No. 19–15074

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Doe One, John Doe Two, John Doe Three, John Doe Four and John Doe Five, on behalf of themselves and all others similarly situated,

Plaintiffs/Appellants,

v.

CVS Pharmacy, Inc.; Caremark, L.L.C.; Caremark California Specialty Pharmacy, L.L.C.; National Railroad Passenger Corporation d/b/a Amtrak; Lowe's Companies, Inc.; and Time Warner Inc.

Defendants/Appellees.

PLAINTIFFS/APPELLANTS' REPLY BRIEF

On Appeal From The United States District Court
For The Northern District of California
Case No. 3:18–cv–01031–EMC

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INTRODUCTION

This appeal raises three primary issues.

First, the Court must decide whether offering a prescription drug benefit that (i) threatens the health and privacy of individuals living with HIV/AIDS, (ii) eliminates access to 85% of Network Pharmacies that Appellants would otherwise have access to but for their disability, and (iii) eliminates the ability to access pharmacists who are essential to ongoing care denies HIV/AIDS patients "meaningful access" to their prescription drug benefit under *Alexander v. Choate*, 469 U.S. 287 (1985) and Section 1557 of the ACA.

Ignoring the well-pled allegations of disproportionate harm and loss of meaningful access for individuals with HIV/AIDS, Appellees'[1] arguments are based on a series of mischaracterizations. For example, Appellees try to justify the error of the district court arguing that Appellants' lawsuit "threaten[s] the basic structure of [HMOs and PPOs]." Appellees' Brief ("AB") at 2. It does not. The accommodation sought by Appellants is *not* "preferential" access to their HIV/AIDS Medications for favorable prices at *any* non-CVS pharmacies, as the district court incorrectly found and Appellees reiterate. AB at 33. Appellants do not seek

[1] "Appellees" or "CVS Caremark" refers collectively to Defendants CVS Pharmacy, Inc.; Caremark, L.L.C.; and Caremark California Specialty Pharmacy, L.L.C., except for section VII relating to the ERISA Causes of Action, where Appellants refer to all Appellees.

preferential treatment—they seek equal treatment in the ability to access the same Network Pharmacies and pharmacists to which others not subject to the Program have access, and to which they would otherwise have access save for this discriminatory program. *See, e.g.*, EOR 19–20, 23–24, 28–30, 39, 72 ¶¶ 9–13, 23, 27, 40–41, 45, 71, 102. Appellees' callous claim that Appellants can avoid the harms caused by the Program by "choos[ing]" to buy their medications at an out-of-network pharmacy of their choice at full price, AB at 24, 33–34, ignores the fact that HIV/AIDS Medications cost *thousands of dollars each month*. EOR 38 ¶ 69. Appellants allege they cannot realistically "choose" to purchase their medications outside the Program. EOR 83–84 ¶ 146. Appellees also argue that this Court should follow the lead of the Sixth Circuit in deciding that Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, incorporated into Section 1557 of the ACA, ("Section 1557"), 42 U.S.C. § 18116, does not recognize "disparate impact claims," AB at 3, while ignoring that doing so would be contrary to Ninth Circuit precedent.

Second, the Court must decide whether the network pharmacies are a "place of public accommodation" relevant to the determination of Appellants' ADA claim. Appellees repeat the errors of the district court in arguing that *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), forecloses an ADA claim when an insurance plan is at issue. That is not the case. As *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042 (9th Cir. 2000) subsequently clarified, *Weyer*

only stands for the proposition that for an ADA cause of action there must be a nexus between "a place of public accommodation" and the discriminatory conditions at issue, which Appellants pled. EOR 87–88 ¶¶ 157–162.[2]

Third, the Court must decide whether Appellants have stated a claim for denial of benefits under ERISA. They plainly have, as they alleged that their plans entitled them to receive their medications at the pharmacy of their choice, and that this right was taken away from them without a change in the terms of their plans.

ARGUMENT

I. The ACA Unequivocally Expands Disability Protections in Healthcare

The district court erred by not recognizing that Section 1557 established a new healthcare discrimination standard. As Appellees' briefs do not rehabilitate the district court's reasoning, the Order must be reversed.

Appellants adequately alleged disability discrimination under Section 1557. Opening Brief ("OB") at 16–22. Appellees' arguments, relying on the faulty reasoning of the Sixth Circuit, should not be entertained. The Sixth Circuit's ruling is an aberration, as it is the *only* Circuit to reach this decision. *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (6th Cir. 2019). Seven other Circuits,

[2] Because Appellants are entitled to relief on their claims under the ACA and ADA, dismissal of their claims under the California Unruh Civil Rights Act and Unfair Competition Law ("UCL"), and their claim for declaratory judgment, should be reversed as well.

including the Ninth Circuit, have found the opposite. *See, e.g.*, *supra* II.B; *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996).

As discussed in Appellants' Opening Brief, OB at 16–22, the ACA greatly expanded protections for the most vulnerable communities in the context of private health insurance. *See also* Disability Rights and Education Fund et al Amicus Brief ("DREDF Br.") at 15–21. Contrary to Appellees' assertions, Appellants' argument that Section 1557 established a new healthcare discrimination standard does not "almost exclusively rely" on *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015). In fact, the statutory text, implementing regulations, agency guidance, and legislative history, all make clear that Section 1557 created a new anti-discrimination standard in healthcare. *See* OB at 16–22; DREDF Br. at 21.

Appellees do not and cannot dispute that prior to the adoption of Section 1557, no statutory anti-discrimination standard applied specifically to private health insurance. To clarify Section 1557's import, the final rule implementing Section 1557 made clear that all health-related disability claims under Section 1557 may invoke the "disparate impact" standard: "OCR interprets Section 1557 as authorizing a private right of action for claims of disparate impact discrimination on the basis of any of the criteria enumerated in the legislation." 81 Fed. Reg. 96, 31439–40; OB 20–21. This is the only logical result based on the unambiguous language of the

statute, which states "[t]he enforcement mechanisms provided for and available under such title VI, title IX, section 504, *or* … Age Discrimination Act ["ADEA"] shall apply for purposes of violations of this subsection." 42 U.S.C. § 18116(a) (emphasis added). The use of the disjunctive "or" in this context makes clear that *any* of the enforcement mechanisms used by the incorporated statutes are available to every claim of discrimination under Section 1557, regardless of the plaintiff's protected class. *Rumble*, 2015 WL 1197415, at *11–12.

