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Mind the Gap: Time to Rehabilitate Section 504 to Prohibit Disparate Impact Discrimination

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Abstract

Section 504 of the Rehabilitation Act of 1973 is a landmark civil rights statute that prohibits disability-based discrimination by recipients of federal funding. While the statute plays a crucial role in protecting the rights of people with disabilities in the United States, the scope of the discrimination it prohibits remains unsettled. Amid growing judicial skepticism, executive rollbacks of diversity and inclusion initiatives, attacks on disparate impact theory and the erosion of administrative enforcement mechanisms, the statute's continued viability as a tool for challenging disparate impact discrimination is at risk.

This Article argues that disparate impact liability under § 504 is essential for addressing the often unintentional, but harmful exclusion of individuals with disabilities, frequently resulting from acts of "thoughtlessness, indifference and benign neglect." It explores the ambiguity regarding whether § 504 provides a private right of action for disparate impact claims, addresses the critical role of agency enforcement and examines the growing threats posed by the broad exercise of executive power and judicial and administrative retrenchment.

In conclusion, the Article calls for urgent Congressional action to amend § 504 or enact clarifying legislation. Recognizing that federal reform may not be forthcoming, the Article also suggests alternative strategies, including state-level legislation and grassroots advocacy, as means to preserve and advance the protections that disparate impact theory affords to people with disabilities.

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Introduction

Several decades ago, Congress took affirmative steps to establish broad civil rights protections for individuals with disabilities. Section 504 of the Rehabilitation Act of 1973 (§ 504)[1] was a landmark piece of legislation and remains a cornerstone of federal anti-discrimination law. A precursor to the Americans with Disabilities Act (ADA),[2] § 504 was groundbreaking in its reach, prohibiting discrimination in any program or activity by governmental and private recipients of federal funding[3] through the Congressional Spending Clause.[4] As one of the earliest legal protections for individuals with disabilities, § 504 has been pivotal in the effort to secure basic civil rights in areas such as education, employment, housing, and healthcare, among other areas of public life. In the fight for equality, disparate impact discrimination claims, alleging liability for seemingly neutral policies or practices that disproportionately impact a protected group, have been critical to supporting disability rights. Individuals with disabilities are frequently disadvantaged by practices and policies that, while not intentionally discriminatory, still result in unequal outcomes. However, despite § 504's foundational role, it remains unclear whether it prohibits and provides a private right of action for both disparate treatment and disparate impact discrimination.

In the current climate, in which the executive branch is making significant efforts to dismantle so-called diversity, equity, and inclusion (DEI) and diversity, equity, inclusion, and accessibility (DEIA) initiatives

1. 9 U.S.C. § 794.

2. 42 U.S.C. §§ 12101–12213.

3. Section 504's prohibition on discrimination reaches any "program or activity receiving Federal financial assistance" and includes federal executive agencies and the U.S. Postal Service. 29 U.S.C. § 794(a). By comparison, the ADA extends further to include entities that do not receive federal financial assistance, including state and local governments. The ADA does not apply to federal executive agencies or the U.S. Postal Service; rather, these entities are covered under § 504 of the Rehabilitation Act. *See* 29 U.S.C. § 794(a). In many cases, the definition of "program or activity" under § 504 has been interpreted broadly. 29 U.S.C. § 794(b). *See* Brief for National Conference of State Legislatures et al. as Amici Curiae Supporting Petitioners, CVS Pharmacy, Inc. v. Doe, , No. 20-1374 (U.S.), (citing 29 U.S.C. §794(a)) (2018) (defining "program or activity" broadly to include "all operations of" any government instrumentality "any part of which is extended Federal financial assistance"). *See also,* JARED P. COLE, CONG. RSCH. SERV., LSB10459, APPLICABILITY OF FEDERAL CIVIL RIGHTS LAWS TO RECIPIENTS OF CARES ACT LOANS (2020).

4. U.S. CONST. art. 1, § 8, cl. 1.

in both the public[5] and private sectors[6] and simultaneously targeting disparate impact theory,[7] critical to identifying the individual impact of systemic discrimination, there is increased urgency to strengthen statutory safeguards for vulnerable populations, such as the people with disabilities. These efforts, coupled with the lack of clarity in the text of the statute, pose a serious threat to the continued viability of § 504 as a tool for fully enforcing the rights of people with disabilities.

Currently, both private rights of action for disparate impact claims and agency enforcement mechanisms face threats.[8] Unlike claims of intentional discrimination, the availability of a private right of action for disparate impact hangs precariously on a forty-year-old Supreme Court precedent, and the federal courts remain split on the issue.[9] Recent Supreme Court decisions and shadow docket activity[10] demonstrate a growing willingness to overturn precedent and a progressive narrowing of disparate impact theory. The Court's recent decisions have also imposed substantial constraints on the powers of federal administrative agencies, which play a key role in ensuring the comprehensive enforcement of protections provided under § 504 and other

5. During the first days in office for his second term, President Trump issued four initial executive orders directly aimed at eliminating policies promoting diversity, equity and inclusion in the public sector. *See* Initial Rescissions of Harmful Executive Orders and Actions, Exec. Order No. 14148, 90 Fed. Reg. 8237 (Jan. 20, 2025); Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 20, 2025); Ending Illegal Discrimination and Restoring Merit-Based Opportunity, Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025); and Ending Radical Indoctrination in K-12 Schooling, 90 Fed. Reg. 8853 (Jan. 29, 2025).

6. *See, e.g.*, Memorandum on Preventing Abuses of the Legal System and the Federal Courts, 2025 DAILY COMP. PRES. DOC. No. 00387 (Mar. 21, 2025); Addressing Risks from Perkins Coie LLP, Exec. Order No. 14230, 90 Fed. Reg. 11781 (Mar. 6, 2025) (directing the EEOC to look at large, influential, or industry leading law firms and their compliance with race-based and sex-based non-discrimination law).

7. President Trump issued Restoring Equality of Opportunity and Meritocracy, Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025), calling for the repeal of disparate impact regulations under Title VI, as well as directing all federal agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability," and directing the Attorney General and the Chair of the EEOC to review all pending matters that rely on a theory of disparate-impact liability and to "take appropriate action" consistent with the policy stated in the Executive Order.

8. *See infra* Part III.

9. *See* Alexander v. Choate, 469 U.S. 287 (1985). *See infra* Section II.B.i.

10. The term "shadow docket," coined by Professor William Baude, refers to the set of decisions and orders issued by the United States Supreme Court outside of the regular, public docket of argued and fully briefed cases. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015). The growing use of the shadow docket has drawn increasing attention from legal scholars, lawmakers and the public. *See, e.g.*, Stephen I. Vladeck, *Putting the "Shadow Docket" in Perspective*, 17 HARV. L. & POL'Y REV. 289, 289–90 (2023).

antidiscrimination statutes.[11] For example, the Department of Justice recently revoked previously issued guidance clarifying how disparate impact may be assessed under Title VI, which served as a model for § 504.[12]

This Article emphasizes that without clarification of the scope of § 504, the rights of people with disabilities are increasingly vulnerable to legal challenges, especially given the current political and legal pressures. The continued uncertainty will further undermine protections against disparate impact discrimination, weakening disability rights. The rollback of DEI and DEIA initiatives, and the erosion of federally mandated supports and services under § 504 for many students with disabilities, further underscores the urgent need for Congress to act. Part I of this Article discusses the importance of disparate impact theory in protecting the rights and equal access of people with disabilities. It also discusses the role of § 504 in prohibiting discriminatory practices, while highlighting some of the concerns raised by entities subject to § 504, such as compliance challenges and the scope of its application. Part II demonstrates why the existence of a private right of action for disparate impact discrimination under § 504 is in question, by examining its text, judicial rulings, and recent significant legal challenges. Part III discusses the judicial trends and executive actions that potentially threaten the protections of § 504 through either private suits or agency enforcement. These include Supreme Court decisions that suggest that, if the questions were presented to the Court, it would reject the existence of disparate impact claims and nullify the regulations prohibiting disparate impact discrimination. Part IV advocates for Congress to act by either amending § 504 or issuing clarifying legislation. However, as such action may be unlikely in the current political environment, it suggests state legislation and grassroots advocacy as the most viable pathways towards reform.

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11. Enforcement is carried out by the federal agency that provides the financial assistance to the relevant program or activity. For example, the U.S. Department of Housing and Urban Development (HUD) enforces § 504 with respect to HUD funded programs and is one of several agencies that have implemented regulations incorporating § 504's protections. In 1988, HUD issued its § 504 regulations for federally conducted programs and activities. *See* General Prohibitions Against Discrimination, 24 C.F.R. § 9.130.

12. *See* Rescinding Portions of Department of Justice Title VI Regulations to Conform More Closely with the Statutory Text and to Implement Executive Order 14281, 28 C.F.R. pt. 42, (Dec. 10, 2025) (rescinding portions of the regulations that prohibit conduct having a disparate impact) *See also* U.S. DEP'T OF JUST., CIV. RTS. DIV., TITLE VI LEGAL MANUAL, SECTION IV-INTERPLAY OF TITLE VI WITH TITLE IX, SECTION 504, THE FOURTEENTH AMENDMENT, AND TITLE VII (2024) ("Title VI served as the model for several subsequently promulgated statutes that prohibit discrimination on other grounds in federally assisted programs or activities, including Title IX (sex discrimination in education programs) and Section 504 (disability discrimination)).

I. The Importance of Disparate Impact

The legal system generally recognizes both disparate treatment and disparate impact discrimination. The Supreme Court's decision in *Griggs v. Duke Power Co.* marked a key moment in the development of disparate impact doctrine under Title VII of the Civil Rights Act of 1964 (CRA).[13] The case involved an employment criterion for obtaining higher-paying jobs at an electricity generating plant that disproportionately and adversely impacted Black employees and was shown to be unnecessary for performing the jobs in question.[14] Despite Duke Power's claim that the requirement was neutral and not intentionally discriminatory,[15] the Court ruled that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[16] In the wake of *Griggs*, disparate impact has spread to other areas of the law beyond employment law. The Supreme Court, for example, has interpreted the doctrine to apply, inter alia, to housing, under the Fair Housing Act (FHA),[17] as well as to disability.[18] While disparate impact theory has not been without its detractors, the courts have generally adopted it as a means to address unintentional discrimination.[19]

A. Disability Rights

As with racial discrimination in employment, discrimination based on disability is frequently the result of facially neutral laws and policies that are disparate in "effect" rather than "by design."[20] Discrimination[21]

13. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

14. *Id.* at 431–32.

15. *Id.* at 432.

16. *Id.* at 431.

17. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 539 (2015) ("Recognition of disparate-impact claims is consistent with the FHA's central purpose . . . .[T]he FHA . . . was enacted to eradicate discriminatory practice within a sector of our Nation's economy.").

18. *See* Alexander v. Choate, 469 U.S. 287, 299 (1985).

19. For example, in two pivotal opinions decided by the Supreme Court, Justice Thomas opposed disparate impact theory. *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (Thomas, J., concurring) ("The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate impact."); *see also Tex. Dep't of Hous. and Cmty. Affs.,* 576 U.S. at 547 (Thomas, J., dissenting) ("[T]he foundation on which the Court builds its latest disparate-impact regime—*Griggs v. Duke Power Co.*—is made of sand. That decision, which concluded that Title VII of the Civil Rights Act of 1964 authorizes plaintiffs to bring disparate-impact claims represents the triumph of an agency's preferences over Congress' enactment and of assumption over fact. Whatever respect *Griggs* merits as a matter of *stare decisis*, I would not amplify its error by importing its disparate-impact scheme into yet another statute.") (internal citations omitted).

20. Alexander v. Choate, 469 U.S. 287, 297 (1985).

21. Section 504 uses the term "discrimination" without specifying the scope of the

against people with disabilities is often unintentional, resulting from acts of "thoughtlessness and indifference—of benign neglect,"[22] but is still harmful to individuals. These everyday instances of neglect are ubiquitous: voters are deprived of their rights because ballot return methods are inaccessible;[23] otherwise qualified applicants are denied employment solely because they are deaf or hearing impaired;[24] access to lifesaving medical treatments are limited when disability is inappropriately considered in eligibility criteria;[25] and students with disabilities are denied equal educational opportunities because platforms, websites, or other course materials provided are inaccessible or accommodations are lacking.[26] These and many other practices, while not always intended to exclude, systemically disadvantage people with disabilities and reinforce ableism. Prior to the enactment of § 504, individuals with disabilities had no recourse under federal law to challenge such policies.[27] Today, the ability to bring claims based on disparate impact remains essential to protecting disability rights and fully realizing the anti-discrimination goals of § 504 and Title II of the ADA.[28]

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discrimination covered. 29 U.S.C. § 794 provides that: "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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."

22. *Alexander v. Choate*, 469 U.S. at 295.

23. *See* Cal. Council of the Blind v. Weber, 758 F. Supp.3d 1054,1055–56 (2024).

24. *See* Complaint at 1, U.S. Equal Emp. Opportunity Comm'n v. United Parcel Service, No. 1:23-cv-14021 (N.D. Ill. Sep. 22, 2023).

25. *See Preventing Discrimination in the Treatment of COVID-19 Patients: The Illegality of Medical Rationing on the Basis of Disability*, DISABILITY RTS. EDUC. & DEF. FUND (2020), https://dredf.org/the-illegality-of-medical-rationing-on-the-basis-of-disability/ [https://perma.cc/XC9P-RJ36]; Sam Bagenstos, *Who Gets the Ventilator? Disability Discrimination in COVID-19 Medical Rationing Protocols*, 130 YALE L.J.F. 1, 2–3 (2020) (discussing how medical treatments during COVID, due to state guidelines that permit the rationing of health care services during health emergencies, disproportionately lead to the denial of treatment to people with disabilities based on quality-of-life assumptions).

26. *See* Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 732–33 (9th Cir. 2021).

27. Federal legislation addressing the needs of people with disabilities began with support for veterans. The Rehabilitation Act of 1973 was preceded by a disability rights movement that emerged following World War I, as injured veterans returned home seeking support and reintegration. The Vocational Education Act of 1917 was enacted in response to studies by the Federal Board for Vocational Education, which examined veterans' disabilities and sought to provide "rehabilitation and reintegration" through vocational training. This effort was later expanded by the Rehabilitation Act of 1920. Wendi Maloney, *World War I: Injured Veterans and the Disability Rights Movement*, LIBR. OF CONG. BLOGS (Dec. 21, 2017), https://blogs.loc.gov/loc/2017/12/world-war-i-injured-veterans-and-the-disability-rights-movement/ [https://perma.cc/8ZJJ-XHKZ].

28. *See, e.g.*, 42 U.S.C. §§ 12117(b), 12201(a). The ADA and the Rehabilitation Act are

While there is limited accessible data distinguishing disability discrimination complaints alleging both disparate treatment and disparate impact from those alleging disparate treatment alone, the effects of each are no less salient. For example, in fiscal year 2024, the Equal Employment Opportunity Commission (EEOC) received over 29,000 charges alleging disability discrimination under the ADA.[29] That same year, the Department of Education's Office of Civil Rights (OCR) resolved 7,164 complaints alleging discrimination under § 504/Title II of the ADA.[30] Additionally, over 52% of discrimination claims filed with the Department of Housing and Urban Development (HUD) were based on disability.[31] These figures highlight the systemic nature of disability based bias, which often manifests through policies or practices that result in disparate impact. Without legal recognition of disparate impact liability, many of the most pervasive and harmful forms of disability exclusion would remain unchallenged.

However, in the absence of clear statutory language, as discussed below,[32] the availability of disparate impact claims under § 504 currently relies on the application of decades old precedent. In *Alexander v. Choate*,[33] a case decided almost forty years ago, the Supreme Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon" people with disabilities.[34] Fifteen years later, in *Alexander v. Sandoval*,[35] the Court concluded that the text of § 602 of Title VI, on which § 504 was modeled, did not provide a private cause of action for disparate impact discrimination.[36]

In the last few years, there were two significant legal challenges to disparate impact claims under § 504. These Ninth Circuit cases, involving health care[37] and higher education,[38] respectively, and the public

interconnected, with the Rehabilitation Act incorporating the definition of disability. *See* 29 U.S.C. 794(a); Derek Warden, *The Rehabilitation Act at Fifty*, 2023 CALIF. L. REV. ONLINE 54, 59.

