Appellants receive the same benefit as all other plan participants: in-network pricing on specialty medications obtained through the Program and Program services for those prescriptions. *See* CVS Br. 7–9 (citing record). Appellants’ lawsuit seeks to require Defendants to make local retail pharmacies in-network for all prescriptions. *See, e.g.*, Appellants’ Br. 46; EOR 16–17, 38, 41–42, 96. That is a claim for an *additional* benefit, not equal access to the existing benefit their employers offer. Appellants’ claim is foreclosed by *Choate*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. D. Singer".

Craig D. Singer

Counsel for Appellees CVS Pharmacy, Inc.,
Caremark, L.L.C., and Caremark California
Specialty Pharmacy, L.L.C.