Furthermore, interpreting Section 1557 as Appellees request this Court to do would leave courts unequipped to adjudicate intersectional discrimination claims. For example, there would be no readily apparent standard when a person alleges discrimination on the basis of both race and age, implicating Title IX and the ADEA. *Id.* at *12; *see also* 81 Fed. Reg. 96, 31439–40 ("For example, it would not make sense for a … plaintiff claiming race discrimination to be barred from bringing a disparate impact [claim] but then allow a plaintiff alleging disability discrimination to do so …."). Such a scenario presents obvious workability problems and is likely to lead to "patently absurd consequences." *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Connor, J., dissenting).

II. The ACA and Section 504 of the Rehabilitation Act Prohibit Policies That, Although Facially Neutral, Unjustifiably Harm Individuals

This Court has long held that Section 504, which is incorporated into Section 1557 of the ACA, allows for disparate impact claims. However, in attempting to

ignore this authority, Appellees incorrectly assert that disability-based disparate impacts are not actionable discrimination under the ACA, such that denials of meaningful access are permissible as long as they are not intentional. *See* AB at 17–22. The only way to reach this conclusion is to overrule long-established Ninth Circuit jurisprudence interpreting Section 504, and ignore Supreme Court precedent and persuasive decisions from sister Courts of Appeals. The Court should reject this invitation.

A. The Ninth Circuit Recognizes That Disparate Impact Discrimination is Unlawful Under Section 504

The district court correctly recognized that "Section 504 protects persons with disabilities from both intentional and disparate-impact discrimination," EOR 187 (citing *Crowder*, 81 F.3d at 1484; 81 Fed. Reg. 31375, 31440 (May 18, 2016)), and found that disparate impact claims are actionable under Section 504 and the ACA. *Id*. Arguing that "[t]his Court is free to, and should, adopt the Sixth Circuit's reasoning in *BlueCross*" and "hold that disparate-impact discrimination is not an actionable theory … under § 504," AB at 22, Appellees ignore that both this Court and district courts in this Circuit have applied the meaningful-access standard adopted in *Alexander v. Choate* to claims of disparate impact under Section 504 in over 70 well-reasoned decisions going back over twenty years. *See* OB at 23–24.

Thus, Appellees' chief argument, that "[t]he Supreme Court has never squarely decided whether disparate-impact is actionable under § 504," and that "[i]n

this Circuit, no case has held explicitly that disparate-impact is actionable under Section 504 …" is false. AB at 21–22. While the Supreme Court in *Alexander* assumed without deciding that Section 504 reached disparate impact claims, the Ninth Circuit memorialized the disparate impact standard in *Crowder v. Kitagawa*. 81 F.3d at 1483. Since *Crowder*, both this Court and district courts in this Circuit have continued to find that Section 504 disparate impact claims are cognizable. *See, e.g.*, *Machlan v. Neven*, 13-CV-00337-MMD, 2015 WL 1412748, at *19 (D. Nev. Mar. 27, 2015), *aff'd*, 656 F. App'x 365 (9th Cir. 2016) ("[Section] 504 embraces both disparate impact and reasonable accommodation claims."); *Hunsaker v. Contra Costa Cnty.*, 149 F.3d 1041, 1042–43 (9th Cir. 1998) (*Alexander* "struck a balance between making all or no disparate impacts actionable under" Section 504).[3]

B. Sister Courts of Appeals Agree with the Ninth Circuit's Recognition That Disparate Impact Claims Are Cognizable

Appellees suggest that this Court should overrule its precedent and join the Sixth Circuit in foreclosing disparate impact claims under Section 504. Yet Appellees fail to acknowledge that *BlueCross BlueShield of Tennessee, Inc.* is an outlier decision at odds with the First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits. *See Ruskai v. Pistole*, 775 F.3d 61, 79 (1st Cir. 2014); *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009); *NAACP v. Med. Ctr., Inc.*, 657 F.2d 1322,

[3] This should be the end of this issue for purposes of this Court's decision. *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003).

1331 (3d Cir. 1981); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 306 (5th Cir. 1981); *McWright v. Alexander*, 982 F.2d 222, 228–29 (7th Cir. 1992); *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002). In fact, only the Sixth Circuit has found no disparate impact claims lie under Section 504. *See, e.g.*, DREDF Br. at 15 n.12 (discussing the Sixth Circuit's "blatant repudiation of *Choate* and other Section 504 precedent"). There is no reason for this Court to compound that error.

III. The Program Disproportionately Harms Appellants "Solely by Reason of Their Disability," as Compared to Other Individuals in the Program

A. Appellants Adequately Alleged That the Program Burdens Them in a Manner Different From and Greater Than Other Enrollees

As explained in the Opening Brief, the district court applied the wrong legal standard when it ruled that "the allegations … are not sufficient to support Plaintiffs' claim that the Program's impact on enrollees with HIV/AIDS is 'unique'" and, therefore, are insufficient to allege a disparate impact claim. EOR 190; *see also* OB at 27–32.

Appellees do not address Appellants' allegations that the Program disproportionately harms the health and privacy of individuals with HIV/AIDS "solely by reason of their disability" as compared to other Program enrollees. *Compare* AB at 27 (stating, without any explanation, that Appellants make only "one allegation" of disproportionate harm in the Amended Complaint) *with* OB at 27–32. Instead, Appellees simply mischaracterize Appellants' allegations as seeking lower

prices and better customer service *from any pharmacy* regardless of whether it is in the CVS pharmacy network. CVS Caremark misrepresents Appellants' allegations, the gravity of the Program's failures, and the harm Appellants suffer under the Program. There is no allegation Appellants sought lower prices—they want to pay the same price they were previously paying and would continue to pay to see pharmacists that are currently in Appellees' existing networks.