29. *Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0 [https://perma.cc/P7FE-PWLC].

30. U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 2024 FISCAL YEAR ANN. REP. 52.

31. LINDSAY AUGUSTINE ET AL., NAT'L FAIR HOUS. ALL., 2024 FAIR HOUSING TRENDS REPORT 4 (2024), https://nationalfairhousing.org/wp-content/uploads/2023/04/2024-Fair-Housing-Trends-Report-FINAL_07.2024.pdf **[**https://perma.cc/ZV7M-E5UF].

32. *See infra* Section II.

33. 469 U.S. 287, 299 (1985).

34. *Id.*

35. 532 U.S. 275, 291 (2001).

36. *Id.*

37. Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1208–09 (9th Cir. 2020).

38. Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 731–33 (9th Cir. 2021).

pressure and attention the cases received, underscored the importance of disparate impact liability under § 504 for people with disabilities. The public attention and amicus briefs also made clear that the continued lack of statutory clarity creates difficulties for entities subject to § 504 and its implementing regulations.[39]

Similarly, the COVID-19 pandemic revealed the urgent need for effective application of these protections, as the crisis exacerbated systemic inequalities and highlighted the harmful effects of unintentional discrimination in hospitals and healthcare facilities. People with disabilities, particularly within marginalized communities of color, faced disproportionately poor medical outcomes during the pandemic[40] and were overrepresented among patients requiring hospitalization and experiencing death due to COVID-19.[41] In accordance with "crisis standards of care,"[42] hospitals are permitted to ration medical care during public health emergencies leading, in many cases, to denials of lifesaving treatment to patients with disabilities and terminal illnesses based on quality of life assessments.[43] Black and Indigenous communities, who generally experience higher rates of disability,[44] were more likely to receive adverse medical evaluations of their quality of life, resulting in denials of life sustaining treatments such as ventilators.[45]

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39. *See infra* Part II.D. More recently, two other challenges to § 504, have emerged. While neither of these cases specifically addresses the issue of disparate impact, decisions in each could have an important effect on disability rights. In *Texas v. Becerra* (now titled *Texas v. Kennedy*), the attorney generals of seventeen states filed a complaint to block an amendment of the § 504 (and ADA) definition of disability that would include gender dysphoria. Complaint at 1–2, Texas v. Kennedy, No. 5:24-CV-00225 (N.D. Tex. Sep. 26, 2024). In *A.J.T. v. Osseo Area Sch.*, the Eighth Circuit addressed the level of intent that a plaintiff must prove to establish liability for failure to provide educational accommodations under § 504 and the ADA. 96 F.4th 1058, 1061 (8th Cir. 2024), *cert. granted*, 145 S. Ct. 1915 (2025).

40. *See Payan*, 11 F.4th at 732–33.

41. *See* ADMIN. FOR CMTY. LIVING, IMPACT OF THE COVID-19 PANDEMIC ON PEOPLE WITH DISABILITIES (2022), https://acl.gov/sites/default/files/COVID19/ACL_Research_ImpactC19-PWD.pdf [https://perma.cc/PMX8-LEJV].

42. *See also* Jasmine Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 32 (2020).

43. *Id.* at 32–34 (examining how crisis standards of care, the "rationing [of health care] on the categorical basis of disability" may lead to intersectional medical discrimination against COVID patients).

44. Brook Dorsey Holliman et al., *Disability Doesn't Discriminate: Health Inequities at the Intersection of Race and Disability*, FRONTIERS REHAB. SCIS., July 6, 2023, at 1, 1 ("Recent estimates indicate that 26% of US adults experience disability, with higher rates of disabilities in Black, Indigenous, and people of color (BIPOC) communities. For example, compared to 26.6% of white persons with disabilities (PwD) ages 45–64, 35.5% of Black and Hispanic adults in that same age group are living with a disability in the US.") (internal citations omitted).

45. *See* Infographic of Adults with Disabilities by Ethnicity and Race, *in Infographic:*

COVID-19 also exacerbated existing disparities in access to healthcare and essential services, further underscoring the need for disparate impact claims.[46]

In response to these challenges both in the courts and in the healthcare system during the pandemic, the incorporation of § 504 by reference into § 1557 of the Affordable Care Act (ACA)[47] has become increasingly significant in addressing some aspects of disability discrimination in healthcare. Section 1557 stipulates that individuals cannot be excluded from, denied benefits from, or discriminated against in any health program or activity receiving federal funds based on the basis of race, color, national origin, sex, age, or disability – incorporating Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or § 504 of the Rehabilitation Act of 1973 by reference.[48] Cases such as *Doe v. BlueCross BlueShield of Tennessee*,[49] *Schmitt v. Kaiser Found. Health Plan of Wash.*,[50] and *Doe v. CVS*[51] highlight ongoing efforts to challenge healthcare policies that disproportionately impact individuals with disabilities under § 504 and § 1557. As such, § 1557 is a critical tool in advocating for equitable healthcare for people with disabilities. However, as discussed below, the Sixth Circuit's interpretation of § 504 narrows its application by challenging the viability of disparate impact claims and rejecting the availability of a private cause of action under the statute.[52]

Adults with Disabilities: Ethnicity and Race, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 7, 2025), https://www.cdc.gov/disability-and-health/articles-documents/infographic-adults-with-disabilities-ethnicity-and-race.html [https://perma.cc/6J5E-HKFC]; NANETTE GOODMAN, MICHAEL MORRIS & KELVIN BOSTON, NAT'L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA 9 (2019), https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf [https://perma.cc/LA8Q-S33V].

46. *See* Shawn Grant, *Lessons from the Pandemic: Congress Must Act to Mandate Digital Accessibility for the Disabled Community*, 55 U. MICH. J. L. REFORM 45, 67–68 (2021).

47. Pub. L. No. 111-148, tit. I, § 1557, 42 U.S.C. § 18116.

48. 42 U.S.C. § 18116(a).

49. Doe v. BlueCross BlueShield of Tenn., Inc., 926 F.3d 235, 237–38 (6th Cir. 2019) (addressing whether BlueCross Blue Shield of Tennessee's policy of requiring HIV positive beneficiaries to obtain their medication exclusively through a pharmacy network discriminates in violation of § 504 and § 1557 of the ACA)*; see infra* Part II.C.ii.

50. Schmitt v. Kaiser Found. Health Plan of Wash., 965 F.3d 945, 948–49 (9th Cir. 2020) (addressing whether a health insurer discriminated in violation of § 504 and § 1557 of the ACA by excluding all hearing devices except cochlear implants, disproportionately affecting individuals with hearing disabilities).

51. Doe v. CVS Pharmacy, Inc., 982 F.3d 1204, 1208–13 (9th Cir. 2020) (addressing whether policy of requiring HIV/AIDS drugs to be obtained exclusively through CVS's specialty pharmacy network to qualify for in-network benefits and forcing individuals to use mail order services violated § 504 and § 1557 of the ACA). *See infra* Part II.D.

52. *See infra* Part II.C.ii.

Further, disparate impact laws are needed to help address the disproportionate negative effects of artificial intelligence (AI) discrimination on people with disabilities. The increasing use of AI technologies in all areas of life—such as employment, marketplace, healthcare, education and the criminal justice system—has had a disparate impact on vulnerable communities.[53] For example, as algorithms are based on a statistical average, AI frequently engages in implicit bias against individuals with disabilities.[54] As individual motives are difficult to detect, disparate impact liability provides legal remedies for people with disabilities and other marginalized groups who are victims of "algorithmic discrimination."[55] The availability of disparate impact claims is clearly of great (and increasing) significance for the disabled community, particularly under § 504.

B. Concerns of Recipients of Federal Funding

While protection of the rights of people with disabilities is of paramount concern, the current uncertainty regarding the scope of § 504 may also present hardships for recipients of federal funding, particularly small businesses, an additional reason why Congress should act. This is due in part to the far-reaching scope of government funding, which extends § 504's protections to a wide variety of programs and settings to

53. *See, e.g.*, Anthony Kimery, *Disparate Impact Laws Are Needed to Combat AI Discrimination, Says Policy Analyst*, BIOMETRIC UPDATE (Sep. 19, 2024), https://www.biometricupdate.com/202409/disparate-impact-laws-needed-to-combat-ai-discrimination-says-policy-analyst [https://perma.cc/Q8SV-DJN2] (discussing the recent call upon Congress to develop legislation to prevent "algorithmic discrimination"). *See* New York City Bar Ass'n Presidential Task Force on Artificial Intelligence & Digital Technologies, *Task Force Dashboard*, https://www.nycbar.org/committees/task-force-on-digital-technologies/ [https://perma.cc/ZA2A-D4D7]; New York City Bar Ass'n Presidential Task Force on Artificial Intelligence & Digital Technologies, *The Impact of the Use of AI on People with Disabilities* (June 12, 2025), https://www.nycbar.org/reports/the-impact-of-the-use-of-ai-on-people-with-disabilities/ [https://perma.cc/35MK-JKNM] (documenting harms to people with disabilities caused by existing AI systems and the likelihood of continued or future harm, including findings that disabled people are frequently stereotyped, objectified, or rendered invisible in AI-generated content due to flawed training data).

54. *Cf.* U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., ALGORITHMS, ARTIFICIAL INTELLIGENCE, AND DISABILITY DISCRIMINATION IN HIRING (2022), https://www.ada.gov/resources/ai-guidance/ [https://perma.cc/3EBL-9QNA]. *See also* Jessica Hallman, *AI Language Models Show Bias Against People with Disabilities, Studies Find*, PA. STATE UNIV., INFO. SCIS. & TECH. (Oct. 13, 2022), https://www.psu.edu/news/information-sciences-and-technology/story/ai-language-models-show-bias-against-people-disabilities [https://perma.cc/8U2J-F8QM] (reporting that all tested algorithms and thirteen natural-language models exhibited significant implicit bias against people with disabilities).

55. *See* Chiraag Bains, *The Legal Doctrine That Will Be Key to Preventing AI Discrimination*, BROOKINGS (Sep. 13, 2024), https://www.brookings.edu/articles/the-legal-doctrine-that-will-be-key-to-preventing-ai-discrimination/ [https://perma.cc/34XV-SGJZ].

address the practical realities faced by individuals.[56] However, advocates representing states, businesses, organizations, and programs subject to § 504, have expressed concerns about permitting such claims.[57] Similar to concerns about the proliferation of lawsuits over website accessibility under Title III of the ADA,[58] many commentators and amici for the petitioners in *CVS v. Doe* focus on the potential economic impact of increased litigation.[59] As § 504 applies to thousands of schools, some argue that increased disparate impact litigation will lead to increased education costs, including higher tuition rates.[60] Additionally, there is concern that plaintiffs' attorneys may exploit the threat of § 504 claims to pressure settlements, as defendants may seek to avoid the high costs of legal proceedings and the risk of loss of federal funding.[61]

These concerns about the potential economic impact of disparate impact claims under § 504 also raise broader legal questions about the law's scope and constitutional implications. For instance, some commentators have argued that if the Supreme Court should rule that § 504 includes a private cause of action for disparate impact claims, the law's broad definition of "programs and activities" could have wide-reaching consequences.[62] They argue that the reach of disparate impact liability could make it legally applicable to nearly every aspect of state action extending to areas such as law enforcement and state hospitals,[63]

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56. Shariful Khan, *An Expansive View of "Federal Financial Assistance"*, 133 YALE L.J.F. 691, 694 (2024).

57. *See* Brief of Washington Legal Foundation and Independent Women's Law Center as Amici Curiae Supporting Petitioners at 14, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) [hereinafter Brief of Washington Legal Foundation] ("It is hard to overstate the disastrous and costly effects of recognizing disparate-impact claims under Section 504."), *cert. dismissed*, 142 S. Ct. 480 (2021).

58. *See* Grant, *supra* note 46, at 77.

59. Brief of Washington Legal Foundation, *supra* note 57, at 20 (noting that recognizing claims "will open the courts to a flood of Section 504 suits against other entities.").

60. *Cf.* Brief of Washington Legal Foundation, *supra* note 57, at 17 (criticizing the Ninth Circuit's interpretation of § 504 by asserting that it places "no limit to the possible suits against colleges and universities" resulting in either increased spending or a loss of educational opportunities to students).

61. *See* Brief of Washington Legal Foundation, *supra* note 57, at 4 (asserting that plaintiffs' counsel hoped "to extort settlements from less-capitalized defendants."); *see also* Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 4, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) (expressing concerns about the potential for increased litigation raised by the Ninth Circuit's decision and its impact on the healthcare system), *cert. dismissed*, 142 S. Ct. 480 (2021).

62. Khan, *supra* note 56, at 696.

63. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 4(b), 102 Stat. 28, 29 (codified at 29 U.S.C. § 794(b)) (clarifying the definition of "program or activity" under Section 4(b) § 504 of the Rehabilitation Act of 1973 to include all of the operations of an entire corporation, partnership, or other private organization, or an entire public entity, any

and could extend beyond states and localities to include, for example, federal recipients of Paycheck Protection Program (PPP) loans[64] and Federal Emergency Management Agency (FEMA) funds.[65] Further, some states have challenged the constitutionality of § 504, arguing that its scope is ambiguous, challenging their ability to voluntarily and knowingly accept federal funds from Congress.[66] Under the Spending Clause, Congress is allowed to attach conditions to federal funding, essentially creating a contractual agreement where recipients agree to comply with certain conditions to receive the funds.[67] Some states contend that this lack of clarity undermines the principle that states must "knowingly and voluntarily" accept federal funding conditions.[68]

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part of which receives federal financial assistance). Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents at 10, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) (noting that Section 504 non-discrimination provisions extend to any program or activity receiving federal financial assistance), *cert. dismissed*, 142 S. Ct. 480 (2021).

64. Paycheck Protection Program (PPP) Loans were authorized under the Coronavirus Aid Relief and Economic Security Act (CARES Act) and the Coronavirus Response and Relief Appropriations Act and distributed by the small business administration. Such funds are categorized as federal assistance, thereby obligating recipients of such loans to act in accordance with antidiscrimination statutes. JARED P. COLE, CONG. RSCH. SERV., LSB10459, APPLICABILITY OF FEDERAL CIVIL RIGHTS LAWS TO RECIPIENTS OF CARES ACT LOANS 1 (2020), https://crsreports.congress.gov/product/pdf/LSB(/LSB10459 [https://perma.cc/LRN7-2B3D]. *See id.*; *see also* Khan, *supra* note 56, at 697 (noting that low-interest federal loans may also qualify as federal financial assistance).

65. Brief of the States of Louisiana et al. as Amici Curiae in Support of Petitioner at 4–15, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) ("If the Court now recognizes disparate-impact liability under Section 504, it will throw wide the federal courthouse doors to similarly improper attacks" and "open the doors to similar attempts at rewriting valid state policy through federal litigation."), *cert. dismissed*, 142 S. Ct. 480 (2021). *But see* Brief for the United States as Amicus Curiae Supporting Respondents at 16–17, CVS Pharmacy, Inc. v. Doe, 141 S. Ct. 2882 (2021) (No. 20-1374) (emphasizing need for expansive application of § 504 to ensure institutions receiving federal funding cannot circumvent the law by isolating those funds to specific programs.), *cert. dismissed*, 142 S. Ct. 480 (2021).

66. Congress makes federal funds available, subject to stated conditions, and a recipient knowingly and voluntarily accepting the funds and the conditions. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Knowing and voluntary acceptance is what lends Spending Clause legislation its legitimacy. Barnes v. Gorman, 536 U.S. 181, 186 (2002); Complaint at ¶¶ 228–32, Texas v. Kennedy, No. 5:24-CV-00225 (N.D. Tex. Sep. 26, 2024) [hereinafter Texas v. Kennedy Complaint].

