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July 17, 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:

Decisions have issued in the cases for which the Court's June 16 order deferred submission of this appeal: *Schmitt v. Kaiser Foundation Health Plan*, No. 18-35846, 2020 WL 3969281 (9th Cir. 2020) ("*Schmitt*"), and *E.S. v. Regence Blueshield*, No. 18-35892, 2020 WL 3969675 (9th Cir. 2020).

Schmitt (which *E.S.* incorporates) declined to decide the legal issues presented in this appeal concerning disparate-impact claims under the ACA (§ 1557) and the Rehabilitation Act (§ 504) because the plaintiffs alleged only *intentional discrimination*: defendants excluded coverage for hearing treatments purposefully to target the hearing disabled. *Schmitt* at *5 ("*Schmitt* . . . did not allege a disparate impact claim"), *6, *10. Here, by contrast, Appellants assert a *disparate impact* on HIV/AIDS patients incidental to the Program for all specialty drugs. *See, e.g.*, CVS Br. 16–17 & n.6.

Schmitt declined to decide the open question in this Circuit whether disparate-impact claims like Appellants' are available under § 504, and its reasoning casts significant doubt that they are permitted after *Alexander v. Sandoval*, 532 U.S. 275 (2001). *Schmitt* at *5, *6; *cf. Doe v. BCBS of Tenn., Inc.*, 926 F.3d 235, 242 (6th Cir. 2019) (concluding § 504 does not recognize disparate-impact claims); CVS Br. 17–22.

Schmitt also declined to decide whether § 1557 permits disability discrimination claims beyond those available through § 504. *Id.* at *5. Operative agency guidance, which recently superseded the commentary consulted (and discounted) in *Schmitt, id.*, answers this question in the negative. *See* June 5 and 16, 2020 Rule 28(j) Letters, Dkt. Nos. 111.1 & 117.

WILLIAMS & CONNOLLY LLP

July 17, 2020
Page 2

Schmitt concluded only that the ACA permits at least some *intentional*-discrimination claims for plan designs targeting the disabled, relying on regulations, not applicable here, governing “individual[] and small employer” plans. Compare *Schmitt* at *2, *6, with EOR 159–60; EOR 21–22 ¶¶ 15–17; CVS Br. 52–53. Ultimately, *Schmitt* and *E.S.* affirmed dismissal of the plaintiffs’ complaints for failure to adequately plead intentional discrimination (“proxy” or otherwise) and remanded for leave to amend. *Schmitt* at *10–11.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. Singer', written in a cursive style.

Craig D. Singer

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