Moreover, although CVS Caremark contends that "[e]veryone purchasing a specialty medication, whether suffering from HIV/AIDS or not, faces these same alleged inconveniences," AB at 33, Appellants extensively allege that the Program's failures have a unique and disproportionate impact on patients with HIV/AIDS. *See* OB II.B–C. For Appellants, who need to obtain HIV/AIDS Medications in a manner that does not threaten their health and privacy, CVS Caremark has "no realistic fail-safe procedure in place" to ensure appropriate and dependable delivery of these important medications or access to pharmacists. EOR 46 ¶ 90.

CVS Caremark alleges that HIV/AIDS "specialty medications" must be provided by mail-order *because* of the nature of the medication, with no explanation why. AB at 6. This factual argument is contradicted by Appellants' allegations and irrelevant at this procedural stage. In any event, CVS Caremark has it backwards: its explanation is that these are "specialty medications" that by definition require specific counseling, pharmacist interaction, or special handling. EOR 48, 71 ¶¶ 94–

95. But in accessing those medications, consumers such as Appellants receive less counseling, no in-person pharmacist interaction and less safe handling.

Just as the defendants in *Rodde v. Bonta* consolidated services for the disabled at a single hospital, 357 F.3d 988, 990 (9th Cir. 2004), CVS Caremark has consolidated their services for individuals with HIV/AIDS into a single program—within their wider pharmacy benefits system available to other enrollees—that disproportionately harms Appellants. *See* OB at 6–10. Moreover, while everyone has the right to medically appropriate care and medical confidentiality, the need is uniquely acute for Appellants. *Id*. at 27–32; *see also Rodde*, 357 F.3d at 998 ("[T]he services designed for the general population would not adequately serve the [disabled-plaintiffs'] unique needs, who therefore would be effectively denied services that the non-disabled continued to receive.").

In addition, contrary to CVS Caremark's claims, "[e]veryone purchasing a specialty medication" *does not* "face[] these same" injuries. AB at 33. As to the complete denial of access to pharmacists under the Program, this aspect of the prescription drug benefit is "vitally important for HIV/AIDS patients" to manage "side effects[] and other problems that arise while living with and managing HIV/AIDS," "even as compared to patients taking other 'specialty' medications." EOR 43 ¶ 80. *See also* AIDS Healthcare Found. Br. at 4–6 (pharmacies and pharmacists have a critical role in the treatment of individuals with HIV/AIDS).

Rather than provide Appellants access to this essential pharmacist support, Appellants receive *zero* in-person pharmacist counseling under the Program. CVS's *only* response to these allegations is an assertion in a footnote that "the ability to '[t]alk to a pharmacist and nurse specially trained in your condition' is a primary reason health plans increasingly are adopting mail-order requirements for specialty medicines." AB at 34 n.12. Appellants agree that it is crucial for them to talk with their pharmacists, who understand their condition and their unique needs. But CVS Caremark's Program cuts off this option. CVS Caremark's argument is contradicted by Appellants' well-pled allegations about lack of access to pharmacists, and is irrelevant on a motion to dismiss. *See* OB at 9, 10, 29–30.

The Program's failures clearly have "an outsized effect," AB at 26, disproportionately felt by Appellants as compared to others enrolled in the Program. No additional allegations to "compare the Program's impact on HIV/AIDS patients with its impact on non-HIV/AIDS patients …" are necessary. *Id*. Appellants have alleged in detail how they have been denied meaningful access to the benefit at issue. *See Doe v. Coventry Health Care, Inc.*, No. 15-CIV-62685, (S.D. Fla. May 5, 2016), at 15–17, n.12 (denying motion to dismiss ACA claim where "Plaintiff claims he, along with all other persons prescribed HIV/AIDS medications and subject to the mail-order program, is denied meaningful access to the drugs") (ER-N-15–17); *accord P.P. v. Compton United Sch. Dist.*, 135 F. Supp. 3d 1098, 1114 (C.D. Cal.

2015) (holding that Plaintiffs suffering from complex trauma could survive a motion to dismiss by alleging that the school district denied meaningful access to an education by failing to create a trauma-sensitive school environment); *see also* OB at 31–32.

B. CVS Caremark's Interpretation of Section 504's "Solely by Reason of" Language Would Open the Door to Widespread Discrimination

1. Including Medications That Treat Non-Disabling Conditions Does Not Undercut Appellants' Disparate Impact Claim

As discussed in Appellants' Opening Brief, the district court erroneously found the fact that individuals not taking HIV/AIDS Medications are also enrolled in the Program to be "fatal" to Appellants' disparate impact claim. OB at 25. CVS Caremark's statement that "the Complaint's other allegations undermine the assertion" of disproportionate harm is again a mischaracterization. AB at 27.

The doctrinal basis of a disparate impact theory is to allow relief when a policy that appears neutral on its face results in unlawful discrimination. *Crowder*, 81 F.3d at 1484; DREDF Br. at 16 ("The [*Alexander*] Court did not just scrutinize whether the hospitalization benefit applied on the same terms to both people with or without disabilities … instead, it also considered whether the structure of the benefit policy disproportionately prevented disabled people from receiving a meaningful benefit from the inpatient coverage …"). Moreover, a neutral policy that provides some level of service to certain disabled individuals may still be properly challenged and

is not immune from suit as a matter of law. *See, e.g.*, *Mark H. v. Lemahieu*, 513 F.3d 922, 938 (9th Cir. 2008) ("[E]vidence that appropriate services were provided to some disabled individuals does not demonstrate that others were not denied meaningful access 'solely on the basis of their disability.'"); *Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002) (similar).