67. The U.S. Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States." U.S. CONST. art. 1, § 8, cl. 1. Several federal laws, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Section 1557 of the Affordable Care Act, operate under the Spending Clause. The Court has emphasized that entities receiving federal funds must voluntarily and knowingly accept the terms of this contractual relationship and be aware of the penalties they may be subject to if they breach the contract. *See Pennhurst*, 451 U.S. at 17.

68. Texas v. Kennedy Complaint, *supra* note 66.

In addition, conflicting decisions in the courts regarding the scope of § 504 may put recipients of federal financial assistance in the untenable situation of a loss of funding because they lack a clear understanding of what constitutes unintentional discriminatory conduct.[69] Statutory clarity is also important with respect to the spending clause and federal funding scheme under § 504.[70] As violations of § 504 and its implementing regulations can trigger a loss of federal funding by recipients, a lack of understanding of which acts are prohibited by law with respect to the scope and remedies under § 504 will undoubtedly affect programs and organizations that receive federal funding, as well as the beneficiaries of federal funding. Some recipients may implement facially neutral discriminatory policies under the mistaken belief that they are in compliance with the statute because of a lack of understanding of what constitutes unintentional discriminatory conduct. This implementation may also be due to dissonance between the plain meaning of the text of § 504 and agency implementing regulations which, in many cases, explicitly prohibit disparate impact discrimination. In the context of education, the loss of federal funding due to a lack of compliance could be crippling for states that are dependent upon the federal government to supplement state school funding, including those funds necessary to meet § 504's requirement that public schools offer accommodations to eligible students with disabilities.[71] The loss of educational funding is more likely to have a outsized effect in those states where incomes are lowest.[72] As people with disabilities, their families and

69. Presumptively, without notice as to whether the scope of § 504 prohibits disparate impact discrimination, a recipient of federal funding pursuant to the Congressional Spending Clause may be unaware they are engaging in actions in violation of the federally imposed grant conditions. *See* Barnes v. Gorman, 536 U.S. 181, 188 (2002).

70. Enacted under the Spending Clause, § 504 authorizes Congress to condition federal funding on compliance with anti-discrimination statutes. As with contractual terms, recipients must have clear notice of their legal obligations. *See Pennhurst*, 451 U.S. at 17 ("[T]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."); *see also* Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212, 229–30 (2022) (holding that under the Spending Clause, emotional distress damages are unavailable where federal funding recipients lack clear notice of such liability in the Statute).

71. *See, e.g.*, *Federal Funding and the "Strings" Attached to It*, N.J. COMMON GROUND (Jan. 17, 2025), https://njcommonground.org/federal-funding-and-the-strings-attached-to-it/ [https://perma.cc/C7GH-ANKQ] ("If federal education funding were significantly reduced or eliminated, [due to noncompliance] New Jersey would lose hundreds of millions of dollars in federal funding. This could force cuts in services, teacher positions, and educational support programs. Along with other cuts to education, a loss of federal funding would strain the state's ability to maintain its current level of special education services.").

72. *See* Samantha Wilkerson, *Exploring the Nexus of Property Taxes, Housing Disparities*

their allies are powerful consumers, comprising a substantial market segment,[73] a legal interpretation of § 504 by the courts which negatively impacts disability rights could have additional financial implications for culpable businesses that violate the statute.[74]

These issues underscore the need for clearer legislative guidance. To address this, Congress could amend § 504 or introduce new legislation, which could resolve the existing uncertainty surrounding the law, providing clarity on the law's scope and application.[75]

II. In Search of a Private Right of Action for Disparate Impact Claims Under § 504

The absence of a clear definition of discrimination under § 504, coupled with the search for a private right of action for disparate impact claims, creates uncertainty and undermines the statute's ability to effectively protect people with disabilities. Gaps in both the language and legislative history of § 504 leave the statute open to legal challenges, which may lead to additional discord among the circuit courts and could ultimately result in an adverse Supreme Court decision that narrows the scope of § 504's protections. Although forty years have passed since the

and Educational Access for Black and Brown Youth in Major U.S. Cities, CONG. BLACK CAUCUS FOUND., https://www.cbcfinc.org/capstones/education/exploring-the-nexus-of-property-taxes-housing-disparities-and-educational-access-for-black-and-brown-youth-in-major-u-s-cities/ [https://perma.cc/US89-CVUY] (highlighting that reliance on property taxes for school funding exacerbates disparities, as communities with lower property values have less funding for their schools, adding to existing persistent funding gaps and disproportionately impact low income students of color). These and other educational disparities will likely be exacerbated by the elimination of the U.S. Department of Education under Executive Order, with a disproportionately negative impact on black students with disabilities. *See* Tim Walker, *How Dismantling the Department of Education Would Harm Students*, NEA TODAY (Mar. 20, 2025), https://www.nea.org/nea-today/all-news-articles/how-dismantling-department-education-would-harm-students [https://perma.cc/HU8K-ANF5].

73. People with disabilities make up a $1 billion market segment. John Burbank, *Measuring the Impact of Consumers with Disabilities*, NIELSEN (Apr. 2017), https://www.nielsen.com/news-center/2017/measuring-impact-consumers-disabilities/ [https://perma.cc/D4PL-SBNE]; *see also* U.S. Department of Labor, Office of Employment, "Diverse Perspectives: People with Disabilities Fulfilling Your Business Goals" https://www.dol.gov/sites/dolgov/files/odep/topics/508-odepcardrackbusiness2020feb5.pdf.

74. For instance, culpable businesses may face consumer boycotts. In response to the allegations against CVS that their prescription drug benefits program discriminated against people with HIV, there was public pressure to boycott CVS. *See e.g.*, Ged Kenslea, *'Corporate Vampire Suck' Ads by AHF Skewer CVS*, AIDS HEALTHCARE FOUND. (July 10, 2021), https://www.aidshealth.org/2021/07/corporate-vampires-suck-ads-by-ahf-skewer-cvs/ [https://perma.cc/Z2VP-2SWR]; CVS v. Doe *Explained*, DREDF (Nov. 2, 2021), https://dredf.org/cvs-v-doe-explained/ [https://perma.cc/8W89-E9WZ] ("We need to come together to tell CVS to pull this case from the Supreme Court. Please tweet and tag CVS to drop the appeal. You can also tell CVS why Section 504 matters to you personally.").

75. *See infra* Part IV.A.

Supreme Court last directly addressed this issue in *Alexander v. Choate*,[76] Congress has yet to provide clarifying guidance on the matter. Recent judicial challenges have continued to highlight the lack of clarity in § 504's provisions, underscoring the need for legislative action.

A. Statutory Text and Legislative History

The statutory text and legislative history of § 504 provide only limited guidance regarding whether the statute grants a private cause of action for disparate impact claims. The text of § 504 specifies that it is unlawful to discriminate against an otherwise qualified individual with a disability in the United States.[77] Specifically, it states:

> No otherwise qualified individual with a disability in the United States, as defined in sections 705(20) of this title, 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.[78]

Section 504, as enacted, does not define "subjected to discrimination" and the plain meaning of the text does not indicate whether the covered discrimination extends beyond disparate treatment to include disparate impact claims.[79] As further discussed below, defendants facing allegations of violating § 504 based on disparate impact discrimination assert that the statute's language does not support this type of claim and that it is not backed by legislative history.[80] The following discussion focuses on the vulnerabilities of § 504 to that may lead to negative litigation outcomes, underscoring the urgent need for Congressional action.

i. Statutory Text

The plain meaning of the text of § 504, does not explicitly address or prohibit disparate impact discrimination.[81] Some commentators suggest that, at the time of § 504's enactment, disparate impact theory

76. 469 U.S. 287 (1985). *See infra* Part II.B.i.

77. The definition is found in 29 U.S.C. § 705(9)(B), which incorporates the ADA's definition from 42 U.S.C. § 12102 by reference. The term "disability" under the statute means, "with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ."

78. 29 U.S.C. § 794(a).

79. *See* 29 U.S.C. § 794.

80. *See infra* Part II.A.

81. The language of § 504 states that individuals with disabilities shall not be excluded, denied benefits, or subjected to discrimination under federally funded programs "solely by reason of her or his disability." 29 U.S.C. § 794(a). Legal interpretations of this text differ.

had not yet fully developed, which may explain its absence from the statute.[82] Further, some argue that the passive voice structure of "by reason of" in § 504 suggests that the identity of the actor engaged in the alleged discrimination is less important than the discriminatory act itself.[83] Therefore, disparate impact liability is arguably implied within § 504.[84] However, this interpretation, that the use of passive voice in legal drafting broadens the statutory scope, could be vulnerable to challenge by a textualist approach to statutory interpretation, which emphasizes the plain meaning of the statute's language. Currently, the Supreme Court generally favors interpreting statutes based on the language's plain meaning. As Justice Elena Kagan noted, "We're all textualists now," reflecting on the Court's increasing reliance on textual clarity in legal interpretation.[85] In this light, the use of passive voice in legal texts, such as § 504, could function to maintain clarity and formality rather than signaling a broader substantive reach.[86]

Whereas Title VII, as amended, explicitly includes protections against disparate impact discrimination,[87] § 504 does not directly reference the effects of discrimination. This lack of explicit mention has

82. While disparate impact discrimination existed prior to the *Griggs v. Duke Power* decision, its application through other statutes was not immediately clear. *See* Patricia Pattison & Phillip E. Varca, *The Demise of Disparate Impact Theory*, 29 AM. BUS. L.J. 413, 420 (1991). Additionally, there was no definitive legislative history indicating that Title VII was intended by Congress to include disparate impact discrimination. *Id.* at 416; s*ee also* Derek Warden, *The Rehabilitation Act at Fifty*, 14 CAL. L. REV. ONLINE 54 (2023), https://doi.org/10.15779/Z38DR2P96R (responding to the passage of the codification of disparate impact discrimination within the passage of the 1991 Civil Rights Act (42 U.S.C. § 2000e-2)).

83. *See* Joshua M. Alpert, *Disability Environmental Justice: How § 504 of the Rehabilitation Act Can Be Used for Environmental Justice Litigation*, 59 HARV. C.R.-C.L. L. REV. 403, 410 (2024) ("[The] . . . use of [the] passive voice suggests the focus of § 504 is the action rather than the intent behind it . . . .").

84. *Id.* at 410–12 ("If 'by reason of' refers to *intent*, then only intentional discrimination is prohibited, whereas if 'by reason of' refers to *causation*, then both unintentional (disparate impact) and intentional (disparate treatment) discrimination are prohibited."). Notably, Alpert does not approach his analysis from the textualist perspective.

85. JUSTICE ELENA KAGAN, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:29 (Nov. 17, 2015), https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [https://perma.cc/FW27-ZADJ].

86. As not all scholars agree that passive voice broadens statutory interpretation, we cannot rely on the textualist Court to interpret disparate impact liability. *See generally* BRYAN A. GARNER & ANTONIN SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2011) (arguing that courts should focus on the actual meaning of the text and the ordinary meaning of words rather than expanding the scope of the law beyond what is explicitly written); *see also* Anita S. Krishnakumar, *Passive Voice References in Statutory Interpretation*, 76 BROOK. L. REV. 941, 945–46 (2011) (suggesting that passive constructions are often used to avoid assigning responsibility, thereby maintaining neutrality and preventing the statute from being interpreted as expanding its scope).

87. Congress amended Title VII to include disparate impact discrimination when it passed the Civil Rights Act of 1991 at 42 U.S.C. § 2000e–2(k).

led some commentators to interpret the statute's prohibition on discrimination "solely by reason of" disability as a limiting clause, suggesting that § 504 might not cover claims based solely on the disproportionate impact of neutral policies.[88]

ii. Legislative History

There is sparse legislative history regarding § 504.[89] Because § 504 was adopted by Congress as a floor amendment, it bypassed the usual Committee hearings and reports, resulting in a lack of legislative history.[90] This absence leads to uncertainty regarding both the definition of discrimination and the scope of § 504's provisions. During the proceedings of the 92nd Congress leading up to the adoption of § 504,[91] there is no record of discussions as to the scope of the discrimination prohibited by the statute, nor do the proceedings address whether or not disparate impact discrimination is covered by the section.[92]

Some commentators attribute the lack of floor discussion regarding the statute to the drafters' original intent to amend Title VI of the CRA of 1964 by incorporating the language of § 504, thereby expanding its protections to people with disabilities.[93] However, fearing Senate opposition to further expansion of the CRA that might jeopardize its approval, the protections that would later become § 504 were included in the reauthorization of the Rehabilitation Act of 1973.[94] Since its adoption,

88. *See* Alpert, *supra* note 83, at 434–35 (suggesting that the language "solely by reason of" heightens the level of analysis required to prove a prima facie claim of disparate impact liability, but does not imply that such claims are not available under the statute).

89. *See* Bianca Chamusco, *Revitalizing the Law That "Preceded the Movement": Associational Discrimination and the Rehabilitation Act of 1973*, 84 U. CHI. L. REV. 1285, 1291–92 (2017). *See also* Ralph D. Rouse, Jr., Presentation on Section 504 of the Rehabilitation Act, 21 J. Educ. Libr. 196, 198 (1981) ("Section 504 was passed by Congress with no debate and no legislative directive, and the job of the U.S. Department of Health was extremely difficult" as they were charged with developing implementing regulations).

90. *Id.* at 1292 CYNTHIA BROUGHER, CONG. RSCH. SERV., RL34041, SECTION 504 OF THE REHABILITATION ACT OF 1973: PROHIBITING DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL ASSISTANCE, (Sept. 29, 2010).

91. *See* Alexander v. Choate, 469 U.S. 287, 295 n.13 (1985) (noting the "lack of debate devoted to § 504 in either the House or Senate when the Rehabilitation Act was passed in 1973"); NAT'L COUNCIL ON DISABILITY, REHABILITATING SECTION 504, 15 (2003), https://www.govinfo.gov/content/pkg/GOVPUB-Y3_D63_3-PURL-LPS97246/pdf/GOVPUB-Y3_D63_3-PURL-LPS97246.pdf [https://perma.cc/L9H6-PXVJ] ("One of the nation's first laws barring discrimination based on disability was enacted without fanfare and with little notice. No hearings were held, no debate took place on the floor of either house of Congress, and the name of the provision's author has long been forgotten.").

92. NAT'L COUNCIL ON DISABILITY, supra note 91.

93. Chamusco, *supra* note 89, at 1285, 1290–92.

94. *Id.* at 1290–91; *see also* Alexander v. Choate, 469 U.S. at 295 n.13 (1985) (discussing the process by which the antidiscrimination principle as applied to people with disabilities became part of Title V of the Rehabilitation Act of 1973, as amended).

the Rehabilitation Act—particularly § 504—has been amended several times, but the legislative history of those amendments provides no significant insight into Congressional intent regarding the scope of the discrimination prohibited at the time the statute was enacted.[95]

Some courts have attempted to infer Congressional intent to prohibit disparate impact discrimination by drawing on cases such as *Alexander v. Choate*.[96] As discussed below, the Court in *Choate* opined in dicta that Congress *likely* intended to allow some disparate impact discrimination claims to be covered under § 504.[97] The Court reasoned that without allowing such claims "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach . . . ."[98] Courts and commentators have invoked the legislative history of other civil rights statutes enacted after § 504, and the ADA in particular, to identify Congressional intent that § 504 was intended to cover disparate impact discrimination claims.[99] Although the language of the ADA does not explicitly address disparate impact discrimination,[100] unlike § 504, the ADA does have a robust language emphasizing Congressional intent to redress not just "outright intentional exclusion[,]" but also "discriminatory effects."[101] It remains unclear, however, whether these interpretations would withstand a

95. *Alexander v. Choate*, 469 U.S. at 306 n.27 ("The year after the Rehabilitation Act was passed, Congress returned to it with important amendments that clarified the scope of § 504. While these amendments and their history cannot substitute for a clear expression of legislative intent at the time of enactment . . . their history do shed significant light on the intent with which § 504 was enacted.") (citations omitted).

96. *See, e.g.*, Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 734 (9th Cir. 2021).

97. *Alexander v. Choate*, 469 U.S. at 294 n.11.

98. *Id.* at 296–97.

