No. 20-1374

In the Supreme Court of the United States

CVS PHARMACY, INC.; CAREMARK, L.L.C.; CAREMARK CALIFORNIA SPECIALTY PHARMACY, L.L.C., *Petitioners*,
v.

JOHN DOE, ONE ET AL., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF PETITIONERS

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September 10, 2021

QUESTION PRESENTED

Whether section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination.

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INTEREST OF *AMICI CURIAE*[1]

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs in cases, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

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[1] All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae* and their counsel have made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.

The U.S. Conference of Mayors ("USCM") is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The National School Boards Association ("NSBA") is a non-profit organization founded in 1940 that represents state associations of school boards and the Board of Education of the U.S. Virgin Islands. Its mission is to promote excellence and equity in public education through school board leadership. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 local school districts

serving approximately 51 million public school students. NSBA strives to promote public education and ensure equal educational access for all children. Through legal and legislative advocacy, and public awareness programs, NSBA promotes its members' interests in ensuring excellent public education and effective school board governance. It closely monitors legal issues that affect the authority of public schools and regularly participates as amicus curiae in cases before this Court.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

Amici are well-situated to speak to the potentially devastating consequences to state and local governments if the Court were to expand § 504 of the Rehabilitation Act to encompass disparate-impact liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nothing in Section 504 of the Rehabilitation Act supports disparate-impact liability. By importing a disparate-impact theory into § 504, the Ninth Circuit stretched the Act beyond its text, structure, and history—as the Petitioners' brief ably explains. That alone is reason enough to reverse.

But the Ninth Circuit's interpretation of the Act also risks unleashing an untenable situation for state and local governments that Congress could not possibly have intended to impose. Because federal funding is conditioned on compliance with § 504, expanding the Act to include disparate-impact liability would threaten to deprive state and local governments of critical federal funds without any proof of purposeful discrimination. In addition to arming dozens of federal agencies with the ability to cripple the budgets of states and localities, the mere threat of such a loss could encourage extortionate lawsuits by plaintiffs' lawyers intent on securing unfairly large settlements for even the most frivolous claims.

That severe threat is especially pernicious and unwarranted because a number of existing federal and state legal regimes either expressly provide for disparate-impact claims or have been interpreted to support such claims. In contexts ranging from schools, to land use regulations, to prisons, disabled plaintiffs have ample avenues for relief available to them. Any expansion of § 504 to include disparate-impact claims would thus cover little additional ground while posing a new and disproportionate threat to state and local officials. There is no evidence that Congress intended that

disproportionate result, and this Court should not impose it here.

ARGUMENT

I. Expanding Section 504 To Include Disparate-Impact Liability Could Lead To Crippling Consequences For State And Local Governments.

The Ninth Circuit's expansion of Section 504 is particularly concerning to state and local governments whose federal funding is tethered to compliance with the Rehabilitation Act. The Act's nondiscrimination provisions apply only to recipients of federal funding, and Congress' authority to enact and enforce the provisions derives from the spending power. It thus comes as no surprise that one of the most daunting threats governments face in Rehabilitation Act lawsuits is the loss of critical federal funding. Even when federal agencies choose not to withhold funding for real or alleged violations of § 504, enterprising plaintiffs' lawyers can use the threat of losing federal funding as a bargaining chip against state and local governments. An expansion of § 504 to include disparate-impact claims would vastly (and improperly) increase that bargaining power, leading to extortionate settlements and crippling liability.

Section 504's nondiscrimination mandate is tied directly to participation in federally funded programs. It reads:

> No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or*

> *activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.*

29 U.S.C. § 794(a) (emphasis added). The phrase "program or activity" is defined broadly to include "all the operations of" any government instrumentality "any part of which is extended Federal financial assistance." *Id.* § 794(b).

Section 504's language implements one of the Rehabilitation Act's key legislative objectives—that federal funding be kept clear of discriminatory activities. Several courts have noted that a primary purpose of § 504's nondiscrimination provision is "to ensure that federal funds are not used to facilitate disability discrimination." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 493 (4th Cir. 2005) (citing *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1168–69 (D.C. Cir. 2004); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003); *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002); *Koslow v. Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002)).

That purpose, as reflected in § 504's statutory terms, is tied closely to the source of Congress' authority to promulgate the Act's nondiscrimination mandate. The spending power grants Congress authority to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds," including by "conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."

South Dakota v. Dole, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)). Several courts have concluded that the Rehabilitation Act "is a valid exercise of Congress's spending power," whereby Congress has conditioned the receipt of federal funds on equal treatment of the disabled. *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002); *see also Barbour*, 374 F.3d at 1169–70 (same); *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (rejecting an argument that § 504 "plac[es] overly broad and therefore coercive conditions on federal funds"); *accord Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984) (holding Title VI of the Civil Rights Act of 1964, which uses language similar to § 504, is a valid exercise of the spending power).