Here, Appellants allege that the Program's design and failures result in an unequal opportunity to utilize their prescription drug benefit. *See supra* III.A. As in *Alexander*, Appellants challenge a policy "neutral on its face" that applies to both disabled and non-disabled individuals. 469 U.S. at 303. Unlike in *Alexander*, however, where the district court found that the 14-day limitation on inpatient coverage "would fully serve 95% of even handicapped individuals," 469 U.S. at 303, Appellants allege that the Program does *not* "le[ave] all patients 'with … effective'" services. *Rodde*, 357 F.3d at 996–97 (citing *Alexander*, 469 U.S. at 302–04). On the contrary, the crux of Appellants' claim is that they have been *denied meaningful access* to the services to which they are entitled. It is of no moment that individuals not taking HIV/AIDS Medications are also subject to the Program, because just as "*Alexander* may allow the [defendants] to step down services equally for *all* who rely on it for their healthcare needs, [] it does not sanction the wholesale elimination of services relied upon disproportionately by the disabled because of their disabilities." *Id*. at 997. The Amended Complaint properly alleges that this is

precisely what CVS Caremark has done under the Program. EOR 16–18, 83–85 ¶¶ 1–3, 47, 92–93, 145–47.

2. CVS Caremark Cannot Flout the ACA's and Section 504's Protections by Engaging in Constructive or "Proxy" Discrimination Based on Prescription Drug Classifications

Appellees take the position that Appellants are not discriminated against "'solely by reason of' having HIV/AIDS'" but instead because of "the classification (specialty vs. non-specialty) of the medication" to treat Appellants' disability. AB at 23–24; *see also id*. at 4 ("[T]he Complaint does not allege … impacts resulting from Does I–V's disability rather than the type of medication purchased."). To find Appellants have not alleged a causal connection between Appellants' HIV/AIDS Medication, their disability, the Program's failures, and the denial of meaningful access to Appellants' prescription drug benefit would lead to the "grotesque scenario" of covert disability discrimination that this Court warned against in *Pacific Shores Properties, Ltd. Liability Co. v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013).

The Program's limitation in access to the prescription drug benefit with respect to HIV/AIDS Medications is a form of actual or "constructive" facial discrimination. *See McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (concluding "gray hair" was a close enough fit to "old age" such that allegations an employer rejected all applicants with gray hair stated a claim of age discrimination,

even if there are young people with gray hair). Here, the limitations on access to HIV/AIDS Medications are a plausible proxy for limitations on access due to Appellants' disability, even if some non-disabled insureds are also impacted. *See Pacific Shores*, 730 F.3d at 1160, n.23. Appellees' "over-discrimination" or "proxy" discrimination does not excuse its practice.[4] *Id.* In fact, such a strategy, if permitted by this Court, would allow companies to avoid liability in any health context by merely placing one or two seldom-used medications on a "specialty pharmacy" formulary and then point to drug-based distinctions as a fig leaf to a classification of the *disability* those drugs treat.

IV. The Program's Design Violates the ACA Because It Erodes Appellants' Health and Privacy and Denies Them Meaningful Access to Their Prescription Drug Benefit

Appellees contend *as a matter of law* that merely because Appellants have been enrolled in the Program they automatically "have not been deprived access, much less meaningful access to the[ir] prescription coverage." AB at 31. This argument is wrong for several reasons, and fails to address the district court's errors of (1) re-defining the benefit Appellants seek meaningful access to in a manner that is at odds with the Amended Complaint, and (2) applying an overly restrictive meaningful access standard to Appellants' claims. OB at 32–39.

[4] Proxy discrimination is not a new legal theory asserted for the first time on appeal. It is a form of disability discrimination, whether characterized as facial or disparate impact discrimination. *See McWright*, 982 F.3d at 228.

A. The Prescription Drug Benefit Available Under the Program Is Unlawful Under *Alexander v. Choate* and the ACA, Which Require Appellees to Provide More Than Just Mere "Enrollment" in the Program

Both the district court and CVS Caremark have attempted to redefine the health plan benefit at issue in a way that undermines Appellants' claims. Appellants allege the Program denies them meaningful access to HIV/AIDS Medications in a medically appropriate manner and actual access to Network Pharmacies[5] and counseling from knowledgeable pharmacists. OB at 33. The district court incorrectly redefined this benefit as "HIV/AIDS Medication for favorable prices at non-CVS pharmacies" or "at favorable prices outside the Program's network." EOR 186, 191; *see also* OB at 32–34. As described above, Appellants are not complaining about the price of their medications; they are complaining about lack of meaningful *access* to their medications and prescription drug benefit. *See supra* at 9.

Similarly, according to CVS Caremark, Appellants' prescription drug benefit only entitles them to enrollment in the Program, even though the Program fails to provide access to "pharmacists specially trained in HIV/AIDS" and inherently threatens Appellants' health and privacy. AB at 33. According to Appellees, a company may adopt a discriminatory benefit design but avoid liability as long as

[5] Contrary to Appellees' assertions, AB at 30, Appellants have lost access to 85% of CVS's Network Pharmacies. *See* OB at 6–7, 9; *see also* EOR 38–42 ¶¶ 68–70, 73–76. Moreover, this percentage *does not* "come from general numbers on the Internet," AB 30, but Appellees' own websites. OB at 6–7.

enrollees are provided access to that discriminatory benefit. The Court must reject these attempts to manipulate the definition of Appellants' prescription drug benefit to escape liability under the ACA. *See Alexander*, 469 U.S. at 301 ("The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled…").

CVS Caremark does not address Appellants' allegations that they have no meaningful access to pharmacists, instead arguing that "Does I–V are free to forego" their prescription drug benefit and their "specialty drug coverage," AB at 24, 33, if they believe the Program's failures threaten their health and privacy, simply by "choosing" to pay thousands of dollars per month out-of-pocket. *Id*. at 24. Under the Program, in order to have their HIV/AIDS Medications paid for under their health plans, Appellants may only obtain those medications by mail-order or at a CVS store—but only for pick up, not to interact with a knowledgeable pharmacist. The Amended Complaint alleges the harms to Appellants' health and privacy with this option. EOR 44–47 ¶¶ 81–91.