99. Among civil rights statutes enacted after § 504, the ADA's history is particularly significant because it was modeled after § 504. *See infra* note 126; Brief for Amici Curiae The Arc of the United States and the American Association of People with Disabilities et al. in Support of Respondent John Doe at 27–28, CVS Pharmacy, Inc. v. Doe, No. 20-1374 (U.S. Sept. 30, 2021) (Noting that while Title II of the ADA does not explicitly reference disparate impact, its legislative history suggests that Congress intended through Title II "'to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services' of state and local government" and that furthermore "Section 504 recognizes that discrimination results from actions or inactions, and that discrimination occurs by effect as well as by intent or design." (emphasis removed)). In addition, Title III of the ADA, explicitly references disparate impact discrimination. 42 U.S.C. § 12182(b)(1)(D)(i).

100. 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

101. In 42 U.S.C. § 12101(a)(5), Congress declared its intent to address "outright intentional exclusion" as well as "the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices . . . ."

direct legal challenge outside of Title II and Title III. Given the lack of express statutory language and of relevant legislative history, it is not surprising that the case law is not settled regarding whether disparate impact discrimination is prohibited under § 504.

B. Supreme Court Precedent

While the Supreme Court has not resolved whether § 504 permits disparate impact liability claims, two cases are often cited as opining the Court's stance on disparate impact with respect to § 504. However, neither case directly addresses the reach of § 504 or definitively resolves the issue of whether the section provides a private right of action for disparate impact. As a result, lower courts have continued to interpret and apply § 504 inconsistently, with some allowing disparate impact claims and others rejecting them—creating uncertainty in the legal landscape.

i. *Alexander v. Choate*[102]

As one of several cost saving measures, Tennessee proposed reducing, from twenty to fourteen, the number of in-hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient.[103] Respondents, disabled Medicaid recipients, demonstrated that, in the previous year, "27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care."[104] Thus, the potential disparate impact of this measure was undisputed. Respondents argued that this reduction would, therefore, have a disparate impact on disabled Medicaid recipients and was discriminatory in violation of § 504.[105]

The first question addressed by the Court in *Choate* was whether § 504 reached disparate impact claims or only claims of intentional discrimination.[106] Relying largely on Congressional remarks regarding § 504 and its predecessor, 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."[107] However, the Court

102. 469 U.S. 287 (1985).

103. *Id.* at 289.

104. *Id.* at 289–90.

105. *Id.* at 290. Respondents also argued that any annual limitation on days of hospitalization would have a disproportionate effect on the disabled and suggested alternative approaches. *Id.* at 290–91.

106. *Id.* at 292.

107. *Id.* at 296–97.

deemed the countervailing consideration to be "the desire to keep § 504 within manageable bounds."[108] That is, the Court theorized that "[b]ecause the handicapped typically are not similarly situated to the nonhandicapped,"[109] if the statute reached all actions that had a disparate impact, covered entities, before taking any action, might ultimately be required to produce "Handicapped Impact Statements,"[110] similar to environmental impact statements. Given that sort of burden, the Court questioned "whether Congress intended § 504 to embrace all claims of disparate-impact discrimination."[111]

The Court opted to apply a "meaningful access" standard to determine whether § 504 had been violated instead of directly addressing the scope of disparate impact under the statute.[112] Rather than focusing solely on whether there is a disparate impact with respect to the denial of access to a particular service to people with disabilities, meaningful access only requires an assessment of whether people with disabilities are given equal access to services or benefits, without requiring the court to engage in an empirical examination of the nature and extent of that access.[113] Under this standard, a defendant may have to make reasonable modifications to the program but need not fundamentally alter the nature of the service or benefit provided to eliminate all disparities.[114]

Applying the meaningful access standard to the facts of the case, the Court determined that the fourteen-day limitation was neutral on its face and did not deny individuals with disabilities meaningful access to or exclude them from the Medicaid services.[115] The Court noted that the change in coverage would "leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation."[116] The Court also rejected any argument that because those with disabilities potentially required longer inpatient stays, they should not be subject to any durational limitations.[117] Rather, the Court concluded, the Medicaid statute and regulations did not require

108. *Id*. at 298.
109. *Id*.
110. *Id*. at 298–99.
111. *Id*. at 299.
112. *Id.* at 301. The Court stated that the meaningful access standard represented the balance struck in its decision in *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (noting that *Davis* "struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs.").
113. 469 U.S. at 304.
114. *Id.* at 300.
115. *Id.* at 302.
116. *Id.* at 302.
117. *Id*. at 302–03.

a state "to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users."[118] Ultimately, the Court "assume[d] without deciding" that a cause of action for disparate impact exists under § 504 "reaches at least some conduct that has an unjustifiable disparate impact" on people with disabilities.[119]

The Court's interpretation of meaningful access in *Choate* emphasizes a formal equality standard, which focuses on equal treatment, rather than a substantive equality approach that would account for the differential impacts experienced by people with disabilities.[120] This interpretation permits the conclusion that meaningful access exists even when people with disabilities experience worse outcomes, so long as they are not explicitly denied program or service.[121] Such a view has been criticized for failing to address the systemic inequalities that disproportionately affect individuals with disabilities—particularly in essential areas such as healthcare, housing, education, and economic opportunity.[122] Legal scholars, such as Mark Weber, have argued that the *Choate* framework, as applied by the court, is too narrow and insufficiently responsive to real world disparities.[123] Weber calls for the courts to adopt a more empirically grounded analysis of what constitutes "meaningful access," contending that the current standard often equates equal opportunity with equal treatment without examining whether adverse outcomes stem from structural discrimination.[124]

Therefore, while some commentators have viewed *Alexander v. Choate* as opening the door to disparate impact claims, as it recognizes that § 504 prohibits "at least some" disparate impact discrimination, the Court's failure to specify which claims fall under the statute has led to challenges regarding not only the scope of discrimination covered by § 504 but also of statutes incorporating it by reference, such as § 1557 of the Affordable Care Act.[125] The Court's decision in *Choate* left unclear the

118. *Id*. at 305–06.

119. *Id.* at 299.

120. *Id.* at 289.

121. *Cf.* Mark Weber, *Meaningful Access and Disability Discrimination: The Role of Social Science and Other Empirical Evidence*, 39 CARDOZO L. REV. 649, 653 (2017).

122. *Cf. id.* at 650.

123. *Id.* at 655.

124. *Id.*

125. Section 1557 of the Affordable Care Act incorporates the procedures and remedies of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act. 42 U.S.C. § 18116(a). There is an unresolved question, however, regarding how and to what extent those statutes are incorporated. In 2016, the Obama administration's regulation under 1557 to include a private cause of action for disparate impact claims. Under this interpretation, if the Supreme Court determines that Section 504 does not prohibit disparate impact discrimination

extent to which disparate impact claims are permissible, allowing courts to make this determination under an evolving meaningful access standard, which does not require an empirical consideration of the effects of disparate impact.[126] The Supreme Court's equivocation and ambiguity regarding disparate impact discrimination in *Choate* leaves § 504 vulnerable to future legal challenges concerning the statute's scope and application.[127]

ii. *Alexander v. Sandoval*[128]

The second Supreme Court decision impacting the question of disparate impact claims under § 504 did not involve that statute. Sixteen years after *Choate*, the Supreme Court addressed the issue of whether a private cause of action for disparate impact exists under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin by recipients of federal funds.[129] The majority opinion pronounced that "three aspects of Title VI must be taken as given."[130] The first was that "private individuals may sue to enforce § 601 and obtain both injunctive relief and damages."[131] The second was "that § 601 prohibits only intentional discrimination."[132] As to the third, the Court "assume[d] for purposes of deciding this case that regulations

against people with disabilities by recipients of federal funds, a private cause of action would still be available to enforce Section 1557. However, for courts following *Doe v. BlueCross BlueShield of Tennessee*, 926 F.3d 235, 239 (6th Cir. 2019), a limitation on private causes of action to enforce claims of disparate impact under Section 504 would also apply to Section 1557 under the Affordable Care Act. In 2020, the 2016 regulation was reversed and rescinded leaving uncertainty with respect to "independent" private causes of action under Section 1557. Jennifer Shelfer & Andrew Stevens, *Court Denies Attempt to Prevent Closure of Lone Maternity Ward Under Section 1557 of ACA and Disparate-Impact Theory of Discrimination*, JD SUPRA (Oct. 21, 2020), https://www.jdsupra.com/legalnews/court-denies-attempt-to-prevent-closure-13227/ [https://perma.cc/3CD9-JSPY].

126. Weber, *supra* note 121, at 651–52.

127. Any future court ruling might also impact Title II of the ADA. See BROUGHER, *supra* note 90, at 7–8 ("The Americans with Disabilities Act was modeled on the statutory language, regulations, and case law of § 504."). To create consistent standards between the two statutes, the definition of disability under § 504 was also amended by the ADA Amendments Act of 2008 to conform with the definition of disability under the ADA. See ADA Amendments Act of 2008, Pub. L. No. 110-325, § 7, 122 Stat. 3553, 3559. Unlike Title I and Title III of the ADA which lists all of the types of actions included within the term discrimination, "[Title II"] essentially simply extends the anti-discrimination prohibition embodied in Section 504 to all actions of state and local governments." *See* Pathways Psychosocial v. Town of Leornardtown, 133 F. Supp.2d 772, 782 (D. MD. 2001).

128. 532 U.S. 275 (2001).

129. *See Alexander v. Sandoval*, 532 U.S. at 293 (holding that there is no private right of action to enforce Title VI's disparate-impact regulations); Civil Rights Act of 1964 tit. VI, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in federally funded programs).

130. *Alexander v. Sandoval*, 532 U.S. at 280.

131. *Id.* at 279.

132. *Id.* at 275.

promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."[133]

This led the Court to the central question: whether a private cause of action exists to enforce a disparate impact regulation promulgated under Title VI. The majority held that Title VI does not include a private right of action to enforce disparate impact regulations nor was there evidence of Congressional intent to make it so.[134] The Court explained, "We . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."[135] The Court's decision in *Sandoval* overturned decades of precedent which supported a private cause of action under Title VI.[136]

Although the decision did not address § 504 specifically, *Sandoval* raised additional questions as to whether (because § 504 was modeled after and adopted the language of Title VI) § 504 might be similarly interpreted to exclude a private right of action for disparate impact.[137] Thus going forward, post-*Sandoval*, any judicial analysis of § 504 should address two questions: (1) In addition to prohibiting intentional discrimination, does the statute also prohibit disparate impact discrimination? (2) Does the statute provide a private right of action as a mechanism of enforcement? As to the first question, *Choate* only "assume[d]" but did not decide that some disparate impact was prohibited. *Sandoval* found that § 601 did not prohibit disparate impact discrimination but assumed that § 602 permitted agencies to promulgate

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133. *Id.* at 275. Section 602 of Title VI the Civil Rights Act of 1964 directs federal departments and agencies that provide financial assistance to issues rules and regulations implementing § 601. 42 U.S.C. § 2000d-1 (2018).

134. *Alexander v. Sandoval*, 532 U.S. at 289–93.

135. *Id.* at 288. The Equity and Inclusion Enforcement Act of 2021 was introduced by Rep. Robert C. "Bobby" Scott (D-Va.), Chair of the House Committee on Education and Labor, and Rep. Jerrold Nadler (D-N.Y.), Chair of the House Judiciary Committee. If passed, the bill would restore a private right of action for disparate impact discrimination claims under Title VI. H.R. 730, 117th Cong. (2021). A prior version had been proposed in 2019 and passed in the House of Representatives but failed to move to the Senate. H.R. 2574, 116th Cong. (2019). The 2021 bill was last reported in the House of Committee of Education and Labor in November 2021. *See* H.R. REP. 117-177 (2021).

136. Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (Stevens, J., dissenting). Justice Stevens, joined by Justice Ginsberg, Souter and Breyer, issued a scathing 24-page dissent, in which they assailed the majority for engaging in "judicial fiat" by ignoring not just their own precedent, but the reliance demonstrated by the lower court opinions that have followed the Supreme Court's interpretation—not to mention the reliance by victims of discrimination that this avenue would be available to them. *Id.* at 295. In short, according to the dissent, the majority got it wrong, as the issue had already been settled. *Id.*

137. Section 504 of the Rehabilitation Act mirrors the language of Section 602 of Title VI, which prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance. *See* 42 U.S.C. § 2000d; 29 U.S.C. § 794.

regulations proscribing such discrimination.[138] With respect to the second question, *Choate* implies that there is a private right of action to the extent that § 504 prohibits disparate impact discrimination.[139] However, *Sandoval* concludes that there is no such private right of action because disparate impact under Title VI can only be prohibited by regulation.[140] More broadly, after *Sandoval* questions remain regarding the relationship between Title VI and § 504 and the impact of the decision on that section and on other legislation modeled after Title VI. Few courts have dealt directly with the question of whether *Sandoval* in effect overruled *Choate*.

C. Circuit Court Split

For almost three decades after *Choate*, circuit courts faced with the question accepted that disparate impact claims were available under § 504. Eventually, a Sixth Circuit decision[141] created a circuit split that has yet to be resolved by the Supreme Court. Two pandemic era decisions in the Ninth Circuit potentially presented the opportunity to resolve the split.[142] The circumstances under which those cases avoided Supreme Court review underscores the significance of the issue to the disabled community.[143]

i. Post-*Choate* Cases

Following *Choate*, the circuit courts accepted the potential viability of claims of disparate impact under § 504, often without extended discussion or analysis.[144] However, the courts did grapple with questions

138. Sandoval, 532 U.S. at 286. By analogy, the question remains open as to whether agencies are empowered under Section 504 to implement disparate impact regulations.

139. Alexander v. Choate, 469 U.S. 287, 301 (1985).

140. Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001).

141. Doe v. BlueCross BlueShield of Tenn, Inc. 926 F.3d 235 (6th Cir. 2019). In *Nicholas v. Fulton Cnty. Sch. Dist.*, No. 1:20-cv-3688, 2022 WL 2276900, at *18–19 (N.D. Ga. June 23, 2022), the district court followed the Sixth Circuit's reasoning in deciding that § 504 does not prohibit disparate impact discrimination, while noting, however, that the Eleventh Circuit had not directly addressed the issue, citing *Berg v. Fla. Dep't of Lab. and Emp. Sec.*, 163 F.3d 1251, 1254 (11th Cir. 1998) and *Forsyth v. Univ. of Ala. Bd. of Trustees*, No. 20-12513, 2021 WL 4075728, at *6 (11th Cir. Sep. 8, 2021).

142. Doe v. CVS Pharmacy, Inc., 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), *cert. dismissed*, 142 S. Ct. 480 (2021); Payan v. Los Angeles Community College Dist., 11 F.4th 729 (9th Cir. 2021).

143. *See infra* Part II.D.

144. *See, e.g.*, Nathanson v. Medical College of Pennsylvania, 926 F. 2d 1368, 1384 (3d Cir. 1991) (noting that the *Choate* Court "emphasized that the Rehabilitation Act was directed particularly at unintentional conduct . . . ."); Am. Council of the Blind v. Paulson, 525 F. 3d 1256, 1260 (D.C. Cir. 2008) ("The Supreme Court has instructed that section 504 does not require proof of discriminatory intent . . . ."); Ruskai v. Pistole, 775 F.3d 61, 78 (1st Cir.

about how to apply the meaningful access standard. For instance, has the plaintiff properly identified a benefit to which meaningful access has been denied?[145] Further, *Choate* admonished that "[t]he 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."[146] How broadly or narrowly, then, is the benefit to be defined?[147] What degree of deprivation is required before the plaintiff lacks meaningful access to the benefit?[148] The *Choate* Court also recognized that "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."[149] How then does the meaningful access standard affect the measure of reasonableness and even the question of whether the plaintiff is "otherwise qualified?"[150]

ii. Post-*Sandoval* Cases

After the Supreme Court's decision in *Sandoval* rejecting disparate impact claims under Title VI,[151] the Tenth Circuit, in *Robinson v. Kansas*, stated that "[t]he decision in *Sandoval* does not affect plaintiffs' right to

2014) (noting that although the Supreme Court has not revisited the issue of disparate impact claims under § 504 since *Choate*, "[w]e nevertheless think it well established what the Court assumed to be so is so—proof of discriminatory animus is not always required in an action under Section 504.").

