No. 20-1374

IN THE

Supreme Court of the United States

CVS PHARMACY, INC., *et al.*,
Petitioners,
v.
JOHN DOE, ONE, *et al.*,
Respondents.

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

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND VIRGINIA IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

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

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

The Rehabilitation Act of 1973 seeks the "full inclusion and integration" of individuals with disabilities "in[to] the economic, political, social, cultural, and educational mainstream of American society." 29 U.S.C. § 701(a)(3)(F). Section 504, one of the Act's landmark provisions, serves that goal by prohibiting discrimination based on disability in programs or activities receiving federal funds. *Id.* § 794.

Filtered through the unique lens of Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), this case presents a relatively novel Section 504 claim: that the facially neutral provisions of a health insurance plan discriminate against certain individuals with disabilities. While that application of Section 504 may be new, the framework for evaluating such a claim is not. Nearly four decades ago, this Court explained in *Alexander v. Choate*, 469 U.S. 287 (1985), that, under Section 504, individuals with disabilities must have "meaningful access" to a particular government benefit or program. *Id.* at 301.

Choate's logic was sound. There, this Court noted precisely what Congress also observed when crafting Section 504: often, individuals with disabilities faced exclusion from core aspects of American society—healthcare, education, public parks, transportation, and beyond—not through invidious animus, but through thoughtlessness. Many of the largest obstacles to full participation by individuals with disabilities, in other words, resulted from uncritical inertia: the perpetuation of longstanding norms that simply

did not consider how individuals with disabilities would access particular programs or services.

As the Court explained, any non-discrimination mandate embodied in the Rehabilitation Act therefore *had* to reach beyond intentional discrimination. Although the Court only assumed, without deciding, that disparate impact claims would be cognizable (*Choate* ultimately rejected the claims at issue in that case), the opinion's articulation of "meaningful access" has become a mainstay of Section 504 jurisprudence ever since.

Attempting to reverse an unfavorable Section 1557 ruling below, petitioners urge this Court to repudiate *Choate*. But jettisoning *Choate* would be a mistake. The District of Columbia and the States of California, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia ("*Amici* States") submit this brief as *amici curiae* in support of neither party to urge this Court, however it ultimately resolves plaintiff-respondents' specific claims, to retain *Choate*'s "meaningful access" standard and to reject a requirement of intentional discrimination for Section 504 claims.

As explained further below, *Choate*'s standard—whether initially based on an assumption or not—is now firmly embedded in American law. Over the past three-and-a-half decades, nearly every federal appellate court has adopted it. Congress has ratified it and imported it into new contexts. Executive Branch agencies have continuously applied it. And, most importantly here, the *Amici* States—along with their

agencies, businesses, and residents—have relied on the "meaningful access" standard as settled law in crafting their own policies and structuring their own conduct.

Thankfully, there is no need to upset the settled expectations of the States and three branches of the federal government. This Court has multiple routes to resolving this case while keeping *Choate* and its guarantee of "meaningful access" intact. Doing so would not only uphold the reliance interests of the *Amici* States, but would also, in one scholar's famous formulation, continue to make real for individuals with disabilities their "right to live in the world." Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 Calif. L. Rev. 841, 848 (1966). This Court should reject petitioners' invitation to cast *Choate* aside.

SUMMARY OF ARGUMENT

1. Congress enacted the Rehabilitation Act to fully integrate individuals with disabilities into core aspects of American life. In drafting Section 504, Congress recognized that the social logic of disability discrimination, while related to other forms of class-based subordination, functioned differently than canonical instances of intentional discrimination. Often, the primary engines of disability-based exclusion were *unintentional*: the thoughtless design or implementation of core programs—schools, parks, health services, or transportation—that simply failed to consider how individuals with disabilities might obtain access. The Act therefore sought to target the structural barriers excluding individuals with disabilities,

rather than simply prohibiting intentional discrimination.