Relatedly, CVS Caremark incorrectly asserts that its conduct does not violate the ACA because the "relevant 'benefit provided' [here] is the 'package' of 'individual services offered—not 'adequate health care.'" AB at 30. CVS Caremark's selective quotation and analysis of *Alexander* does not tell the complete

story of their obligations under the meaningful access standard or the ACA. *See* DREDF Amici at 8–11. CVS Caremark—unlike Tennessee under the Medicaid Act—does not have the "substantial discretion to choose the proper mix of amount, scope, and … limitations on coverage …" *Alexander*, 469 U.S. at 303. ACA-regulated entities, like CVS Caremark, must do more than provide just *any* "package" of benefits, and they are required to provide more than "adequate health care."[6] The ACA imposed extensive restrictions on how ACA-regulated entities can design and administer health programs and activities to ensure meaningful access without regard for disability. *See* OB 2–3, 19, 36, 38–39; s*ee also* DREDF Br. at 15. Therefore, the "package" of individual services offered—*i.e.*, the prescription drug benefit—must be designed and implemented so that individuals with HIV/AIDS can access their medications without risking their health and privacy.

While Appellants do not disagree that Section 504 requires "evenhanded treatment," AB at 32, neither this language nor the reasoning in *Alexander* support

[6] Appellants sufficiently alleged at EOR 83 ¶ 143 that as a participant in the Medicare program and a subsidiary of CVS Health Corporation—a recipient of federal financial assistance—CVS Caremark is subject to Section 1557. *See* 42 U.S.C. § 18116 (Entities subject to Section 1557 include "any health program or activity, any part of which is receiving Federal financial assistance …); 45 C.F.R. § 92.4 ("For an entity principally engaged in providing or administering health services …, all of its operations are considered part of the health program or activity" subject to Section 1557.) Appellees misstate the standard for determining which entities are covered by Section 1557 and fail to cite ACA case law in support of their argument. *Compare* AB at 36–37 *with Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 851 (D.S.C. 2015), and *Rumble*, 2015 WL 1197415, at *12–13.

CVS Caremark's contention that barebones access to HIV/AIDS Medications under the Program in a manner that threatens their health and privacy is sufficient as a matter of law to negate Appellants' meaningful access claim. *Id*. "Evenhanded treatment" must still result in meaningful access to the benefit. *Alexander*, 469 U.S. at 301–02. That is why in *Alexander*, though disabled and non-disabled Medicaid recipients were subject to the same 14-day limitation (*i.e.*, enrolled in the same program), the disparate impact claim was rejected because "the 14-day limitation would fully serve 95% of even handicapped individuals eligible . . . ." *Id*. at 303. Here, by contrast, Appellants have sufficiently alleged that because of the Program's inherent failures it does not result in "evenhanded treatment" for HIV/AIDS patients, nor does it provide Appellants with equal opportunity to utilize their plan's prescription drug benefits. OB at 27–32; *see also Coventry Health Care, Inc.*, at 16–17 (ER-N-16–17).

B. The Harm Alleged Is Sufficient to Demonstrate a Denial of Meaningful Access

In granting the motion to dismiss Appellants' ACA claim, the district court failed to apply the proper standard in light of the requirement that Section 504 and *Alexander*'s meaningful access standard be interpreted and applied within the context of the ACA. *See Alexander*, 469 U.S. at 302–04 (considering whether policy undermines purposes of underlying statute to determine proper definition of "meaningful access"); *see also* DREDF Br. 5, 7. According to the district court, if

an individual with a disability receives any benefit *at all*, the access is per se "meaningful." Both Supreme Court and Ninth Circuit jurisprudence applying the meaningful access standard do not recognize such an absolutist approach. In fact, regulations implementing the ACA define meaningful access to prescription drugs, which the district court ignored. "A health plan must allow enrollees to access prescription drug benefits at in–network retail pharmacies, unless" the drug is subject to certain conditions. 45 C.F.R. § 156.122(e). The district court then misconstrued the gravity of the deprivations Appellants suffer under the Program. OB at 32–34. Appellees' brief fails to correct this error or the ensuing analysis.

As discussed in their Opening Brief, Appellants allege that the Program fails to provide their prescription drug benefit in an "effective manner," causing them to lose meaningful access to their prescription drug benefit. *Katie A. ex rel. Ludin v. Los Angeles City*, 481 F.3d 1150, 1159 (9th Cir. 2007) (a benefit design is ineffective if it does not provide disabled individuals with the same opportunities to benefit from the services that are available to others); *see also* 81 Fed. Reg. 31429, 31434 (declining to codify examples of discriminatory benefit designs under the ACA because determining whether a particular benefit design results in discrimination will be fact-specific). Under the Program, HIV/AIDS patients may only obtain their life-sustaining medications from a CVS-branded store *for pick-up only* or by mail-order to their home or place of employment. Both options raise significant health

and privacy concerns. OB at 7–8, 10. Though CVS Caremark may technically "supply" Appellants' HIV/AIDS Medications under the Program, providing HIV/AIDS Medications in a manner that sabotages their treatment is not "meaningful access" under *Alexander*, or any reasonable interpretation of the meaningful access standard under the ACA. *Id*. at 12.

Appellants alleged how they have lost all face-to-face interaction with pharmacists who provide their life-sustaining care. OB at 9–10; *see also* AIDS Healthcare Found. Br. at 4–5 (Pharmacists serving HIV/AIDS populations "do more than merely ensure that the right number of the right of pills are put in a bottle … [they] provide a number of vital services that help people stay adherent to their regimen, and stay in care."). Despite the medical necessity of consultations with knowledgeable pharmacists, Appellants are completely denied this aspect of their prescription drug benefit by the design of the Program. OB at 9–10.

Appellants have also alleged that, with alarming frequency, Appellants have all suffered delays, mistakes, or bureaucratic runarounds that have caused them to miss doses of their HIV/AIDS medications. *Id*. at 28–29. The option of picking up a drop-shipment from a local CVS pharmacy is no better. *Id*. at 7–8. Moreover, there are no pharmacists on-site available to consult with Appellants. *Id*. at 10. This is not an "effective manner" of providing Appellants' prescription drug benefit due to the unique health needs of individuals with HIV/AIDS. Appellants are thus denied

meaningful access to the prescription drug benefit under their health plans. *See id*. at 34–38.