145. *Ruskai*, 775 F.3d at 79 (holding that a Petitioner with a metal implant who was subject to TSA pat down procedures had failed to identify a benefit to which she was denied meaningful access, having received "full and complete access to the secure side of the checkpoints . . . and to TSA's security screening procedures.").

146. Alexander v. Choate, 469 U.S. 287, 301 (1985).

147. *See, e.g.*, Disabled in Action v. Bd. of Elections, 752 F.3d 189, 199 (2d Cir. 2014) ("[T]he relevant benefit is the opportunity to fully participate in [the Board of Elections'] voting program. This includes the option to cast a private ballot on election days. Indeed, to assume the benefit is anything less, such as merely the opportunity to vote at some time in some way, would render meaningless the mandate that public entities may not 'afford [ ] persons with disabilities services that are not equal to that afforded others.'" (citations omitted)); Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 505 (4th Cir. 2016) ("On the whole, then, we think it is far more natural to view absentee voting—rather than the entire voting program—as the appropriate object of scrutiny for compliance with the ADA and the Rehabilitation Act.").

148. *See, e.g.*, *Am. Council of the Blind v. Paulson*, 525 F.3d at 1269 (discussing issues of visibility related to impaired persons' ability to use paper currency, stating that "the Rehabilitation Act's emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of a third persons . . . [and that] coping mechanisms and alternate means of participating in economic activity do not address the scope of the denial of access that the [plaintiffs have] shown.").

149. *Alexander v. Choate*, 469 U.S. at 301.

150. Brennan v. Stewart, 834 F.2d 1248, 1261–1262 (5th Cir. 1988) ("The question after [*Choate*] is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy legitimate interests of both the grantee and the handicapped person.").

151. Alexander v. Sandoval, 532 U.S. 275, 276 (2001).

bring a disparate impact claim under section 504 . . . ."[152] The court observed that even though the language in the relevant sections of § 504 and Title VI were "essentially" identical, *Choate* had "laid out the different aim of the Rehabilitation Act as well as the different context in which the Act was passed."[153]

Six years later, the Ninth Circuit, in *Mark H. v. Lemahieu*, did not rule out the possibility that, post-*Sandoval*, plaintiffs could state a claim to enforce regulations promulgated under § 504 regarding the requirement to "provide a free appropriate public education to each qualified handicapped person" even if those claims might be considered disparate impact claims.[154] Considering both *Sandoval* and *Choate*, the court concluded that, "[f]or purposes of determining whether a particular regulation is ever enforceable through the implied right of action contained in a statute, the pertinent question is simply whether the regulation falls within the scope of the statute's prohibition."[155] Because the parties had treated the regulations under the Individuals with Disabilities Education Act (IDEA)[156] as identical with those promulgated under § 504, the case was remanded to the district court to give the plaintiffs "an opportunity to amend [their] complaint to specify which § 504 regulations they believe were violated and which support a privately enforceable cause of action."[157]

However, in *Doe v. BlueCross BlueShield of Tennessee, Inc.*, the Sixth Circuit declared that "[w]e now resolve what *Choate* did not and conclude that § 504 does not prohibit disparate-impact discrimination."[158] The particular facts involved a claim that the defendant health insurer violated § 1557 of the ACA by requiring that the plaintiff's HIV medication, among other medications, could only be obtained at in network prices through a specialty network, so only by either mail delivery or at specified pharmacies.[159] Having concluded that the plan did not intentionally discriminate against those with disabilities, the court turned to the question of disparate impact claims under § 504.[160] The court looked first at the language of the section, which bars discrimination against any individual "solely by reason of her or his

152. 295 F.3d 1183, 1187 (10th Cir. 2002).

153. *Id.*

154. Mark H. v. Lemahieu, 513 F.3d 922, 929 (9th Cir. 2008).

155. *Id.* at 938.

156. Individuals with Disabilities Act, 20 U.S.C. §§ 1400–1482.

157. *Mark H.*, 513 F.3d at 939.

158. 926 F.3d 235, 241 (6th Cir. 2019).

159. *Id.* at 237–38.

160. *Id.* at 241. The court had already rejected Doe's argument that § 1557 allowed him to apply the standard of care or enforcement mechanism of any of the statutes incorporated by reference in § 1557. *Id.* at 238–39.

disability."[161] The court reasoned that such language "does not encompass actions taken for nondiscriminatory reasons."[162] Similarly, in the court's view, the prohibition in Title VI, after which § 504 was patterned, prohibits discrimination on the basis of a protected characteristic, and in *Sandoval*, the Supreme Court concluded that such language did not reach disparate impact discrimination.[163]

Considering *Choate*, the Sixth Circuit observed that the Court declined to decide the issue and subtly criticized the Court for minimizing or disregarding the similarities between § 504 and Title VI.[164] Accordingly, the Sixth Circuit "remain[ed] free to hold that § 504 does not cover disparate-impact claims."[165]

It might be easy to regard *BlueCross BlueShield* as an outlier, and indeed, the court notes that other courts of appeals had reached a different conclusion as to disparate impact claims.[166] However, as discussed below, the court's reasoning, particularly as to the language of the statute, may be a harbinger of how the Supreme Court might rule should the question of disparate impact under § 504 be presented to the Court again.[167]

D. Recent Legal Challenges to § 504

The Ninth Circuit did not follow the Sixth Circuit in a pair of cases that drew widespread attention. What was particularly interesting in both cases was that the defendant chose not to seek Supreme Court review, presumably due to publicity and pressure from the disabled community, its supporters, and advocates, leaving the issue of the scope of § 504 open.

i. *Doe v. CVS Pharmacy, Inc.*[168]

The first case, *Doe v. CVS Pharmacy, Inc.*, was brought under § 1557 on facts remarkably similar to those in *Doe v. BlueCross BlueShield*. The

161. *Id.* at 241.

162. *Id.* at 242.

163. *Id.*

164. *Id.* ("[The *Choate* Court] then chose to 'assume without deciding' that § 504 means something different than its twin.").

165. *Id.* The court's conclusions seem to be significantly influenced by what it viewed as a meritless claim and the perception that the *Choate* Court's concern of unleashing a floodgate of complaints had materialized. *Id.* ("With thirty years of hindsight, we can go one step further. Even entertaining the idea of disparate-impact liability in this area invites fruitless challenges to legitimate, and utterly nondiscriminatory, distinctions, as this case aptly shows.").

166. *Id.* at 242–43.

167. *See infra* Part III Judicial Trends and Executive Actions That Threaten the Protections of § 504.

168. 982 F.3d 1204 (9th Cir. 2020).

plaintiffs were individuals living with HIV/AIDS whose pharmacy benefits manager now required them to get their specialty medications through either mail delivery or from a CVS pharmacy in order to get in network pricing, potentially thousands of dollars less than out of network prices.[169] The plaintiffs alleged that the disproportionate impact of an employer sponsored medication plan on people living with HIV violated § 504 and § 1557 of the ACA.[170] Among the specific harms alleged were that the process resulted in delays in delivery, damaged and stolen shipments, difficulties with prescription changes and ensuring current medication dosages, and, in some cases, violations of medical privacy.[171] In addition the plaintiffs alleged that the program forced them to forego consultation with their specialty pharmacists, which was critical to managing their medication regimens.[172]

The petition was granted as to the first question only on July 2, 2021.[173] The case was fully briefed, including nineteen amicus briefs.[174] Argument before the Supreme Court was scheduled for December 7, 2021.[175] In the interim, a significant outcry was raised by the disabled community and their advocates and the case became national news.[176] For instance, a banner headline on the ACLU website proclaimed: "CVS Wants the Supreme Court to Gut Non-Discrimination Protections For People With Disabilities. It Could Set Us Back Decades."[177] Presumably in response to these public reactions,[178] on November 11, 2021, CVS took the extraordinary step of withdrawing its petition and thus removed the

169. *Id.* at 1207.

170. *Id.* at 1208–09.

171. *Id.* at 1207–08.

172. *Id.* at 1208.

173. CVS Pharmacy, Inc. v. Doe, 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), *cert. dismissed*, 142 S. Ct. 480 (2021).

174. *No. 20-1374 Proceedings and Orders*, SUP. CT. OF THE U.S.: DOCKET SEARCH, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1374.html [https://perma.cc/NWE4-DE3M].

175. *Id.*

176. *See, e.g.*, Michael Roppolo, *Supreme Court Case Could "Rip" Laws That Protect People with Disabilities, Advocates Warn*, CBS NEWS (Nov. 5, 2021), https://www.cbsnews.com/news/supreme-court-cvs-doe-disabilities-laws/ [https://perma.cc/VG2D-ZVPD].

177. Susan Mizner, Arlene B. Mayerson & Aaron Madrid Aksoz, *CVS Wants the Supreme Court to Gut Non-Discrimination Protections for People with Disabilities. It Could Set Us Back Decades.*, ACLU: NEWS & COMMENT. (Oct. 29, 2021), https://www.aclu.org/news/disability-rights/cvs-wants-the-supreme-court-to-gut-non-discrimination-protections-for-people-with-disabilities-it-could-set-us-back-decades [https://perma.cc/66Q7-BLHW].

178. Michelle Diament, *CVS Drops Supreme Court Case over Disability Community Concerns*, DISABILITY SCOOP (Nov. 12, 2021), https://www.disabilityscoop.com/2021/11/12/cvs-drops-supreme-court-case-over-disability-community-concerns/29593/ [https://perma.cc/66Q7-BLHW].

issue from Supreme Court consideration.[179] Thus, the Court did not have the ability to resolve the issue, left open by Congress and *Choate*, of whether § 504 prohibits disparate impact discrimination.

ii. *Payan v. Los Angeles Community College District*[180]

The Ninth Circuit's decision in *Payan v. L.A. Community College District* presented another potential opportunity for the Supreme Court to address the issue of whether a private cause of action for disparate impact is cognizable under § 504. In *Payan*, among other questions, the Ninth Circuit directly addressed the issue of whether a private cause of action under § 504 to enforce disparate impact discrimination survived *Sandoval*.[181] At the time of the suit, the plaintiffs, who are blind, were enrolled in classes at Los Angeles City College (LACC), part of the public community college district serving Southern California (the Los Angeles Community College District or LACCD).[182] While taking classes, the students encountered accessibility barriers with respect to in-class materials, textbooks, educational technology, websites, and computer applications, as well as research databases in the LACC library.[183] The plaintiffs sued the LACCD alleging violations of § 504 and Title II of the ADA[184] and the case reached the Ninth Circuit on appeal after a grant of partial summary judgment and a bench trial, which resulted in each plaintiff receiving some relief.[185]

The court addressed what it identified as the open question regarding whether there is a private right of action to enforce disparate impact claims, post-*Sandoval*, under § 504 and Title II of the ADA.[186] The court rejected the defendant's position that, because the three statutes share the same statutory language and remedies, the Supreme Court's elimination of a private right of action under Title VI in *Sandoval* should

179. *See* Joint Stipulation to Dismiss, CVS Pharmacy, Inc. v. Doe, 982 F.3d 1204 (9th Cir. 2020) (2021) (No. 20-1374), *cert. dismissed*, 142 S. Ct. 480 (Nov. 12, 2021); *see also* Diament, *supra* 178.

180. 11 F.4th 729 (9th Cir. 2021).

181. *Id.* at 734.

182. *Id.* at 732.

183. *Id.* at 731–33.

184. The district court granted partial summary judgment with respect to some of the claims and instructed the plaintiff to reframe their disability discrimination arguments through a disparate impact framework. *See id.* at 733. Subsequent to their amended complaint, the court entered judgment for one plaintiff, Payan, after a two-day bench trial and for another plaintiff, Mason, after a three-day jury trial. *See id.* at 733. Applying the meaningful access standard to the plaintiffs' disparate impact claims, the court found that the LACCD violated Title II of the ADA and § 504 with respect to the inaccessible handbook, website and library databases. *See id.* at 733-734. The district court did not raise the issue of a private right of action under § 504. *Id.* at 734.

185. *Id*. at 733–34.

186. *Id*. at 734.

also apply to § 504 and Title II of the ADA.[187] Distinguishing Title VI, the court noted that the Supreme Court's decision to limit the availability of private rights of action to intentional discrimination was not based on the statutory language of Title VI but on its review of prior equal protection jurisprudence.[188] Based on that analysis, the court "reject[ed] LACCD's invitation to limit the enforceability of disparate impact disability discrimination claims based on inapplicable reasoning found in cases interpreting Title VI" and concluded that "disparate impact disability discrimination claims remain enforceable through a private right of action" under § 504 and Title II of the ADA.[189]

Ultimately, the Board of Trustees voted not to petition for Supreme Court review, seeking instead to settle the dispute with the plaintiffs through mediation.[190] This decision followed petitions and public protests against the district, which had indicated an intent to seek Supreme Court review.[191]

Although the *CVS* and *Payan* cases avoided Supreme Court review, there is a strong possibility, based on the Court's previous grants of certiorari, that it may once again grant certiorari in a future case.[192] The Supreme Court's previous grant of a writ of certiorari in *CVS* could signal that it may consider the lack of clarity regarding § 504 to be an issue which "could have national significance, might harmonize conflicting

187. *Id.* at 735.

188. *Id*. at 735–37. The court noted that in *Sandoval*, the Supreme Court turned to its prior decisions in *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582 (1983), *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and *Washington v. Davis*, 426 U.S. 229 (1976), where it considered the scope of Title VI and reached its decisions based on the reach of the Fourteenth Amendment's Equal Protection Clause jurisprudence. *Payan*, 11 F.4th at 736–37. The Ninth Circuit cited Justice White's plurality opinion from *Guardians*: "in *Bakke*, five Justices, including myself, declared that Title VI on its own bottom reaches no further than the Constitution, which suggests that, in light of [*Washington v. Davis*], Title VI does not of its own force proscribe unintentional racial discrimination." *Payan*, 11 F.4th at 736 (citing *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 589–90).

189. *Payan*, 11 F.4th at 737.

190. William Boyer, *LACCD Drops Supreme Court Review for Mediated Settlement on ADA Issue*, CULVER CITY CROSSROADS (Mar. 3. 2022), https://culvercitycrossroads.com/2022/03/03/laccd-drops-supreme-court-review-for-mediated-settlement-on-ada-issue/ [https://perma.cc/J9LZ-2JEU].

191. Colleen Shalby, *Protests Intensify as a Disability Rights Case Nears Deadline for Supreme Court Petition*, L.A. TIMES (Mar. 2, 2022), https://www.latimes.com/california/story/2022-03-02/disability-rights-case-against-laccd-could-go-to-supreme-court [https://perma.cc/7VYN-L5J2].

192. *See* Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 934 (2022). The Supreme Court is most likely to grant certiorari where there is a conflict. *Id.* at 925, 934 ("The Roberts Court . . . seems to favor granting review in cases that invite the Court to overrule precedent . . . .").

decisions in the federal Circuit courts, and/or could have precedential value."[193]

III. Judicial Trends and Executive Actions That Threaten the Protections of § 504

Limitations on the availability of disparate impact discrimination claims, stemming from restrictive judicial interpretations, diminished administrative agency authority, and adverse executive actions, pose significant challenges to the enforcement of a private right of action under § 504. These developments threaten to erode the protections the Rehabilitation Act was designed to provide, as suggested by the Court in *Choate*, potentially leaving many individuals with disabilities without recourse to challenge discriminatory practices absent a showing of discriminatory intent.[194] Thus, congressional action to codify disparate impact under § 504 is both necessary and urgent.