That central insight—that the largest structural barriers to full participation by individuals with disabilities were often unintentional—formed the backbone of this Court's opinion in *Choate*. There, the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped," 469 U.S. at 299, and even while rejecting the claims at issue, set forth a workable standard to effectuate Section 504's express statutory purpose: "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers," *id.* at 301. That opinion captured both the nature of disability discrimination, and Congress's deliberate attempt to reach beyond an animus-based conception of exclusion.

2. Irrespective of whether *Choate* technically left open the question presented here, this Court should retain *Choate*'s "meaningful access" standard. In the wake of *Choate*, nearly every federal appellate court has adopted the "meaningful access" standard as binding circuit law. Congress has ratified the standard, then imported it into new contexts. Numerous administrations—across time and ideology—have endorsed it and implemented it. And, most importantly for *Amici* States, states have relied on it in structuring their own conduct; crafting their own codes; and advising their own citizens. Regardless of *Choate*'s initial precedential status, *stare decisis* considerations strongly counsel toward retaining the "meaningful access" standard today.

3. This Court has multiple routes for doing so. If this Court chooses to uphold the opinion below, the path to reaffirming *Choate*'s analysis of Section 504 is clear. But even if this Court reverses or remands, it need not disturb the "meaningful access" standard: just as in *Choate* itself, should the Court conclude that petitioner's plan passes muster under the ACA, it could reject the specific claims at issue without addressing the precise boundaries of Section 504 disparate impact liability in all instances.

In any event, however this Court proceeds, it should reject any invitation to address the availability of disparate impact claims under Section 504 *regulations*. The Court granted certiorari only on the statutory question, and a long line of precedent makes clear that questions addressing a *statute's* cause of action are analytically and doctrinally distinct from questions about the scope and enforceability of implementing regulations. Those issues were developed nowhere below; if and when the Court confronts those questions, it should do so with the benefits of a complete record and the fully aired arguments of interested parties. It should not address them in the first instance here.

ARGUMENT

I. *Choate* Properly Construed Section 504.

Congress enacted the Rehabilitation Act of 1973 "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion." 29 U.S.C. § 701(b)(1). "[D]isability," that landmark legislation recognized, "is a natural part of the human experience," one that "in no way

diminishes the right of individuals to . . . live independently;" "enjoy self-determination;" "make choices;" "contribute to society;" and "pursue meaningful careers." *Id.* § 701(a)(3). The Rehabilitation Act therefore sought nothing less than the "full inclusion and integration" of individuals with disabilities "in[to] the economic, political, social, cultural, and educational mainstream of American society." *Id.* § 701(a)(3)(F). Section 504 of the Act effectuates this mandate by prohibiting discrimination based on disability in programs or activities receiving federal funds. *Id.* § 794.

In some ways, the Rehabilitation Act resembled earlier antidiscrimination statutes. *See Cmty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 509 (1983) (explaining how, in regulating federal funding recipients, Section 504 "was patterned after Title VI of the Civil Rights Act of 1964"). But the Act's vision of prohibited discrimination was, at the time, novel. Congress recognized that disability discrimination was unique in crucial respects. To be sure, disability discrimination bears parallels to race- and gender-based discrimination, and Congress was aware of instances of abuse or harassment directed toward individuals with disabilities. *See Choate*, 469 U.S. at 296 n.12 (citing research of the United States Commission on Civil Rights). But as the architects of Section 504 and its predecessors explained, the primary engines of disability-based exclusion were just as often *unintentional*. The largest barriers to full participation in American society often took the form of "oversights," 117 Cong. Rec. 45,974 (1971) (statement of Rep. Vanik), or instances of "societal neglect," 119 Cong. Rec. 5883 (1973) (statement of Sen. Cranston), that

simply failed to consider how the design and implementation of core government programs—schools, parks, health services, or transportation—might be inaccessible to individuals with disabilities. Therefore, seeking to end the continued "invisibility of the handicapped" in all aspects of governance, the Act rejected a narrow conception of intentional disparate treatment, and instead targeted the *barriers* excluding individuals from the full spectrum of American life. 118 Cong. Rec. 525 (1972) (statement of Sen. Humphrey).