CVS Caremark makes no real attempt to distinguish the numerous Section 504 and ADA disparate-impact cases that discuss the proper level of deprivation a plaintiff must allege to sufficiently plead a claim.[7] *Compare* AB at 35 n.13 *with* OB at 36–37. Instead, CVS Caremark contends, without addressing the seriousness of these injuries, that it "unquestionably provides Does I–V's prescriptions … thus, Does I–V have not been 'deprived' of any right 'offered ….'" AB at 14. This makes Appellants' point. Simply re-asserting that "[t]he Program here does not restrict Appellants' *access* to any medications," *id*. at 35 (emphasis in original), and continuing to cynically mischaracterize Appellants' alleged injuries as "unpleasant impacts," *id*. at 3, does not relieve Appellees of liability under the ACA and Section 504. "These deficiencies in the [Program], coupled with the inability to opt-out, force Plaintiff[s] to choose between receiving the medication from an inadequate program covered by insurance or an in-person pharmacy without insurance and at great expense." *Coventry Health Care, Inc.*, at 16 (ER-N-16). On a motion to dismiss, the district court could not say as a matter of law that the Program "provides

[7] "[T]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act." *Zukle v. Regents of the Univ. of California*, 166 F.3d 1041, 1045 n.11 (9th Cir.1999).

meaningful access and is not actionable discrimination." *Id*. at 17.[8]

V. The District Court Erred in Dismissing Appellants' Failure-to-Accommodate and Unruh Act Claims

As discussed in their Opening Brief, Appellants made repeated requests to opt out of the Program and return to the prescription drug benefit they received before the adoption of the Program, which allowed them full access to Network Pharmacies and pharmacists. OB at 39–41. CVS Caremark denied all these requests. *Id*. These allegations are sufficient to support a failure-to-accommodate claim under Section 504 and the Unruh Act. *Id*. Dismissing Appellants' failure-to-accommodate claim, the district court erred in ruling that one-time exceptions CVS Caremark provided two Appellants—then requiring them to continue to utilize the Program despite its failures—fully immunized Appellees from liability. *See id*. at 42–43.

CVS Caremark's primary argument is that Appellants waived their failure-to-accommodate claim, contending Appellants did not argue this theory below and the district court "opinion makes no mention of any failure to accommodate claim." *See* AB at 37–38. This is yet another mischaracterization of the record, as the district court clearly considered and ruled on Appellants' failure-to-accommodate claim. *See* EOR 196–98.[9]

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[8] Appellees cite *Doe v. Coventry Health Care, Inc.* in support of their ADA argument, but fail to distinguish it in the context of Appellants' ACA claim.

[9] Though CVS Caremark also asserts that Appellants waived an intentional discrimination claim, AB at 16 n.6, this argument is of no moment as a failure-to-

Alternatively, CVS Caremark contends that Appellants failed to sufficiently plead reasonable accommodation discrimination. AB at 39–40. All Appellants need allege is the reasonable accommodation requested, and that CVS Caremark refused the accommodation. *See* OB at 40–41, 44–46. Appellants have done so; their allegations are sufficient to state a claim of reasonable accommodation discrimination under Section 504 and the Unruh Act. *Id.* CVS Caremark ignores such allegations by attempting to impermissibly require Appellants to meet their summary judgment burden at the motion-to-dismiss stage, asserting that Appellants' claim fails because courts must "*find*[] *a 'discriminatory effect* in practice' *before considering* whether the plaintiff had 'also show[n] that [the defendant] … fail[ed] to make a reasonable modification," and Appellants have not yet "*demonstrated* discrimination." AB at 40 (emphasis added). The single opinion Appellees rely on for this argument—*Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004)—was an appellate review of a district court's grant of summary judgment, not a motion to dismiss. AB at 40.

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accommodate claim is an independent theory of liability. *McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004). Moreover, Appellees' selective quotation to the oral argument transcript misconstrues the record, as counsel was addressing the district court's question whether a showing of animus was required to prove all of Appellants' claims. *See* EOR 110.

VI. Appellants Adequately Pled an ADA Violation

A. Appellants Sufficiently Alleged Denial of Access to a Place of Public Accommodation

As discussed in Appellants' Opening Brief at 46–53, Appellants sufficiently alleged each element of their ADA claim, including that Appellees denied Appellants access to a "place of public accommodation." Relying primarily on *Weyer v. Twentieth Century Fox Film Corp.*, the district court incorrectly found otherwise.

Contrary to Appellees' contentions, the *Weyer* court did not hold that whenever an insurance policy triggers the loss of access to a "place of public accommodation" there can never be a violation of the ADA as *a matter of law*. AB at 42. As Appellants have explained, the issue with the plaintiff's claim in *Weyer* was that the plaintiff alleged the "place of public accommodation" in question was the insurance company's office. The plaintiff did not allege that she was barred access to the office itself, nor did the plaintiff even allege that she attempted to enter the insurance company office. Therefore, the *Weyer* court found that the plaintiff had simply used the insurance office as a placeholder to satisfy the pleading requirement of a "place of public accommodation."

Appellees repeat this error in the context of discussing *Chabner*, arguing that it too stands for the proposition that "any ADA claim premised upon an insurance policy's terms fails to satisfy the statute's 'place of public accommodation'

requirement." AB at 42. Again, this is a mischaracterization of what this decision actually holds. *Weyer* and *Chabner* stand for the proposition that an ADA claim premised *solely* on an insurance plan's terms fails to satisfy the "place of public accommodation" requirement. Such a rule is not relevant here because Appellants have independently alleged the denial of actual access to a physical place of public accommodation—CVS's Network Pharmacies. OB at 47. Here there can be no dispute the place of public accommodation at issue is a pharmacy, which is a place of public accommodation under the ADA. 42 U.S.C. § 12181(7)(F).

