



June 14, 2020

Via CM/ECF

Molly C. Dwyer
Clerk of Court
U.S. 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
Argued June 12, 2020**

Dear Ms. Dwyer:

Pursuant to Rule 28(j), Plaintiffs-Appellants alert the panel to a relevant development that took place after oral argument. On June 12, 2020, the Department of Health and Human Services announced adoption of the final rule implementing Section 1557 of the Affordable Care Act. (See Ex. A). The draft rule was brought to the Panel's attention by the CVS-Appellees on June 5, 2020 (Dkt. 112).

The final rule supports Plaintiffs-Appellants' argument at the hearing regarding Section 504 of the Rehabilitation Act. This final rule applies "the enforcement mechanisms available" under the four incorporated civil rights statutes, including Section 504, "each for its own statute." Ex. A at 160. The final rule does not disturb Ninth Circuit authority relied upon by Plaintiffs-Appellants "recogniz[ing] that the focus of the prohibition in § 504 is whether disabled persons were denied meaningful access." *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008). This Court has "relied on *Choate's* construction of Section 504 ... that to challenge a facially neutral ... policy on the ground that it has a disparate impact ..., the policy must have the effect of denying meaningful access...." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013) (referencing *Alexander v. Choate*, 469 U.S. 287 (1985)).

Appellants are denied meaningful access to their prescription drug benefit due to: (i) systemic delays in receiving HIV medications, and (ii) lack of access to knowledgeable pharmacists. Both harms occur regardless of whether HIV medications are delivered to Plaintiffs-Appellants or drop-shipped to a CVS pharmacy, and disproportionately impact Plaintiffs-Appellants compared to enrollees not subject to the mail-order program. *See, e.g.*, EOR 41, ¶75 (CVS pharmacists do not fill HIV prescriptions and are unable to provide any counseling services); EOR 24, ¶26 (no tracking of harmful drug interactions because mail-order lacks full record of Plaintiffs-Appellants' medications); EOR 45, ¶85 (CVS personnel with whom Plaintiffs-Appellants interact with over the phone are not pharmacists and have no knowledge of HIV/AIDS

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medications); EOR 32, ¶51 (delivery delays of HIV medications harm health); *see also* EOR 39, 41–46, ¶¶70, 75, 81, 83, 85–91.

Respectfully submitted,

s/ Jerry Flanagan

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