That central insight—that the largest structural barriers to full participation by individuals with disabilities were often unintentional—formed the backbone of *Choate*, this Court's seminal case on Section 504. The *Choate* Court confronted the question "whether proof of discriminatory animus is always required to establish a violation of § 504 and its implementing regulations, or whether federal law also reaches action by a recipient of federal funding that discriminates against the handicapped by effect rather than by design." 469 U.S. at 292. Although the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped," *id.* at 299, and ultimately rejected the challenge in that case, the opinion's core logic confirmed that Section 504 reaches beyond intentional discrimination—because it must.

As the Court in *Choate* explained, disability discrimination is often the product not of "invidious animus, but rather of thoughtlessness and indifference—

of benign neglect." *Id.* at 295. Seemingly unremarkable features of the lived environment—a narrow set of stairs; a sidewalk without curb-cuts; a purely visual instruction booklet; a muffled audio announcement—can sometimes form the largest structural obstacles to full participation by individuals with disabilities. Recognizing that these barriers simply reflected longstanding but well-intentioned norms, the Court observed that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296-97. Section 504 therefore had to "reach[] at least *some* conduct that has an unjustifiable disparate impact upon the handicapped." *Id.* at 299 (emphasis added).

At the same time, the *Choate* Court correctly "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504." *Id.* As the Court explained, "[b]ecause the handicapped typically are not similarly situated to the nonhandicapped," a limitless disparate impact regime "could lead to a wholly unwieldy administrative and adjudicative burden" on the recipients of federal funds. *Id.* at 298.

Accordingly, in "respons[e]" to these "two powerful but countervailing considerations," *Choate*, 469 U.S. at 299, the Court announced a workable standard to effectuate Section 504's express statutory purpose: "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers," *id.* at 301. Such a standard, the Court explained, "keep[s] § 504 within manageable

bounds," *id.* at 299, but also recognizes Congress's critical insight when passing the Rehabilitation Act: that, often, "discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus," *id*. at 296.

Choate, in short, correctly concluded that Section 504 is not a pure disparate impact regime. But the opinion just as correctly and clearly rejected the proposition that Section 504 reaches only intentional discrimination. That conclusion captured Congress's clear intent to shield funding recipients from limitless liability, but also to reach beyond an animus-based conception of exclusion.

II. *Choate* Has Engendered Serious Reliance Interests On The Part of States.

Choate's well-reasoned standard has governed Section 504 claims for nearly four decades. But according to petitioners, *Choate* is "outdated," with "no place in modern statutory interpretation." Pet'rs Br. 11, 25. *Choate*'s lengthy explanation of the "meaningful access" standard and the need to reach beyond intentional discrimination, petitioners contend, was based on a mere "assumption" that "some" theoretical disparate impact claims "might" be cognizable. Pet'rs Br. 24. Because *Choate* was merely a thought experiment, petitioners argue, it "provide[s] no basis" for rejecting an intentional discrimination requirement today. *Id.*

Those claims fail to comprehend *Choate*'s impact. Whatever *Choate*'s status when decided, it has since become the binding law of the land. *Stare decisis* considerations thus strongly counsel toward retaining its "meaningful access" standard today.