A. Failure to Adhere to Precedent

These challenges are amplified by the Supreme Court's increasing willingness to disregard *stare decisis* and previously accepted, though unenumerated, constitutional rights and other protections grounded in longstanding judicial precedents. Most notably, the Court's decision in

193. *Supreme Court Procedures*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures **[**https://perma.cc/M4PV-PZDX]. Although it was not a direct challenge to the availability of disparate impact claims, the complaint in *Texas v. Becerra* (now titled *Texas v. Kennedy*) presented a different threat to § 504. Complaint, Texas v. Becerra, (N.D. Tex. Sept. 26, 2024) (No. 5:24-CV-00225). Seventeen State Attorneys General filed a complaint against the Secretary of the U.S. Department of Health and Human Services ("HHS"), challenging a Biden Administration HHS rule that amended the definition of disability under § 504 and the ADA to include "gender dysphoria." *See id.* at 1. The plaintiffs sought permanent injunctive relief from the enforcement of the rule and a declaration that § 504 was unconstitutional. *See id.* at 42. As of this writing, the case is currently stayed, with the parties submitting monthly status reports and no briefing schedule has been set at this time. As noted in the most recent status report, HHS continues to evaluate its position in light of President Trump's Executive Order 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, which provides that agencies shall not "promote or otherwise inculcate gender ideology." *See* Joint Status Report at 2, Texas v. Kennedy, No. 5:24-cv-00225-C (Apr. 11, 2025); Exec. Order No. 14,168, 90 Fed. Reg. 8615 (Jan. 20, 2025). Although the plaintiffs stated in their April 2025 status report that they do not intend to ask the court to declare § 504 unconstitutional on its face, the complaint was not amended to reflect this position *See* Joint Status Report at 2, Texas v. Kennedy, No. 5:24-cv-00225-C (Apr. 11, 2025). An order was issued staying proceeding in the case on April 17. *See* Joint Status Report, Texas v. Kennedy, No. 6:24-cv-211-JDK. (Apr. 17, 2025). In the most recent status report the parties agreed to the continued stay of District Court proceedings. *See* Joint Status Report at 2, Texas v. Kennedy, No. 6:24-cv-211-JDK (Jun. 12, 2025) There are no recent updates on the current status of this case.

194. *Choate*, 469 U.S. at 296–97.

Dobbs v. Jackson Women's Health Organization[195] overturned *Roe v. Wade*[196] and *Planned Parenthood v. Casey*,[197] reversing nearly fifty years of precedent on abortion rights and destabilizing a broader body of privacy rights jurisprudence.[198] Similarly, the Court's decision to overturn *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[199] in *Loper Bright Enters. v. Raimondo*,[200] discussed below,[201] marked a significant shift in administrative law, eliminating a foundational principle of deference to agency interpretations that had guided courts for decades.[202] These decisions appear to reflect a broader judicial philosophy that is increasingly skeptical of precedent, particularly when it involves unenumerated rights or interpretations grounded in implied congressional intent.[203]

The *Dobbs* ruling also disproportionately impacts millions of women at the intersections of race, disability, sexual orientation, socio-economic status, and other identities.[204] By shifting regulatory authority to the states, the decision in *Dobbs* effectively limits access to reproductive rights and reproductive healthcare, with broader implications for people with disabilities who already face significant challenges accessing healthcare and exercising their right to bodily

195. 597 U.S. 215, 264 (2022) (Alito, J.) (stating "that *stare decisis* is 'not an inexorable command'" and declining to uphold *Roe v. Wade*, despite its longstanding precedent).

196. 410 U.S. 113 (1973).

197. 505 U.S. 833 (1992).

198. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing a constitutional right to privacy); Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581 (1999) (recognizing the rights of individuals with disabilities to live in community settings under the ADA); *see also* Melissa Murray, *The Symbiosis of Abortion Precedent*, 134 HARV. L. REV. 202 (2020) (arguing that abortion jurisprudence has been central to the Court's understanding of precedent and that dismantling it threatens the stability of broader privacy doctrines); *cf.* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling *Roe v. Wade* and rejecting precedent based on substantive due process grounds).

199. 467 U.S. 837 (1984).

200. 603 U.S. 369 (2024).

201. *See infra* Part IV.C.1.

202. *Loper Bright*, 603 U.S. at 412.

203. *See generally Dobbs*, 597 U.S. 215 (2022); *Loper Bright*, 603 U.S. 369 (2024).

204. Latoya Hill, Samantha Artiga, Usha Ranji, Ivette Gomez & Nambi Ndugga, *What Are the Implications of the Dobbs Ruling for Racial Disparities?*, KFF (Apr. 24, 2024), https://www.kff.org/womens-health-policy/what-are-the-implications-of-the-dobbs-ruling-for-racial-disparities/ [https://perma.cc/7BFM-NDJN] (discussing how the *Dobbs* decision has had significant implications for racial and ethnic disparities in health care, particularly among Black, American Indian, and Alaska Native women); *see also* Robyn Powell, *Dobbs, Disability, and the Assault on Reproductive Autonomy*, AM. BAR ASS'N: HUM. RTS. MAG. (July 18, 2025), https://www.americanbar.org/groups/crsj/resources/human-rights/2025-july/dobbs-disability-assault-reproductive-autonomy/ [https://perma.cc/PGL2-BN9L] (discussing how the *Dobbs* decision has further eroded reproductive autonomy by compounding existing high rates of sexual violence, coercion, and poverty experienced by people with disabilities).

autonomy.[205] In many states with restrictive abortion laws,[206] individuals with disabilities often face heightened risks to their health and autonomy as they may be forced to carry pregnancies to term under conditions that may worsen their disabilities—or lead them to seek illegal means of pregnancy termination, putting their lives at risk.[207] Beyond pregnancy, the *Dobbs* decision has also contributed to broader barriers in healthcare access for disabled individuals and other groups.[208] Moreover, Justice Thomas's concurrence in *Dobbs*, suggesting that the Court should reconsider other substantive due process precedents, may signal the potential rollback of other critical civil rights protections.[209] Among those at risk are cases such as *Olmstead v. L.C.* ex rel*. Zimring*, which for twenty-five years has affirmed the fundamental right of individuals with disabilities to live in the least restrictive environment possible.[210]

Given this trend, it is plausible that the Supreme Court could revisit, and potentially overturn, *Alexander v. Choate*.[211] The Court has previously overturned three decades of precedent by limiting disparate impact claims under Title VI in *Alexander v. Sandoval*.[212] The Court's demonstrated willingness to reconsider established precedent suggests that other key legal interpretations of disparate impact discrimination may also be at risk. If this trajectory continues, there is a real possibility

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205. *See* Asha Hassan, Lindsey Yates, Anna K. Hing, Alanna E. Hirz & Rachel Hardeman, Dobbs *and Disability: Implications of Abortion Restrictions for People with Chronic Health Conditions*, 58 HEALTH SERVS. RSCH. 197 (2023), https://doi.org/10.1111/1475-6773.14108; Robyn M. Powell, *Forced to Bear, Denied to Rear: The Cruelty of* Dobbs *for Disabled People*, 112 GEO. L.J. 1095 (2024).

206. Talia Curhan edited by Peter Ephross, *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/state-policies-abortion-bans [https://perma.cc/W9AD-JA29].

207. Powell, *supra* 205, at 1119 ("Forced pregnancies reinforce the systemic ableism that underlies much of the opposition to reproductive rights and justice and threatens to exacerbate the harm that already marginalized people face in accessing reproductive health services and information and asserting their fundamental human rights.").

208. *See* Katie Shepherd & Frances Stead Sellers, *Abortion Bans Complicate Access to Drugs for Cancer, Arthritis, Even Ulcers*, WASH. POST (Aug. 8, 2022), https://www.washingtonpost.com/health/2022/08/08/abortion-bans-methotrexate-mifepristone-rheumatoid-arthritis/ [https://perma.cc/E53S-ES3J] (describing how restrictions on access to abortion have also in some states resulted in the inability of some individuals with disabilities to access medications for chronic conditions).

209. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 332 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents.") (citations omitted).

210. 527 U.S. 581, 599 (1999) (holding that unnecessary institutionalization of individuals with disabilities violates the ADA and their substantive due process rights by depriving them of their liberty and autonomy).

211. 469 U.S. 287 (1985). *See infra* Part III.B.1.

212. 532 U.S. 275 (2001). *See infra* Part III.B.2.

that *Choate* could be similarly dismantled, a move that would severely undermine civil rights protections for people with disabilities and others who rely on disparate impact claims to challenge systemic discrimination.

B. Narrowing Disparate Impact Doctrine

Decisions of the Supreme Court in the last several years have sought to narrow the scope of disparate impact discrimination, affecting the enforcement of § 504. In addition, the executive branch, during the past and current Trump Administrations, has contributed to the weakening of civil rights protections.

i. The Supreme Court

More recent decisions of the Supreme Court reflect a reluctance to recognize or provide remedies for disparate impact claims. For example, in *Marrietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.*,[213] the Court held that the reimbursement structure of an employee health benefit plan, which provided lower reimbursement rates for outpatient dialysis than for in-hospital treatment, did not violate the Medicare Secondary Payer statute's non-discrimination provision, which only prohibited differentiation in benefits provided based on the existence of end-stage renal disease (ESRD).[214] The Court reasoned that because the terms of the benefit plan applied uniformly to all the covered individuals, there was no disparate treatment.[215] Moreover, the Court found, the statute did not "encompass a disparate-impact theory" because the text "[did] not ask about 'the *effects* of non-differentiating plan terms that treat all individuals equally.'"[216]

In contrast, Justice Kagan's dissenting opinion emphasized the potential consequences of this narrow interpretation, arguing that, although the law was applied uniformly, it had a disproportionate impact on patients receiving outpatient dialysis.[217] She cited cases in which the Court had recognized that status and conduct can serve as proxies for one another, thereby supporting findings of impermissible disparate impact discrimination.[218] Joined by Justice Sotomayor, Justice Kagan argued that outpatient dialysis served as a proxy for ESRD, and thus the health benefit

213. Marietta Mem'l Hosp. Emp. Health Benefit Plan v. DaVita Inc., 596 U.S. 880 (2022).

214. *Id.* at 882.

215. *Id.* at 885–886.

216. *Id.* at 886.

217. *Id.* at 888 (Kagan, J., dissenting).

218. *Id.* at 888–90 ("[A] penalty for 'homosexual conduct' is a penalty for 'homosexual persons.' And likewise, a 'tax on wearing yarmulkes is a tax on Jews.'" (citations omitted) (first quoting Lawrence v. Texas, 539 U.S. 558, 575 (2003); and then quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993)).

plan's policy amounted to disparate impact discrimination against individuals with ESRD.[219]

The Court's majority opinion in *Marietta Memorial Hospital* and other cases discussed below may signal its waning recognition of disparate impact claims.[220] In other areas involving disparate impact discrimination, such as challenges under the Voting Rights Acts, the Court has issued rulings that complicate efforts to protect minority voters. For example, *Brnovich v. Democratic National Committee*[221] involved a challenge under § 2 of the Voting Rights Act to an Arizona law that criminalized the collection and delivery of early voting ballots by third parties.[222] This method was frequently used by minority voters participating in early voting by mail who, due to historic inequities, would utilize neighbors or family members to deliver their ballots.[223] Although the Court acknowledged the law's disparate effect, it upheld the Arizona law, downplaying the significance of the statistical disparity on communities of color and asserting that it may be "virtually impossible for a State to devise rules that do not have some disparate impact."[224] In another example, the Court in *Alexander v. South Carolina Conference of the NAACP* upheld a redistricting map that appeared to sort voters along racial lines, ruling instead that the fact that race predominated was incidental to a political gerrymander and not the result of unconstitutional racial gerrymandering.[225] The Court's decision in this racially disparate districting case could make it more difficult for minority voters to challenge discriminatory effects of partisan gerrymandering. It may also signal a broader judicial reluctance to address disparate impact claims.

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219. *Marietta Mem'l Hosp.*, 596 U.S. at 890–891.

220. *Id.* at 888.

221. 594 U.S. 647 (2021).

222. *Id.* at 662 ("For those who choose to vote early by mail, Arizona has long required that '[o]nly the elector may be in possession of that elector's unvoted early ballot. § 16–542(D). In 2016, the state legislature enacted House Bill 2023 (HB 2023), which makes it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed. §§ 16–1005(H)–(I).").

223. *See Brnovich*, 594 U.S. at 662; Brief for Navajo Nation as Amicus Curiae Supporting Respondents at 3, Brnovich v. Democratic Nat'l Comm., 594 U.S. 647 (2021) (Nos. 19-1257 & 19-1258) (arguing that the "law criminalizes ways in which Navajos historically participated in early voting by mail" due to the remoteness of where they reside and lack of transportation).

224. *Brnovich*, 594 U.S. at 677.

225. 602 U.S. 1, 37 (2024).

ii. The Executive Branch

During his 2017–2021 term and his current tenure, President Trump implemented policies and executive orders aimed at rolling back or limiting certain statutory civil rights protections. During his first administration, efforts to limit the scope and availability of disparate impact liability were illustrated by his actions involving the FHA.[226] In 2019, President Trump issued Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents,"[227] emphasizing that the only binding rules on the public are those duly enacted and lawfully promulgated and indicating that agencies sometimes do not follow the rulemaking process.[228] This executive order significantly weakened the HUD's 2013 Discriminatory Effects Rule under the FHA (2013 HUD Rule)[229] which had formalized the agency's policies prohibiting discriminatory effects discrimination on the basis of protected characteristics under the FHA by creating a burden shifting framework.[230] The 2013 HUD Rule was superseded by the Trump Administration's guidance (2020 HUD Rule) which raised the burden of proof and added procedural hurdles, making it significantly more difficult for plaintiffs from protected classes to bring disparate impact claims.[231]

226. Fair Housing Act, 42 U.S.C. §§ 3601–3619; s*ee* DAVID H. CARPENTER, CONG. RSCH. SERV., R48113, FAIR HOUSING ACT (FHA): A LEGAL OVERVIEW, (June 27, 2024). ("The FHA prohibits discrimination [in housing] on the basis of 'race, color, religion, sex, handicap, familial status, or national origin.' The FHA does not expressly prohibit discrimination [on] the basis of sexual orientation or gender identity. However, courts have construed the [FHA's] prohibition against sex discrimination to encapsulate discrimination on the basis of sexual orientation and gender identity in line with the Supreme Court's 2020 decision in *Bostock v. Clayton County*."). HUD codified the prohibition against gender identity and sexual orientation in its final rule for the Reinstatement of HUD's Discriminatory Effects Standard. *See* 88 Fed. Reg. 19450 (Mar. 31, 2023).

227. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019). HUD issued regulations implementing Executive Order 13891 under 85 Fed. Reg. 60694 (Sept. 28, 2020).

228. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 15, 2019).

229. *See* 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013) ("Through this final rule, HUD formalizes its long-held recognition of discriminatory effects liability under the [Fair Housing] Act . . . ."). Under the 2013 Discriminatory Effect Rule, HUD defined a housing practice with a "discriminatory effect" as one that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familiar status, or national origin." *Id.* at 11467–68. The 2013 HUD discriminatory effects rule was later amended in 2020 to better reflect the Supreme Court's ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, which held that disparate impact liability was cognizable under the Fair Housing Act. *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519 (2015); 85 Fed. Reg. 60288 (Sept. 24, 2020).

230. 78 Fed. Reg. 11460, 11460 (Feb. 15, 2013).

231. 85 Fed. Reg. 60288 (Sept. 24, 2020).

The 2020 HUD Rule faced multiple legal challenges and was ultimately blocked by a federal court before taking effect.[232]

The Biden Administration sought to restore protections under the FHA by revoking Executive Order 13891, and in March 2023, HUD released a final version titled *Restoring HUD's Discriminatory Effects Standard*, which formally revoked the first Trump Administration's 2020 HUD Rule and restored the original framework.[233] Despite these reversals, however, the current Trump Administration has renewed its efforts to limit the enforcement of disparate impact discrimination claims under the FHA by cutting HUD staffing and cancelling fair housing grants to the private organizations that help protect disabled and other minority applicants from housing discrimination by filing complaints.[234] The current administration has also revoked a rule previously proposed by the Biden Administration that would have reinstated the Affirmatively Furthering Fair Housing (AFFH) rule, first implemented by the Obama Administration.[235] The AFFH rule required localities to track and address patterns of segregation in housing or risk losing federal funding.[236] These targeted administrative actions could be interpreted as part of a broader strategy by the current administration to eliminate disparate impact liability across the federal government.