As explained in Appellants' Opening Brief, the ADA prohibits both tangible and intangible barriers to places of public accommodation. OB at 46. Appellants have explicitly alleged that through its contractual control over determining that HIV/AIDS Medications obtained at a Network Pharmacy other than a CVS-branded store are not a covered benefit, CVS Caremark has imposed intangible barriers to Appellants' access to these places of public accommodation. OB at 58–59; EOR 88–89 ¶¶ 161–63; *see also Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 846 (9th Cir. 2004) (theater administrators liable as "operat[ors]" of place of public accommodation under the ADA; "'to operate' means … 'to control or direct the functioning of'") (citing *Coddington v. Adelphi Univ.* 45 F. Supp. 2d 211, 217 (E.D.N.Y. 1999) for the proposition that "the relevant standard is whether the individual 'ha[d] the power to facilitate any necessary accommodation.'"); *Aikins v.*

St. Helena Hosp., 843 F. Supp. 1329, 1335 (N.D. Cal. 1994) (stating that the "operate" requirement "retains accountability for those in a position to ensure nondiscrimination."). CVS Caremark's unilateral contractual control in determining where HIV/AIDS Medications must be obtained in order to be covered under Appellants' health plans, EOR 88–89 ¶¶ 161–63, effectively bars all but the wealthiest with HIV/AIDS from "choosing" to obtain their medications from a Network Pharmacy other than a CVS-branded store, which CVS Caremark suggests is their only viable option.

The district court's error on this point is particularly glaring considering the court correctly recognized that CVS "operates" the Network Pharmacies for purposes of the ADA. However, because it erroneously found the *Weyer* decision controlling as described above, it mistakenly found this control to be "of no moment." This error must be corrected. Appellants reiterate their request that this Court consider and adopt the reasoning of *Zamora-Quezada v. HealthTexas Med. Group of San Antonio*, 34 F. Supp. 2d 433, 444 (W.D. Tex. 1998), where the plaintiffs alleged that the defendant insurance companies effectively denied their access to doctors' offices through the defendants' control over their healthcare networks—creating an intangible barrier. The court concluded these allegations were sufficient to state a claim under the ADA. *Id.*; OB at 50–51.

B. There is Discrimination "on the Basis of" Disability

Appellees' Answering Brief further repeats the district court's error that "insurance distinctions that apply equally to all employees cannot be discriminatory." AB at 45. As Appellants established in their Opening Brief, this "rule" is inapplicable here, where Appellants contend that the Program's design has a discriminatory effect on those with HIV/AIDS, in violation of both the ACA and the ADA. OB at 52–53.

Appellees ignore this entire line of argument in Appellants' Opening Brief, mischaracterizing Appellants' position by focusing only on the point that the district court's cited authorities conflict with Supreme Court precedent in *Raytheon v. Hernandez*, 540 U.S. 44 (2003). Appellees misleadingly assert that *Raytheon* "did not even consider, let alone reject, the question of disparate impact premised on neutral insurance terms." AB at 46. While that case involved employment practices, the Supreme Court explicitly discussed the cognizability of ADA claims based on facially neutral practices. *Raytheon*, 540 U.S. at 52–53. Contrary to Appellees' assertions, the scenario here, where Appellants allege they have not been given the same opportunity to access prescription drugs based on a facially neutral policy, is distinguishable from cases like *Weyer*, and directly follows *Raytheon*.

VII. Appellants Clearly Alleged (and Argued) that Appellees Violated ERISA by Denying a Benefit Available Under Appellants' Plans

With respect to Appellants' claims under ERISA, the Appellees' briefs all

make the same mistake that the Appellants pointed out in their Opening Brief: conflating the "Plan" and the "Program." "Appellants' benefit plans are the 'Plans' at issue here. The 'Program' is a set of requirements that Plan members obtain HIV/AIDS Medications only by mail-order or drop-shipment to a CVS-branded pharmacy." OB at 55.

Appellants argued that the Program was implemented without a valid amendment to their Plans. *Id.* at 55–57. Yet Appellees still mischaracterize the record by treating the Plans and the Program as identical, citing several paragraphs from the Amended Complaint specifically discussing the *Program* as an admission that "Does I–V's *plans* ***do not*** provide them a right to in-network prices on specialty drugs purchased at community pharmacies." AB at 50 (emphasis on "plans" added); *see also* Time Warner Br. at 21 (making the same argument); Amtrak Br. at 19 (same).

But that is not what the totality of the Amended Complaint alleges. Appellants did allege that their Plans entitled them to obtain their medications at any in-network community pharmacies, because they had each done so, pursuant to their Plans, before the Program was implemented. EOR 23, 25–26, 29–30, 32, 34–35 ¶¶ 21, 32, 43, 50, 58. But they also alleged that "the implementation of the Program caused a reduction in or elimination of benefits *without a change in actual coverage*." EOR 94 ¶ 196 (emphasis added). Therefore, in light of the duty to read the entirety of the

complaint in the light most favorable to the Appellants, *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 886–87 (9th Cir. 2018), Appellants have sufficiently alleged that the implementation of the Program eliminated a benefit available under their Plans without a valid amendment. There is nothing in the record to suggest otherwise.[10]

Appellees treat this basic argument—that Appellants' plans allow them to obtain their medications at any in-network community pharmacies, and that the Program took away this benefit without actually changing the terms of the Plans—as something concocted for the first time on appeal. As shown above, this is yet another mischaracterization of the record. That assertion was made explicitly in the Amended Complaint, and was stated clearly at the beginning of the ERISA section in Appellants' prior briefing. *See* Plaintiffs' Consolidated Opposition to CVS's and Amtrak's Motions to Dismiss at 16–17. In response to Time Warner and Lowe's arguments on this point, the Appellants argued:

> Plaintiffs allege that they *are entitled* to prescription medication benefits from the in-network pharmacist of their choice *under the terms of their employer sponsored plans*. FAC ¶¶ 20, 31, 43, 50, 58. However, instead of providing Plaintiffs and Class members the prescription medication benefits which would be provided to them if these were not

[10] Lowe's argues that counsel for Appellants conceded at oral argument that the Lowe's plan was validly amended. Lowe's Br. at 19. But the amendment to which counsel referred did not purport to cover the two drugs that John Doe Five takes—Descovy and Prezcobix. 9/28/18 Tr. 61:25–62:4. Therefore, there was no document in the record showing that any Appellant's Plan required that Appellant to obtain his medications through the Program.

