



July 20, 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:

Plaintiffs-Appellants respond to CVS's July 17 Rule 28(j) letter, which ignores that *Schmitt v. Kaiser*, 2020 WL 3969281 (9th Cir. July 14, 2020) supports Plaintiffs-Appellants' argument.

Schmitt reaffirms *Alexander v. Choate*'s "meaningful access" standard as the arbiter for assessing Plaintiffs-Appellants' Rehabilitation Act claims. *Id.* at 2. That is, *Choate* "construed Section 504 as including a 'meaningful access' standard that identified which disparate-impact showings rise to the level of actionable discrimination." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013).

Though *Schmitt* did not specifically address whether disparate impact claims are cognizable under Section 504, *Schmitt* noted that Congress intended Section 504 to address unintentional discrimination. *Schmitt*, at *6 n.5; accord *Mark H. v. Lemahieu*, 513 F.3d 922, 935–37 (9th Cir. 2008) (The district court's holding that "§ 504 'merely prohibits intentional discrimination' ... gave the prohibition contained in § 504 itself too cramped a reading.").

This Court should not, as CVS suggests, follow the Sixth Circuit's misguided reliance on *Alexander v. Sandoval*, 532 U.S. 275 (2001)—which considered regulations under Title VI—to conclude Section 504 disparate impact claims are not cognizable. *Doe v. BCBS of Tenn., Inc.*, 926 F.3d 235, 242 (6th Cir. 2019). To the contrary, *Choate* instructed that "too facile an assimilation of Title VI law to § 504 must be resisted." 469 U.S. 287, 293 n.7 (1985); see also *CONRAIL v. Darrone*, 465 U.S. 624 (1984) (Section 504 did not incorporate Title VI's substantive limitations). *Sandoval* did not overrule *Choate*.¹

¹ Although *Schmitt* cited *Crowder v. Kitagawa*, stating that this Court has "relied on Title VI authority to hold § 504 permits disparate impact claims," *Schmitt*, at *5, *Crowder* actually relies on *Choate* and does not reference Title VI. 81 F.3d 1480, 1484 (9th Cir. 1996).

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This Court's post-*Sandoval* decisions reinforce this principle. For example, in *Lemahieu* this Court examined *Sandoval*'s impact on Section 504 and nevertheless concluded that under Section 504 "a disparate effect ... could be entirely accidental..." 513 F.3d at 936. *Schmitt* also supports Plaintiffs-Appellants' proxy discrimination argument. *Schmitt*, at *10; Reply Br. at 14–15, ECF No. 79.

Respectfully submitted,

s/ Daniel Sternberg

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cc: all counsel