President Trump signed Executive Orders 14173 and 14281, reshaping the civil rights landscape by seeking to eliminate DEI and DEIA policies in the federal and public sectors and curbing the use of disparate impact theory.[237] Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy," calls for eliminating the use of disparate

232. The rule was met with strong opposition from fair housing organizations and advocacy groups. See, for example, *Mass. Fair Hous. Ctr. v. U.S. Dep't of Hous. & Urban Dev.*, 496 F. Supp. 3d 600 (D. Mass. 2020), a lawsuit brought by advocacy groups which resulted in a preliminary nationwide injunction that halted the implementation of the rule the day before it was to take effect on October 25, 2020.

233. *See* 88 Fed. Reg. 19450 (Mar. 31, 2023).

234. *See, e.g.*, *Four Fair Housing Groups Sue HUD and DOGE Over Cancelling FHIP Contracts*, NAT'L LOW INCOME HOUS. COAL. (Mar. 17, 2025), https://nlihc.org/resource/four-fair-housing-groups-sue-hud-and-doge-over-canceling-fhip-contracts [https://perma.cc/QAW5-BMRD] (reporting that four fair housing nonprofits filed a class action lawsuit on March 13, 2025, against HUD, DOGE, and Scott Turner over the cancellation of grants intended to support investigations of discrimination complaints, public education on fair housing laws, and testing for housing discrimination).

235. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8516 (proposed Feb. 9, 2023).

236. *See id.*; *see also* Katy O'Donnell, *Trump Scraps Biden-era Fair Housing Rule*, POLITICO (Feb. 26, 2025), https://www.politico.com/news/2025/02/26/trump-scraps-fair-housing-initiative-00206274 [https://perma.cc/8LKH-JWHG] (reporting on the rescission of the Biden-era fair housing rule).

237. Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025); Exec. Order No. 14,281, 90 Fed. Reg. 28257 (Apr. 28, 2025).

impact liability in all contexts to the maximum degree possible.[238] In carrying out the directive set forth in Executive Order 14173, the U.S. Attorney General issued a memorandum instructing all federal agencies to revise their guidance to "narrow the use of 'disparate impact' theories that effectively require use of race- or sex-based preferences."[239] The memorandum also directs agencies to emphasize that statistical disparities alone do not automatically constitute disparate impact discrimination.[240] The order excludes "lawful Federal or private-sector" preferences for veterans and people with certain disabilities.[241] However, its broad limitations on disparate impact theory are still likely to affect these groups given the intersectional nature of discrimination. While agencies have begun the implementation of this executive order, it will undoubtedly face legal challenges.[242]

This directive, along with President Trump's executive orders and recent Supreme Court decisions, signal a significant shift in the federal government's approach to civil rights enforcement and paves the way for broader efforts to curtail the interpretive and enforcement authority traditionally exercised by administrative agencies and affecting the enforcement of disparate impact discrimination under § 504.

C. Limiting Administrative Agency Enforcement Power

Statutory interpretation and enforcement often depend on federal agencies using their expertise to provide guidance and enact regulations that clarify and implement broad and often vaguely worded congressional statutes that are intended to extend rights and protections.[243] This has been especially true with respect to § 504. After

238. Exec. Order No. 14,281, 90 Fed. Reg. 175373 (Apr. 23, 2025).

239. OFF. OF THE U.S. ATT'Y GEN., MEMORANDUM FOR ALL DEPARTMENT OF JUSTICE EMPLOYEES ON ELIMINATING INTERNAL DISCRIMINATORY PRACTICES (Feb. 5, 2025), https://www.justice.gov/ag/media/1388556/dl?inline [https://perma.cc/J23U-9FEG].

240. *Id.*

241. Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8635 (Jan. 31, 2025). The executive order excludes blind individuals with disabilities covered under the Randolph-Sheppard Act, 20 U.S.C. §§ 107 et seq., which established a program to provide blind vendors the opportunity to operate vending facilities on federal property for remuneration.

242. Lori Sommerfield & Chris Willis, *HUD's New Direction in Fair Housing Act Enforcement and Rescission of Certain Office of Fair Housing and Equal Opportunity Guidance*, Consumer Financial Services Monitor (Sept. 29, 2025), https://www.consumerfinancialserviceslawmonitor.com/2025/09/huds-new-direction-in-fair-housing-act-enforcement-and-rescission-of-certain-office-of-fair-housing-and-equal-opportunity-guidance/ [https://perma.cc/7L67-9PBZ] (reporting that HUD, in response to Executive Order 14281, issued memoranda rescinding "guidance documents related to disparate impact and redlining," and deprioritizing enforcement of the FHA).

243. Justice Elena Kagan has frequently critiqued Congress's penchant for drafting laws which require agency expertise for implementation. *See, e.g.* Loper Bright Enterprises v.

the passage of the Rehabilitation Act,[244] one of the primary challenges was establishing a mechanism for enforcing § 504.[245] It took four years of sustained sit-ins, occupations, demonstrations, protests, government lobbying, and legal action by people with disabilities and civil rights advocates before the Department of Health, Education, and Welfare (HEW) finally issued implementing regulations.[246] Federal agencies were subsequently directed to incorporate these regulations into their operations.[247] Recognizing the importance of addressing both disparate treatment and disparate impact discrimination, many agencies voluntarily included prohibitions against disparate impact discrimination into their § 504 regulations.[248] As such, agency authority has been essential in protecting disability rights and enforcing disparate impact liability under § 504.[249] However, the combined effect of recent Supreme Court decisions, along with deregulatory reforms and anti-DEIA policies of the executive branch, threatens § 504, and disability rights more broadly, by undermining the efficacy of the administrative state.

i. The Supreme Court

The Supreme Court recently issued a series of decisions that have significantly curtailed agency decision-making authority, and the level of deference courts are expected to give to agency interpretations of statutes. These rulings also made it easier for regulated parties to

Raimondo, 603 U.S. 369, 451–52 (2024) (Kagan, J., dissenting) ("[S]tatutes Congress passes often contain ambiguities and gaps. Sometimes they are intentional. Perhaps Congress 'consciously desired' the administering agency to fill in aspects of the legislative scheme . . . Sometimes, though, the gaps or ambiguities are what might be thought of as predictable accidents. They may be the result of sloppy drafting, a not infrequent legislative occurrence. Or they may arise from the well-known limits of language or foresight.").

244. *See* Serene K. Nakano, *The Handicapped and Mass Transportation: The Effectiveness of Section 504 in Implementing Equal Access*, 9 FORDHAM URB. L.J. 895, 897–900 (1981) (discussing the implementation of § 504). Of course, the passage of § 504 faced the challenge of escaping the presidential veto. *Id.* at 898. President Nixon vetoed the Rehabilitation Act twice. *Id.* at 898.

245. *Id.* at 900. Unlike Title VI, § 504 does not have its own rulemaking authority. *Id.* Individuals with disabilities rely on federal agencies to enforce § 504. *Id.*

246. *See* Derek Warden, *The Rehabilitation Act at Fifty*, 14 CAL. L. REV. 54, 56 (2023) (noting that the implementing regulations were required to be signed by the head of what was at that time the Department of Health, Education and Welfare in order for the statute to have the force of law).

247. 29 U.S.C. § 794(b).

248. For example, the U.S. Department of Labor regulations address both disparate treatment and disparate impact discrimination. *See* 29 C.F.R. § 32.4(b)(1) and 29 C.F.R. § 32.4(b)(4). Neither *Alexander v. Choate*, *Alexander v. Sandoval*, nor *Doe v. BlueCross BlueShield* addressed the issue of the scope or validity of the implementing regulations should the court find that § 504 is limited to intentional discrimination.

249. Several agencies' § 504 implementing regulations include specific reference to disparate impact liability, although it is not specifically included in the statute itself. *See* 29 C.F.R. § 32.4(b)(1), (b)(4).

challenge agency regulations in court. For example, in *U.S. Securities and Exchange Commission (SEC) v. Jarkesy*, the Court eliminated the ability of the SEC to seek civil penalties for securities fraud through its own tribunals rather than in federal civil court proceedings, holding that adjudicating such matters in-house are a violation of the Seventh Amendment right to a jury trial.[250] In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* the Court broadened the scope of judicial review under the Administrative Procedure Act (APA) by holding that the six-year statute of limitations by which plaintiff may challenge an administrative agency rule begins to run when the plaintiff suffers an injury from a final agency action, rather than when the final rule is first issued, effectively allowing plaintiffs to challenge decades old rules.[251]

The Court has also continued to limit the power of the Environmental Protection Agency (EPA) in various ways. In *West Virginia v. EPA*, the Court invoked the major questions doctrine, holding that agencies must have clear congressional authorization when they seek to decide issues of vast economic and political significance.[252] This decision further restricts agency flexibility, particularly in areas such as environmental regulation, by introducing a higher bar for regulatory action. In *Sackett v. EPA*, the Court took a narrow view of the EPA's authority under the Clean Water Act, ruling that protections for wetlands only extend to those directly adjoining navigable waters, ignoring statutory language that had long been interpreted to cover wetlands "adjacent" to such waters.[253] This reading effectively undermines decades of environmental regulation and destabilizes a regulatory framework that existed for more than fifty years.[254] Most recently, in *City and County of San Francisco, California v. EPA*, the only 5-4 decision mentioned in this section, the Court further narrowed the EPA's regulatory power under the Clean Water Act by requiring clear and specific guidelines regarding how to comply with water quality standards and potentially limiting the agency's ability to adapt to new and emerging pollution problems where quick action might be necessary to respond to an environmental crises before the agency can produce specific measurable rules.[255]

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250. 603 U.S. 109, 110 (2024).

251. 603 U.S. 799, 799 (2024).

252. 597 U.S. 697, 700–01 (2022).

253. 598 U.S. 651, 651 (2023).

254. By adopting the "continuous surface connection" test, the Supreme Court significantly narrowed the scope of the "significant nexus test" and effectively overturned aspects of the regulatory framework for defining jurisdictions waters of the United States that had been in place since the adoption of the Clean Water Act in 1972. *See id.* at 715.

255. 604 U.S. 334, 335–36 (2023).

The most consequential of these decisions in terms of broad impact across agencies occurred in *Loper Bright Enterprises v. Raimondo*, in which the Court effectively overturned forty years of precedent by discarding the *Chevron* doctrine.[256] Adhering to the Supreme Court's precedent in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts had generally deferred to an administrative agency's reasonable interpretation of ambiguous statutory provisions.[257] Under *Chevron's* framework, courts followed a two-part process to interpret federal statutes—first, determining whether the statute clearly delineates the answer.[258] If the statute was silent or ambiguous, the court would defer to the interpretation of the federal agency charged with enforcing the statute if the agency's interpretation was based on a permissible construction of the statute.[259] By essentially rejecting this approach, the Court shifted interpretive authority away from agencies and back to the judiciary, signaling a dramatic realignment in administrative law.[260] As the enforcement power of § 504 and articulation of disparate impact liability thereunder rests with administrative agency regulations, this decision will likely have far reaching consequences for litigants bringing cases under § 504.

Taken together, these cases could reflect a broader trend within the Court to revive doctrines like the nondelegation doctrine, which limits Congress's ability to transfer lawmaking authority to executive agencies.[261] The practical result could be a judiciary more skeptical of agency expertise and less willing to defer to administrative interpretations, especially in politically or economically significant areas.[262] Consequently, unless administrative agencies are able to show a delegation of congressional authority to add disparate impact discrimination to the regulations implementing § 504, a court could

256. *See* 603 U.S. 369, 369 (2024).

257. 467 U.S. 837, 844 (1984)("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

258. *Id.* at 843.

259. *Id*. at 843.

260. *See* Ian Millhiser, *The Supreme Court Just Made a Massive Power Grab It Will Come to Regret*, VOX (June 28, 2024), https://www.vox.com/scotus/357900/supreme-court-loper-bright-raimondo-chevron-power-grab [https://perma.cc/WNH8-8L2K].

261. Jonathan H. Adler, *The Delegation Doctrine*, Summer 2024 HARV J.L. & PUB. POL'Y: PER CURIAM No. 12, (June 20, 2024).

262. *Id.* at 2 (discussing the Supreme Court's application of the major questions doctrine as illustrative of its reluctance in some cases to recognize administrative authority that is not expressly delegated and emphasizing in those decisions "that administrative agencies are born without any regulatory authority in the domestic sphere.").

invalidate disparate impact liability in those regulations as an impermissible exercise of congressional authority.[263]

In addition, the *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* decision also introduces new uncertainty regarding challenges to agency actions under the APA.[264] The Court in *Corner Post* held that the APA's six-year statute of limitations begins not when the rule is issued, rather when a plaintiff is first injured by the agency action.[265] This departure has major implications, especially for regulations that are decades old, like those implementing disparate impact standards under § 504. Under *Corner Post*, rather than being time barred, a newly affected party may now bring a timely APA claim, even if the regulation in question is decades old.[266] Hence, a plaintiff claiming recent harm under § 504 could challenge the application of the disparate impact regulation under the APA as exceeding statutory authority. This could invite renewed legal challenges to disparate impact regulations by conservative legal organizations, state governments, or regulated entities who may argue that such regulations impose significant burdens without clear authorization from Congress.

Another significant limitation on enforcement of disparate impact protections under § 504 arises from the Court's increasingly restrictive approach to implied private rights of action. Since the mid-1970s, the Supreme Court has been narrowing the availability of implied private rights of action to enforce federal statutes by applying a four-prong test.[267] Implied private rights of action are now generally foreclosed to enforce federal regulations in the absence of statutory text and structure

263. *See* Alison Somin, *Disparate Impact as a Non-Delegation Violation and Major Question*, Summer 2024 HARV J.L. & PUB. POL'Y: PER CURIAM No. 18, at 2 (June 20, 2024) (asserting that disparate impact is a non-delegation issue because it "violates the Constitution's prohibition on delegation of congressional power").

264. *See Corner Post, Inc.*, 603 U.S. at 799 (2024).

265. *Id.* at 809 (holding that the statute of limitations does not accrue until the plaintiff suffers an injury from a final agency action).

266. *See id.* at 809.

267. Cort v. Ash, 422 U.S. 66, 78 (1975) (Brennan, J.) (setting forth a four-part test to determine the availability of an implied private right of action). The test asks whether:

> (1) the plaintiff [is in] the class for whose especial benefit the statute was enacted; . . .
>
> (2) there is any indication of legislative intent, explicit or implicit, either to [deny or to create a private right to enforce;] . . .
>
> (3) [a private right to enforce would be] consistent with the underlying purpose of the legislative scheme; . . . [and] . . .
>
> (4) the cause of action [is] one traditionally relegated to state law, . . . [such that] it would be inappropriate to infer a cause of action based solely on federal law.

Id. (internal quotations omitted).

evidencing the intent of Congress to create a new right.[268] While the "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, it may not create a right that Congress has not."[269] Given these patterns, it is possible that the Court would be cautious in determining whether to extend a private right of action for disparate impact claims under § 504.

ii. Executive Actions

The executive and judicial branches intersect in their influence on administrative agencies. In recent administrations, the executive branch has taken steps to limit and shift the scope of authority granted to administrative agencies by issuing executive orders, proposing new regulations, and directing agencies to alter their policies—setting the stage for challenges that may eventually reach the Supreme Court.

Under the current administration, there have been major policy shifts toward the elimination of Diversity, Equity, Inclusion, and Accessibility (DEIA).[270] However, there has been little discussion of the importance of these frameworks in fostering inclusive policies and environments for individuals with disabilities. DEIA helps to support anti-discrimination laws such as § 504 by fostering the creation of policies that put statutes into practice and filling the gaps between law and practice.[271] For instance, without these policies, individuals with disabilities may face additional challenges in workplaces that may be less accessible or lack inclusive hiring practices. Loss of DEI policies has impacted access to research grants, many of which were focused on

268. Alexander v. Sandoval, 532 U.S. 275, 285–90 (2001).

269. *Id.* at 291.

270. *See, e.g.*, Ending Radical and Wasteful Government DEI Programs and Preferencing, Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025).