> improperly categorized as "specialty medications," *Defendants imposed upon them the Program* that, unlike other medications, require Plaintiffs and Class Members to acquire their medications through the mail or by drop shipment, with no opt-out right.

Opposition to Time Warner and Lowe's Motions to Dismiss at 6 (emphasis added); *see also* Opposition to CVS's and Amtrak's Motions to Dismiss at 16 (using similar language). Counsel for Appellants reiterated the point at oral argument, and the district court acknowledged it. 9/28/18 Tr. at 56:1–57:9. The Appellants made their argument early and prominently. It cannot be properly treated as waived. However, because the district court did not discuss this argument in its opinion, the dismissal of Count V should be reversed, or at least vacated and remanded.

VIII. Reversal of the District Court's Erroneous Holdings Should Revive Appellants' UCL and Declaratory Relief Causes of Action

As to Appellants' claims the Program violates the UCL because it is "unlawful" or "unfair," OB at 57–58; EOR 71, 92 ¶¶ 98, 186, Appellees do not appear to dispute that if this Court reaches a different conclusion and finds that Appellants adequately alleged a predicate violation of the ACA, ADA, ERISA, and/or the Unruh Act for the reasons outlined above, the UCL claim would survive and the district court's ruling would need to be reversed. Appellees also do not appear to dispute that if the claims survive the Court should reverse dismissal of the declaratory relief claim, which would permit the district court to resolve this actual controversy over the rights and relations of the parties relative to the underlying

contracts implicated by the Program. *Societe de Conditionnement en Aluminum v. Hunter Eng. Co.*, 655 F.2d 938, 943 (9th Cir. 1998).

Moreover, at ¶¶ 115, 122–25, 184–193 of the Amended Complaint, EOR 75–78, 92–94, Does I–V specifically explain the facts supporting a claim for unlawfulness based on the violation of the ACA regulation concerning "Essential Health Benefits," 45 C.F.R. § 156.122(e). Appellants do not need to show that the regulation applies to their plans, much less to any CVS entity's provision of services to those plans. Whether the regulation cited by Appellants covers all or some of the Time Warner, Amtrak and Lowe's plans at issue specifically, or CVS Caremark prescription drug coverage generally, is a factual dispute that could not be determined based on the record presented at the district court, and is more an issue for summary judgment. Moreover, Appellees insist in going beyond the pleadings by alleging "Medications requiring 'special handling'—as specialty drugs do, ER-48 ¶ 94—are exempt from the regulation, 45 C.F.R. § 156.122(e)(1)(ii)." But CVS Caremark's argument seems to concede this is a factual issue, since while it claims that such medications require special handling and consultation, it also argues that they can simply drop these "specialized" HIV/AIDS Medications in the mail or to a CVS store for pick-up. In fact, part of the reason this regulation was adopted was to address the needs of individuals with HIV/AIDS. 80 Fed. Reg. 39, 10820–22 (Feb. 27, 2015) ("We … believe that making drugs available only by mail-order could

discourage enrollment by, and thus discriminate against … individuals who have conditions that they wish to keep confidential. We also believe that this provision is important to ensure uniformity in benefit design and consumer choice.") (Addendum C to Appellants' OB).

Appellees also ignore the allegations in the Amended Complaint that the Program is unlawful because it violates Californians' constitutional right of privacy. EOR 71, 75–76 ¶¶ 98, 116–17. Appellants did not need to allege a myriad of violations of privacy to allege a UCL violation, as even a single act would constitute a UCL violation for pleading purposes. *Stop Youth Addiction Inc. v. Lucky Stores Inc.*, 1 Cal. 4th 553, 570 (1998). In addition, Appellants do not need to cite further examples solely to support class action claims, as Appellees assert, since under the UCL and *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), Appellees may seek public injunctive relief without needing to make class allegations. *Blair v. Rent-A-Center*, 928 F.3d 819, 824 (9th Cir. 2019). Finally, "each prong of the UCL is a separate and distinct theory of liability; thus, the 'unfair' practices prong offers an independent basis for relief." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal.App.4th 861, 886 (1999). Appellees' only explanation supporting the district court's dismissal of this independent claim is that "the Complaint makes only conclusory allegations that lack any meaningful detail." AB at 54. But there is no Rule 9(b) requirement for the "unfairness" prong of the UCL, where, as here, the entirety of

the Amended Complaint does not sound in fraud. *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 212 (1983). The Amended Complaint also contains detailed allegations why the Program is "unfair"—it makes individuals with HIV/AIDS obtain their life-sustaining medications in a manner that deprives them of access to necessary in-person consultations, and replaces that access with a system that can, and does, violate their right to privacy. *See, e.g.*, OB at 3, 8. Such allegations satisfy the various tests of unfairness that could apply to this claim. *See Morgan v. AT&T Wireless Serv., Inc.*, 177 Cal. App. 4th 1235, 1254–55 (2009). Such allegations of "unfairness" were particularly ill-suited for resolution on a motion to dismiss based on the variety of factors a court needs to weigh in making such a determination, particularly where there is no analysis of the claim by the district court. *Cel-Tech. Comms. v Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 189–90 (1999).

It was thus error to dismiss the UCL and declaratory relief claims, particularly without leave to amend to address any concerns the district court identified as to such claims where there was no showing it would be futile to do so.

CONCLUSION

This Court should not be led astray by the numerous mischaracterizations of the record upon which Appellees base their argument. This Court should reverse the judgment of the district court.

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Respectfully submitted,

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