To begin, *Choate*'s "meaningful access" standard currently governs most of the geographic United States. In the nearly four decades since *Choate* was decided, nearly every circuit has adopted some form of the test. *See, e.g.*, *Ruskai v. Pistole*, 775 F.3d 61, 78-79 (1st Cir. 2014) ("[P]roof of discriminatory animus is not always required in an action under section 504" because "a case in which persons with disabilities were denied meaningful access to a government program or benefit . . . may fairly be described as the primary target of section 504."); *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 197 (2d Cir. 2014) ("A public entity discriminates against a qualified individual with a disability when it fails to provide 'meaningful access' to its benefits, programs, or services."); *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1384-85 (3d Cir. 1991) (applying the meaningful access standard and explaining that "a plaintiff need not establish that there has been an intent to discriminate in order to prevail under § 504"); *Nat'l Fed'n of the Blind, Inc. v. Lamone*, 813 F.3d 494, 504 (4th Cir. 2016) (citing *Choate* and noting the importance of addressing "questions of discriminatory effects"); *Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1988) (applying *Choate*'s meaningful access standard); *Durand v. Fairview Health Servs.*, 902 F.3d 836, 842 (8th Cir. 2018) (same); *Mark H. v. Lemahieu*, 513 F.3d 922, 936-37 (9th Cir. 2008) (same); *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1197 (10th Cir. 2008) ("actionable disparate impact requires analysis of whether the individual is otherwise qualified and whether reasonable accommodations may provide meaningful access"); *United States v. Bd. of Trs.*, 908

F.2d 740, 747-49 (11th Cir. 1990) (adopting and applying *Choate*'s meaningful access standard); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 (D.C. Cir. 2008) (same). Residents of the *Amici* States—and the states themselves—have accordingly operated against a backdrop of the "meaningful access" standard as binding law.

Equally important, Congress has ratified *Choate*'s reading of Section 504. This Court frequently deploys the maxim that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). That canon of interpretation applies with special force here: the Rehabilitation Act has seen its fair share of red ink, but not a drop has touched *Choate*'s "meaningful access" standard.

Shortly after *Choate* was decided, for example, Congress amended the Rehabilitation Act. Rather than correct the Court for stretching Section 504 beyond intentional discrimination, Congress *expanded* the statute's definition of "program or activity" to include "all of the operations of" a regulated entity. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988). And that was hardly the final word; multiple Congresses have since re-enacted the Rehabilitation Act with updates and various amended provisions. *See, e.g.*, Americans with Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, 104 Stat. 327, § 512 (1990) (revising the Rehabilitation Act's definition of "individual with handicaps" to exclude "illegal use of drugs"); Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat.

4344 (1992) (changing the term "handicapped person" to "individual with a disability" and aligning portions of Title I of the ADA with Section 504); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (revising the meaning and interpretation of the definition of "disability" under § 504). Indeed, Congress has even adopted *Choate*'s standard in new contexts: when enacting Title II of the ADA, its drafters emphasized that "it is . . . the Committee's intent that [ADA Title II] . . . be interpreted consistent with *Alexander v. Choate*." 156 H.R. Rep. No. 101-485, pt. 2, at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 267, 367. Where, as here, "Congress remains free to alter what [the Court] ha[s] done"—but has not only retained but *expanded* the Court's reading—"[c]onsiderations of *stare decisis* have special force." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

The Executive Branch, too, has consistently interpreted Section 504 in harmony with the *Choate* Court. Even before the Supreme Court addressed Section 504's scope, the former Department of Health, Education, and Welfare authoritatively interpreted the Rehabilitation Act to prohibit actions having "the purpose *or effect* of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons." 42 Fed. Reg. 22,676, 22,679 (May 4, 1977) (codified at 45 C.F.R. § 84.4(b)(4)) (emphasis added). This Court has made clear that these regulations "particularly merit deference" because "the responsible congressional committees participated in their formulation, and both these committees and Congress itself endorsed the regulations in their final form." *Consol. Rail*

Corp. v. Darrone, 465 U.S. 624, 634 (1984); *see Traynor v. Turnage*, 485 U.S. 535, 549 n.10 (1988) (explaining that these regulations "were drafted with the oversight and approval of Congress and therefore constitute an important source of guidance on the meaning of § 504" (internal quotation marks and citations omitted)). And, even after *Choate*, those regulations have remained in force; subsequent administrations—including the two most recent—have consistently applied Section 504, among other anti-discrimination statutes, to situations beyond intentional discrimination. *See, e.g.*, Press Release, U.S. Dep't of Health & Human Servs., *OCR Provides Technical Assistance to Ensure Crisis Standards of Care Protect Against Age and Disability Discrimination* (Jan. 14, 2021) (reading Section 504, as incorporated into Section 1557, to prohibit "resource-intensity and duration of need as criteria for the allocation or re-allocation of scarce medical resources" to prevent individuals with "disability from being given a lower priority to receive life-saving care due to such need");[1] Ctrs. for Medicare & Medicaid Servs., *Final 2016 Letter to Issuers in the Federally-Facilitated Marketplace* 41 (Feb. 20, 2015) (requiring that health plan issuers "offer[] a sufficient number and type of drugs needed to effectively treat [certain] conditions").[2]