Indeed, state sovereign immunity principles necessitate the tight nexus between federal funding and § 504's nondiscrimination mandate. A state or locality's acceptance of federal funding constitutes a "clear declaration" that the state intends to submit to federal-court jurisdiction over § 504 claims. *Barbour*, 374 F.3d at 1163; *see also id.* at 1164 (noting that every circuit to consider the question has concluded that the Rehabilitation Act, as amended, "unambiguously conditions a state agency's acceptance of federal funds on its waiver of Eleventh Amendment immunity").

Violations of the Rehabilitation Act can thus result in the loss of critical federal funding. The Act requires "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty" to implement § 504,

ordinarily "by . . . terminat[ing] . . . or refus[ing] to grant or to continue assistance under such program or activity to any recipient" who violates the provision. 42 U.S.C. § 2000d-1; *see* 29 U.S.C. § 794a(a)(2) (incorporating "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964"). That mandate is integral to the Act's purpose of "avoid[ing] the use of federal resources to support discriminatory practices." *Greater Los Angeles Council on Deafness, Inc. v. Cmty. Television of S. Calif.*, 719 F.2d 1017, 1021–22 (9th Cir. 1983) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704–05 (1979)).

While § 504 violations could threaten virtually all of the one trillion dollars per year the federal government returns to states and localities, *see* Office of Management and Budget, *Table 12.3—Total Outlays for Grants to State and Local Governments, by Function, Agency, and Program: 1940–2022*, https://bit.ly/3jHR5Di, two areas are particularly illustrative: *First*, states and localities receive over $74 billion per year in education funding. *Id. Second*, states receive approximately $500 billion per year in Medicaid funding. *Id.* Any alleged violation of the Rehabilitation Act places both of these critical sources of funding at risk. *See* 34 C.F.R. §§ 104.4, 104.6, 104.61 (specifying procedures for Department of Education to revoke funding for discriminating on the basis of disability); 42 C.F.R. § 435.901 (state Medicaid programs must comply with § 504).

It follows that expansion of § 504 to include disparate-impact liability could potentially cost states and localities billions of dollars. Any of the slew of federal agencies that distribute federal funds could use a § 504 disparate-impact suit against a

state or local government to dismantle that government's budget. And even the threat of losing federal funding is too much for many cash-strapped state and local governments to bear. Thus, it would become a cudgel for the plaintiffs' bar to extract disproportionate settlements. There is no evidence that Congress intended that disproportionate result when it enacted the Rehabilitation Act. And, without clear textual evidence, this Court should not stretch the Act to impose it here.

II. Expanding Section 504 Would Be Especially Unwarranted And Pernicious Because A Number Of Overlapping Federal And State Regimes Already Impose Disparate-Impact Liability.

Moreover, applying Section 504's statutory text as written to exclude disparate-impact liability would hardly leave plaintiffs without any grounds to bring suit where actual discrimination has occurred. And plaintiffs' lawyers are hardly lacking legal avenues for disparate-impact liability in those contexts. Rather, many overlapping federal and state laws already provide disparate-impact liability. Thus, expanding § 504 would add little additional coverage—especially in the contexts of schools, land use regulation, and prisons—while threatening to impose the devastating and disproportionate remedy of revoking federal funding.

This Court has held that other federal non-discrimination statutes provide disparate-impact liability that could capture many of the claims that might be brought under the Rehabilitation Act. For instance, the Court has held that the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, authorizes disparate-impact claims. *See Raytheon*

Co. v. Hernandez, 540 U.S. 44, 53 (2003). The Court grounded that conclusion in Congress' choice to define "discriminate" in the ADA "to include 'utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability' and 'using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability.'" *Id.* (quoting 42 U.S.C. § 12112(b)). More recently, this Court held that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*. *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). The latter ruling was based not on the FHA's text, but instead upon various factors including the FHA's "results-oriented language." *Id.* at 545–46. Whether or not that result was correct, the lower courts are currently bound to recognize disparate-impact claims under the FHA in circumstances that will frequently overlap with potential Rehabilitation Act claims under § 504.

Because the ADA and the FHA already reach expansively into matters concerning state and local governments, it follows that those governments are currently subject to a wide variety of disparate-impact claims by disabled plaintiffs. For instance, municipalities have been held liable under disparate-impact claims related to the provision of basic government services like sidewalks, *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 903, 913 (6th Cir. 2004) (failure to properly install curb-cuts), and have been sued for basic determinations such as setting employment qualifications for city employees, *Roberts v. City of Chicago*, 817 F.3d 561, 566 (7th Cir. 2016) (suit by firefighter applicants on disparate-impact claims

related to failed medical screenings). While the basis for such claims are themselves often questionable, they demonstrate that plaintiffs are not currently lacking for potential disparate-impact theories.

The same is true of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, which requires states receiving funding to ensure local districts provide a free public education appropriate to each child. The IDEA requires states to have in effect

> policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities . . . .

Id. § 1412(a)(24). The statute also requires states to collect and examine data "to determine if significant disproportionality based on race and ethnicity is occurring," with respect to disabled children. *Id.* § 1418(d)(1); *see also* 34 C.F.R. §§ 300.646, 300.647 (providing detailed requirements for school district reporting and data collection formulae). These provisions demonstrate that regardless of § 504, school districts may be subject to liability for disparate-impact claims in the disability context.