271. DEI policies help to effectuate the goals of anti-discrimination laws and policies by addressing significant biases in areas such as employment. *See, e.g.*, *Making Equal Opportunity Real: How Diversity, Equity, and Inclusion Efforts Combat Workplace Discrimination*, NAT'L INST. FOR WORKERS' RTS. 2 (May 20, 2025), https://niwr.org/wp-content/uploads/2025/05/2025-NIWR-Policy-Brief-Making-Equal-Opportunity-Real.pdf [https://perma.cc/DH9E-6J8J] ("Diversity, equity, and inclusion initiatives are not only *consistent* with the law but are often *necessary* to ensure compliance with it, as indicated in recent guidance from state attorneys general."); MASS. & ILL. OFFS. OF THE ATT'Y GEN., MULTI-STATE GUIDANCE CONCERNING DIVERSITY, EQUITY, INCLUSION, AND ACCESSIBILITY EMPLOYMENT INITIATIVES 1 (Feb. 13, 2025), https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download [https://perma.cc/DW3G-KQLW] ("Employment policies incorporating diversity, equity, inclusion, and accessibility best practices are not only compliant with state and federal civil rights laws, but they also help to reduce litigation risk by affirmatively protecting against discriminatory conduct that violates the law. Effective policies and practices foster the development of inclusive and respectful workplaces where all employees are supported and encouraged to do their best work.").

addressing inequities in healthcare.[272] Education and learning environments have been particularly impacted and there are efforts to eliminate the Department of Education which assists states in funding programs to provide accommodations for students with disabilities in accordance with § 504 and the IDEA.[273]

The administration has also taken steps that may undermine the independence of federal agencies considered to be independent. Although the President is generally prohibited from removing the heads of independent agencies except for cause—such as "malfeasance" or "neglect of duty"—there is active litigation regarding President Trump's removal of members of the National Labor Relations Board (NLRB), the Merit Systems Protection Board (MSPB), the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission (FTC) and most recently, the Consumer Products Safety Commission (CPSC).[274] The executive actions could also set a precedent with respect to independent agencies that provide essential services and assistance for individuals with disabilities, such as the Social Security Administration and the U.S. Access Board.

Other actions taken by the Trump Administration directly impact the availability of private rights of action under § 504 and other anti-discrimination statutes. In the absence of a private right of action for disparate impact discrimination, parties are forced to depend on administrative agencies such as the EEOC, OCR, and the DOJ to bring their

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272. *See* Katrina Miller, *Accessibility Initiatives Are Taking a Hit Across the Sciences*, N.Y. TIMES (Feb. 22, 2025), https://www.nytimes.com/2025/02/22/science/trump-accessibility-research.html [https://perma.cc/KMP8-TTLB]; Alana Semuels, *Trump Administration Cuts Funding for Autism Research—Even As It Aims to Find the Cause*, TIME (Apr. 22, 2025), https://time.com/7279068/trump-administration-autism-research-cuts/ [https://perma.cc/9UYY-MMZ6].

273. 20 U.S.C. §§ 1400, et seq. In the midst of cuts to DEI and DEIA programs and services which help support students with disabilities, there are extant efforts to eliminate the Department of Education. *See* Sarah Mervosh & Michael C. Bender, *No Education Department? No Problem. Trump's Education Secretary Says*, N.Y. TIMES (Oct. 23, 2025), https://www.nytimes.com/2025/10/21/us/education-department-shutdown-layoffs.html [https://perma.cc/33NW-QC2E].

274. On May 22, 2025, the Supreme Court granted the government's emergency application for a stay of a district court order requiring the reinstatement of members of the NLRB and the MSPB who had been removed by the President without cause. Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025). Although the Court did not issue a full opinion, the decision to grant the stay without a clear statement reaffirming *Humphrey's Executor v. United States* appears to signal a shift away from that precedent, which had limited the President's power to remove officials from independent agencies except for "inefficiency, neglect of duty, or malfeasance in office." *See id.*; *Humphrey's Ex'r*, 295 U.S. 602, 623 (1935). *See also President Trump Removes EEOC and NLRB Officials*, SULLIVAN & CROMWELL: LEGAL DEVS. AFFECTING THE WORKPLACE (May 27, 2025), https://www.sullcrom.com/insights/blogs/2025/May/President-Trump-Removes-EEOC-NLRB-Officials [https://perma.cc/7SQH-8BLE] (detailing the timeline of EEOC and NLRB officials' removals and subsequent lawsuits).

claims. In the current environment, where agencies are likely to be largely understaffed, this becomes less likely.[275] Further, as mentioned above, the power and authority of these agencies has been limited under the current administration in addition to being directed to shift their priorities.[276] These and other developments underscore the urgency of addressing the current gaps in enforcement mechanisms and the broader implications, especially for individuals with disabilities seeking redress.

IV. Recommendations

While these concerns raise significant economic and legal questions, they also highlight the need for clearer legislative guidance with respect to § 504. To that end, Congress is best positioned to address these issues through amended or new legislation. For any legislative effort to be effective, it must resolve the current uncertainty surrounding the law, providing clarity about its scope and application. Clear legislative guidance is essential not only to protect the rights of individuals with disabilities but also to remedy the ambiguity surrounding whether § 504 provides a private right of action for disparate impact discrimination.

If congressional action proves unlikely, however, alternative pathways through state legislation and grassroots advocacy may offer interim or supplemental protections. The following recommendations outline potential avenues to address this issue.

A. Congress Should Amend § 504 or Enact a Clarifying Statute

If disparate impact claims are to be consistently recognized under § 504, their availability should not be left up to the judicial interpretation. As discussed, recent Supreme Court decisions indicate a strong possibility that such claims may be curtailed or eliminated for disparate impact, a decision which would be detrimental to people with disabilities. As Justice Kagan wrote in her dissent in *Marietta Memorial Hospital*, such

275. *See* Ashley Lopez, *Employee Cuts at Social Security Are Leaving Remaining Workers Struggling to Keep Up*, NPR (Apr. 26, 2025), https://www.npr.org/2025/04/26/nx-s1-5368480/social-security-workforce-cuts [https://perma.cc/QH8V-R6SG] (explaining that the employee cuts at the Social Security Administration have led to delayed and halted services).

276. *See, e.g.*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, REMOVING GENDER IDEOLOGY AND RESTORING THE EEOC'S ROLE OF PROTECTING WOMEN IN THE WORKPLACE (Jan. 28, 2025), https://www.eeoc.gov/newsroom/removing-gender-ideology-and-restoring-eeocs-role-protecting-women-workplace [https://perma.cc/E7EN-UUSE] (explaining that Trump issued a directive to EEOC to shift away from pursuing cases of discrimination against transgender individuals); Brigid Harrington, Amy Fabiano, Gerard T. "Gerry" Leone, Jr. & Hunton Andrews Kurth, *Layoffs at the Dept. of Education May Impact Office for Civil Rights Enforcement*, NAT'L L. REV. (Mar. 25, 2025), https://natlawreview.com/article/layoffs-dept-education-may-impact-office-civil-rights-enforcement [https://perma.cc/C29X-U57K] (discussing the massive staffing reductions in the OCR of the Department of Education).

outcomes may once again leave Congress needing to "fix a statute [that] this Court has broken."[277]

The Constitution vests all legislative powers in Congress[278] and under the separation of powers, it is Congress—not the Judiciary or the Executive—that holds the authority to legislate.[279] However, Congress frequently abdicates this function to administrative agencies for the sake of expediency[280] To ensure that individuals with disabilities have a private cause of action to enforce disparate impact claims and to guarantee these protections, Congress must amend § 504 or the Rehabilitation Act or pass new legislation. This legislation should explicitly recognize protections against disparate impact discrimination that are at least coextensive with its implementing regulations.

Congress has precedent for doing so. In response to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, which made disparate impact discrimination under Title VII more difficult to prove,[281] Congress enacted the Civil Rights Act of 1991 (Act of 1991).[282] The law

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277. Marietta Mem'l Hosp. Emp. Benefit Plan v. DaVita Inc., 596 U.S. 880, 891 (2022) (Kagan, J., dissenting).

278. U.S. CONST. art. I, § 1; *see Art I.S1.4.1 Overview of Delegations of Legislative Power*, CORN. L. SCH.: LEGAL INFO. INST. https://www.law.cornell.edu/constitution-conan/article-1/section-1/overview-of-delegations-of-legislative-power [https://perma.cc/ZB67-MEBS].

279. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

280. *See supra* note 243 (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 451 (2024) (Kagan, J., dissenting) (discussing Congress's delegation of authority to administrative agencies)).

281. 490 U.S. 642, 660 (1989) (requiring the burden of persuasion to stay with the plaintiff to prove the absence of a business justification by the employer) ("[I]n disparate-treatment cases . . . the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.").

282. *See* 42 U.S.C. §§ 2000e to 2000e-17 (comprising subchapter VI-Equal Employment Opportunities of ch. 21-Civil Rights under tit. 42-The Public Health and Welfare, which had several provisions amended by the Act of 1991). The 1991 Civil Rights Act amended Title VII to read:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> >
> > (ii) the complaining party makes the demonstration described in paragraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

clarified and reinstated the framework for analyzing disparate impact under Title VII.[283]

However, given the current political climate, amending § 504 may not be feasible. Congressional gridlock, competing legislative priorities, fiscal concerns, and the risk of presidential veto all present significant obstacles that may prevent legislation from moving forward. Even with a Democratic majority in both chambers of Congress, internal party divisions or opposition to disparate impact protections, particularly under a Trump Administration which has pursued a narrowing of disparate impact liability, could stall progress. In light of the possibility of limited congressional action, alternative avenues including state law and advocacy must also be considered.

B. State Law

In the absence of congressional action or a favorable Supreme Court ruling, people with disabilities and their advocates may need to increasingly rely on state and local laws where applicable. Strengthening or enacting state level anti-discrimination statutes can be an effective strategy for countering the negative effects of executive orders and other federal policies aimed at limiting or eliminating protections against disparate impact discrimination in areas such as education, housing, or employment.

For instance, New York state lawmakers are working to codify federal housing protections that explicitly prohibit disparate impact discrimination into state law.[284] This initiative would act as a safeguard

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> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.
>
> > (ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.
>
> (C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

42 U.S.C. § 2000e-2(k)(1).

283. 42 U.S.C. § 2000e-2(k)(1).

284. *See* Brian Kavanagh, *To Combat Trump, NY Dems Want Federal Housing Protections in State Law*, N.Y. STATE SENATE: NEWSROOM (Feb. 3, 2025), https://www.nysenate.gov/newsroom/in-the-news/2025/brian-kavanagh/combat-trump-ny-dems-want-federal-housing-protections [https://perma.cc/SZ26-8FZX].

against efforts to eliminate such protections under the FHA by ensuring claimants receive state housing protections against discrimination.[285] New York's Human Rights Law already prohibits discrimination in employment, housing, education, credit, and public accommodations based on disability and other protected characteristics.[286] In addition to New York, several other states have anti-discrimination statutes which expressly prohibit disparate impact discrimination on the basis of disability, or other protected characteristics. For example, California[287] and Illinois[288] also have statutes that expressly prohibit disparate impact on the basis of disability.

Addressing disparate impact discrimination through state legislation, however, is limited. It could not address discrimination on the federal level, or as a means of enforcement withhold federal funding for violations. There are also challenges with having a patchwork of state laws that lack the consistency and uniform protection that a federal mandate would provide.

C. Advocacy Organizations and Grassroots

Advocacy and public opinion can be powerful impetuses for social change. The disability rights movement, which drew inspiration from the Civil Rights Movement of the 1960s, took root as a grassroots effort led by people with disabilities and their allies.[289] Frustrated by widespread discrimination, inaccessibility, and institutionalization, activists mobilized at the local level to demand equal rights, inclusion, and independence.[290] These movements helped to shift public perception, influence policy, and secure legislative victories such as the signing of the implementation and the enactment of the ADA.[291]

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285. *Id.*; *see also* Assemb. B. 4040A, 2025 Leg., 2025–2026 Reg. Sess. (N.Y. 2025) (proposing to amend the executive law to codify the disparate impact standard in human rights law).

286. *See* N.Y. EXEC. LAW §§ 290–301 (Consol. 2025); N.Y.C. ADMIN. CODE §§ 8-101 to -134.

287. *See* California Disabled Persons Act, CAL. CIV. CODE § 54–55.32 (West 2025).

288. *See* Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/5-101 to 5/10-105 (2025).

289. Marisa Wright, *A Shared Struggle for Equality: Disability Rights and Racial Justice,* NAACP LEGAL DEF. FUND (July 31, 2023), https://www.naacpldf.org/disability-rights-and-racial-justice/ [https://perma.cc/2GWK-NLC2] ("If it weren't for the civil rights movement, the disability rights movement, and resulting civil rights protections for individuals with disabilities, would probably never have existed. The civil rights movement inspired individuals with disabilities to fight against segregation and for full inclusion under the law.").

290. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (Oct. 17, 2017), https://dredf.org/the-history-of-the-americans-with-disabilities-act/ [https://perma.cc/RD2C-DQZV] (discussing how grassroots activism by people with disabilities and their allies led to the signing of the ADA).

291. *Id.*

The outcomes in both the *Payan* and *CVS* cases illustrate the continuing importance of disability organizations, activists, and legal advocates. Confronted with those cases, the undermining of § 504, and the weakening of other disability rights laws, these groups mobilized and rallied against those organizations.[292] By highlighting the instances of disparate impact in education, healthcare, and housing, advocacy groups can pressure policy makers to reconsider their stance on § 504 and take action.

Moreover, public advocacy could also encourage state level action as state legislatures may be more receptive to their local constituent's concerns. Increased visibility of the issue concerning disparate impact liability under § 504, the ADA, and disparate impact liability as a cause of action more generally through the media and grassroots movements could push state lawmakers to act, even if federal legislation is difficult to accomplish under the current administration.

Conclusion

As the Supreme Court retreats from curing legislative ambiguities and overturns longstanding precedents, there is an even greater need for Congress to clarify and address gaps in statutory protections. The judiciary can be the "least dangerous" branch when and if Congress does its job.[293] However, it is apparent, as of the writing of this article, that under the current administration, any efforts to pass congressional legislation attempting to codify an explicit prohibition of disparate impact discrimination under § 504 may be ineffective.[294] As the law continues to grapple over the scope of the protections provided by § 504, people with disabilities face increasing widespread barriers to inclusion and equitable access in our society. Instances of invidious and overt discrimination are increasingly prevalent due to the elimination of diversity, equity, inclusion, and accommodation policies. The current administration, in rolling back civil rights protections and limiting disparate impact, has created additional obstacles for individuals with

292. *See supra* Part II.D.1 (describing the coordinated advocacy by disability rights groups in *CVS Pharmacy, Inc. v. Doe*, including amicus briefs and public pressure campaigns); *supra* Part II.D.2. *See generally* Payan v. Los Angeles Cmty. Coll. Dist., 11 F.4th 729 (9th Cir. 2021); Doe v. CVS Pharmacy, Inc. 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021), *cert. dismissed*, 142 S. Ct. 480 (2021) (demonstrating how advocates pushed for a mediated resolution to avoid a potentially harmful Supreme Court ruling).

293. THE FEDERALIST NO. 78 (Alexander Hamilton) (defining the judiciary as the least dangerous of the three branches of government and extolling the importance of an independent judiciary and judicial review).

294. *See* Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NPR (May 11, 2022), https://www.npr.org/2022/05/11/109f7980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely [https://perma.cc/9VBW-RCFL].

disabilities. In addition, in the current climate, the disability rights bar may be reluctant to bring cases for fear that those cases may potentially make their way to the Supreme Court and result in decisions which have a negative impact on disability rights.[295] As a result, disparities in health, education, employment, and other forms of systemic discrimination perpetuated through seemingly neutral laws, may go unaddressed. Thus, there is an urgent need to address this issue.

295. *See* Eric Garcia, *How This Supreme Court Is Setting Back Disability Rights — Without Even Trying*, MSNBC (July 5, 2022), https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-s-hostility-disability-rights-discouraging-n1296795 [https://perma.cc/C29X-U57K].