This unbroken understanding of Section 504—shared by all three branches of government over multiple decades—forms the stable backdrop against which the *Amici* States operate. Indeed, States have relied on the settled understanding of the federal

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[1] *Available at* https://bit.ly/3A1v9ZF.

[2] *Available at* https://bit.ly/2X2ZHM4.

"meaningful access" standard and its implementing regulations.

Some states expressly incorporate the federal requirements into their own codes. *See, e.g.*, Wash. Admin. Code § 284-43-5950 (2021) (requiring all health plan issuers to "take fair and reasonable steps to provide meaningful access to each enrollee or individual likely to be encountered who has . . . a disability consistent with federal rules and guidance in effect on January 1, 2017, including those implementing . . . Sec. 1557 of the Affordable Care Act"). Others have independently codified the substantive standards in various state contexts. *See, e.g.*, Cal. Code Regs. tit. 2, § 11154(i)(1) (2021) (prohibiting any funding recipient from "utiliz[ing] criteria or methods of administration that have the purpose or effect of subjecting a person to discrimination on the basis of . . . a physical or mental disability"); Md. Code Regs. 10.08.03.03(B) (2021) (prohibiting applicants for state grant funds for developmental disability facilities from choosing a location "with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this chapter applies, on the grounds of . . . disability"). And still others have adapted or altered core policies or programs to guarantee meaningful access for individuals with disabilities. *See, e.g.*, Haw. Code R. § 4-29-22(c) (2021) (providing that certain "service animals and guide dogs shall immediately be released to their designated address following examination and verification" rather than serve the standard antirabies quarantine); Va. Code Ann. § 24.2-704 (2021) (making permanent accessibility accommodations for

voters "requir[ing] assistance due to a visual impairment or print disability").

As these examples reflect, compliance with Section 504 looks different for each state depending on the specific context. But the upshot is that *all* states, as recipients of federal funds and therefore regulated parties under Section 504, have long operated against the backdrop of *Choate*'s "meaningful access" requirement. Even if *Choate*'s interpretation was merely an "assumption," it has since become the authoritative interpretation of Section 504's scope. States have adapted to its standard, structuring their programs, conduct, and contracts with third parties accordingly.

Jettisoning *Choate* at this late stage would therefor eviscerate the "settled rights and expectations" of the states and the public they represent. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991). Indeed, "[c]onsiderations in favor of *stare decisis* are at their acme in cases . . . where reliance interests are involved," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), and departing from an earlier decision is particularly inappropriate where, as here, the prior rule has "serve[d] as a guide to lawful behavior," *United States v. Gaudin*, 515 U.S. 506, 521 (1995). These considerations "carr[y] enhanced force when a decision," like *Choate,* "interprets a statute." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 456 (2015). And that remains true even when "a decision has announced a 'judicially created doctrine' designed to implement a federal statute," and regardless of "whether [the] decision focused only on statutory text or also relied . . . on the policies and purposes animating the law." *Id.*

III. This Court Has Multiple Paths To Resolving This Case.

As noted above, the *Amici* States do not take a position on whether plaintiff-respondents have stated a valid claim under Section 1557 of the Affordable Care Act. But, regardless of how this Court rules on the specific allegations presented here, the Court can—and should—leave *Choate*'s well-settled "meaningful access" standard in place.