These statutes reach many of the contexts where § 504 claims might be brought. In the education context, disparate-impact claims have proceeded on such basic questions as policies denying free breakfast and lunches to students attending private schools. *C.D. v. N.Y. City Dep't of Educ.*, 2009 WL 400382, at *12 (S.D.N.Y. Feb. 11, 2009) (analyzing a disparate-impact claim under the ADA). In the corrections context, a California county settled IDEA

and ADA claims related to the solitary confinement policies of its youth detention center, *G. F. v. Contra Costa Cty.*, 2015 WL 7571789, at *8 (N.D. Cal. Nov. 25, 2015), while in Massachusetts, an ADA claim was permitted to proceed against the state Department of Corrections alleging that its "biological sex-based assignment policy" had a disparate impact on gender-dysphoric inmates, *Doe v. Mass. Dep't of Correction*, 2018 WL 2994403, at *8 (D. Mass. June 14, 2018).

Likewise, disparate-impact claims based on local zoning determinations abound. In *A Helping Hand, LLC v. Baltimore County*, the court refused to dismiss a complaint that the county's zoning ordinance relating to methadone clinics resulted in a disparate-impact prohibited by the ADA. 515 F.3d 356, 358 (4th Cir. 2008). In *Community Services Inc. v. Wind Gap Municipal Authority*, a for-profit caretaker service for the disabled sued a local sewer authority alleging that associating fees with commercial businesses violated the FHA under a disparate-impact theory. 421 F.3d 170, 176 (3d Cir. 2005). In *Sharpvisions, Inc. v. Borough of Plum*, a disabled plaintiff challenged a local ordinance under the FHA, alleging that the "group home" designation of a client's residence amounted to disparate-impact discrimination. 475 F. Supp. 2d 514, 525–26 (W.D. Pa. 2007); *see also Marriott Senior Living Servs., Inc. v. Springfield Twp.*, 78 F. Supp. 2d 376, 389 (E.D. Pa. 1999) (zoning challenge related to multi-unit senior assisted living facility); *Advoc. & Res. Ctr. v. Town of Chazy*, 62 F. Supp. 2d 686, 690 (N.D.N.Y. 1999) (claims related to community residences for people with developmental disabilities). And, in *White v. City of Annapolis*, 439 F. Supp. 3d 522, 542–44 (D. Md. 2020), a plaintiff alleged disparate impact based on the city's alleged decision not to enforce inspection

and licensing requirements in its residential property code.

In addition, disparate-impact claims for disability discrimination are also available under numerous state statutes. For example, Oregon law prohibits an employer from "utiliz[ing] standards, criteria or methods of administration that have the effect of discrimination on the basis of disability." OR REV. STAT. § 659A.112 (c); *accord Melani v. Chipotle Servs., LLC*, 2019 WL 7879951, at *7 n.2 (D. Or. Sept. 4, 2019) (alleging that "Chipotle's three-day exclusion policy has an unlawful, disparate impact on employees who are disabled by" irritable bowel syndrome). And Texas law similarly provides for disparate-impact claims. *See* Tex. Labor Code Ann. § 21.122 ("Burden of Proof in Disparate Impact Cases"); *accord Bishop v. City of Austin*, 2018 WL 3060039, at *4 (Tex. App. June 21, 2018) (alleging that restructuring of the Austin Police Department's organized crime division "resulted in a 'younger and whiter' division"). Washington, too, has a broad antidiscrimination law which allows disparate-impact claims. *See* Wash. Rev. Code Ann. § 49.60.010 *et seq.*; *Kumar v. Gate Gourmet Inc.*, 325 P.3d 193, 204 (Wash. 2014) (reinstating disparate-impact claim related to catering company's restrictive employee meal policy). Finally, California's extremely expansive Fair Employment and Housing Act ("FEHA") allows for disparate-impact claims and is far broader than the ADA or § 504. *See* Cal. Gov't Code § 12940; *Avila v. Cont'l Airlines, Inc.*, 165 Cal. App. 4th 1237, 1246 (2008) (explaining that FEHA proscribes "discrimination resulting from an employer's facially neutral practice or policy that has a disproportionate effect on employees suffering from a disability").

These are just a few of the many statutes that already subject state and local governments to disparate-impact liability. Expanding § 504 to overlap with these protections will only complicate the complex compliance regime small governments face, while imposing the altogether new threat of losing critical federal funding. While that threat, and the accompanying increased compliance costs, will provide little benefit to disabled plaintiffs, it could coerce state and local governments into settlements in order to avoid the disproportionate threat of losing federal funding.

There is no basis whatsoever to assume that Congress wished to place such enormous power in the hands of enterprising plaintiffs' lawyers. On the contrary, by declining to include statutory language contemplating disparate-impact claims, Congress made a legislative decision to exclude such theories. This Court should accordingly reject the Ninth Circuit's atextual interpretation of § 504 and hold that the Act does not provide for disparate-impact liability.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to reverse.

Respectfully submitted,

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