Of course, if this Court chooses to uphold the decision below, the path to reaffirming *Choate*'s analysis of Section 504 is clear. Even if this Court reverses or remands, however, it need not disturb the "meaningful access" standard. That disposition is best exemplified by *Choate* itself: there, the Court rebuffed a challenge to Tennessee's reduction of covered in-patient hospital days under Medicaid, rejecting the plaintiffs' expansive theory that Section 504 imperiled the state's neutral action. 469 U.S. at 309. But, as explained in Part I, that decision made clear that because the court of appeals had overreached, there was no need to define the precise scope of Section 504 beyond rejecting the challenge at issue. This Court could proceed similarly: should it conclude that CVS Pharmacy's plan passes muster under Section 1557, it need not address the precise boundaries of Section 504 disparate impact liability in all instances. That course is particularly wise because the complexities of the commercial health care arena make this case a potentially poor vehicle for confronting Section 504's application in other, more traditional, contexts.

However this Court chooses to proceed, the *Amici* States wish to emphasize one final point. Although

this case presents only the question of whether the statutory text of Section 504 authorizes disparate impact claims, petitioners appear to challenge the validity of disparate impact claims under Section 504 *regulations* as well. *See* Pet'rs Br. 27-28. This Court need not, and should not, address those questions here.

This Court granted certiorari on only the statutory question of "[w]hether section 504 of the Rehabilitation Act, and by extension the ACA, provides a disparate-impact cause of action for plaintiffs alleging disability discrimination." Pet. for Cert. at I; *see id.* (describing the ACA's "private right of action"). A long line of precedent confirms that questions addressing a *statute*'s cause of action are analytically and doctrinally distinct from questions about the scope and enforceability of implementing regulations.

Take Title VI. This Court has held, most notably in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that Title VI's statutory text prohibits only intentional discrimination. *Id.* at 287. But numerous subsequent cases confirmed that, despite that conclusion, agency regulations implementing Title VI may validly prohibit disparate impacts. In *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983), for example, a majority of this Court concluded that plaintiffs suing under agency disparate impact regulations did not need to prove discriminatory intent. *Id.* at 584. And *Choate* further dispelled any doubt. There, a unanimous Court confirmed that even though "Title VI itself directly reached only instances of intentional discrimination," "actions having an unjustifiable disparate impact on

minorities could be redressed through agency regulations designed to implement the purposes of Title VI." 469 U.S. at 293. In short, the scope of Section 504 and its implementing regulations are distinct questions. Should this Court conclude that the statute on its face reaches only intentional discrimination, that ruling would not, by itself, resolve the scope of Section 504's implementing regulations.

Nor would it resolve whether Section 504 creates a private right of action for those regulations. As *Alexander v. Sandoval*, 532 U.S. 275 (2001), confirmed, the question whether Congress "intended a private right of action to enforce disparate-impact regulations," *id.* at 284, is a context-specific inquiry that looks to the "text and structure" of the "[regulation-]authorizing portion" of the statute, not to its underlying substantive scope, *id.* at 288-89. Any suggestion that *Sandoval*'s analysis of Title VI applies equally to Section 504, moreover, is mistaken: *Sandoval* expressly distinguished the Rehabilitation Act's "regulations clarifying . . . disparate impacts upon the handicapped," *id.* at 285, explaining that—unlike Title VI's disparate impact regulations—Section 504's regulations were presumptively enforceable because they represented the "authoritative interpretation of the statute." *Id.* at 284.

As these cases make clear, questions about the relative scope or enforceability of disparate impact regulations implicate thorny (and distinct) questions of statutory interpretation. But neither the court below, nor the Sixth Circuit in *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235 (6th Cir. 2019), ad-

dressed the validity or enforceability of agency regulations in their opinions. Nor did any party develop those arguments during the adversarial process below.

If and when this Court confronts those difficult questions, it should do so with the benefits of a complete record and the fully aired arguments of interested parties (including the *Amici* States). It need not, and should not, address them in the first instance here.

CONCLUSION

The *Amici States* urge this Court to retain *Choate*'s "meaningful access" standard regardless of how it resolves plaintiff-respondents' claims.

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