

November 1, 2021

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Karen S. Lynch
President and Chief Executive Officer
CVS Health

Re: *CVS v. Doe*, 20-1374 (U.S.)

Dear Members of the Board of Directors of CVS Health, including President Lynch:

We are members and leaders of the disability and HIV communities, and we write to urge CVS to remove the *CVS v. Doe* case from review by the U.S. Supreme Court. The brief filed by CVS attacks the very foundation of disability rights law. The argument asserted is not necessary to address the facts of the case and has far reaching implications – setting back more than 40 years of hard-fought-for civil rights of people with disabilities. This brief directly conflicts with CVS’s long-time commitment to the inclusion of people with disabilities.¹ The disability and HIV communities cannot accept this wholesale assault on our civil rights and demand an immediate meeting with the company’s Board of Directors board to explain our deeply held concerns. CVS cannot position itself without consequence as the corporate entity that sought to turn back the clock for disability rights.

In *CVS v. Doe*, CVS’ lawyers seek to remove established “disparate impact” protections from Section 504 of the Rehabilitation Act. These safeguards are at the heart of disability rights laws which recognize that disability exclusion, segregation, and provision of inferior services are most often the result of thoughtlessness and neglect, not animus.

Disparate impact discrimination means discrimination that occurs not because of an intent to discriminate against disabled people but because of facially neutral policies that operate to disadvantage people with disabilities. If disability laws only addressed intentional acts of discrimination, disabled people would not be able to participate and contribute to society – the core goal of Section 504, the Americans with Disabilities Act (ADA), and all federal and state laws that are intended to bring disabled people into the mainstream of American life.²

¹ 2020 Corporate Responsibility Report, pp. 14, 18, 62, 63, 66, 67, <https://cvshealth.com/sites/default/files/2020-csr-report.pdf>.

² See *Alexander v. Choate*, 469 U.S. 287, 295, 296-97 (1985) (“Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect. ...

Common examples of this kind of discrimination include:

- the failure to provide accessible spaces with ramps and elevators;
- the use of trains or buses in public transit that are not wheelchair accessible;
- the failure to provide sign language interpreters or alternative formats such as Braille;
- the launch of websites and mobile apps that are unusable by blind people and others with disabilities; and
- policies that seem neutral but that actually function to exclude people with disabilities such as sending critical Social Security Administration benefit notices to blind people in standard print,³ disallowing motorized vehicles in federal parks,⁴ zoning rules that deter or prohibit group residences for individuals with intellectual and developmental disabilities,⁵ or a health care rationing policy for COVID-19 that gives a lower priority for scarce life-saving resources to individuals based on “life years” or “quality of life,” putting disabled people at the back of the line.⁶

Disabled people are faced with these barriers day in and day out. Before Section 504 people with disabilities had no recourse in American civil rights laws to challenge these practices. That is why the disability community galvanized to ensure that the Section 504 regulations reflect Congress’s intent to protect disabled people from policies that perpetuate inequality, whether by design or effect. The regulations and the events that led to them – including the longest sit-in of a federal building in history – were featured in the Oscar-nominated 2020 movie *Crip Camp* viewed by millions.⁷ The original Section 504 regulations⁸ were made final in 1977 after years of serious negotiation and

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.”).

³ *Am. Council of the Blind v. Astrue*, No. C 05-04696 WHA, 2009 U.S. Dist. LEXIS 97599 (N.D. Cal. Oct. 20, 2009); see also *Cook Cty. v. Wolf*, 962 F.3d 208 (7th Cir. 2020).

⁴ United States Department of Interior, National Park Service, NPS National Laws, Regulations and Policies on Accessibility, <https://www.nps.gov/zion/learn/management/upload/Zion-SETP-Appendix-B-National-Policy-1.pdf>.

⁵ *Cf. Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

⁶ See U.S. Department of Health and Human Services, Office of Civil Rights, Non-Discrimination In Crisis Standards Of Care, Disability and Crisis Standards of Care, OCR Resolutions with States and Others About Crisis Standards of Care, Disability and Age Discrimination, <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/index.html>.

⁷ *Crip Camp: A Disability Revolution* (2020), <https://www.netflix.com/title/81001496>.

⁸ 45 C.F.R. Part 84.

discussion among government representatives, affected parties, and the disability community.

The Honorable Dr. Judith Heumann,⁹ a leader of the movement which brought about these regulations, recounted to Congress during the hearings for the ADA her many experiences with discrimination based on paternalism, discriminatory criteria, and stereotypes that were couched in neutral terms:

When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education trice a week for 3½ years. ...

When I was 19, the house mother of my college dormitory refused me admission into the dorm because I was in a wheelchair and needed assistance.¹⁰

Since 1977, Section 504's implementing regulations promulgated by dozens of federal agencies have included explicit protections against disparate impact discrimination. The ADA incorporates these regulations.¹¹ Discrimination in federally conducted programs, like Veterans Administration programs and Social Security Administration benefits, are based on these regulations.¹² All federal and state disability laws across the country use the basic, accepted tenet of disability protections established in these regulations which CVS seeks to invalidate – that equal opportunity for people with disability requires the removal of architectural, communication and policy barriers regardless of an intent to discriminate.

CVS has long demonstrated its support for the disability community, including through its commitment to disability inclusion in employment. You have a 100% rating from the Disability Equality Index, and received the Excellence in Disability Inclusion award from the U.S. Department of Labor in 2020.¹³ CVS Health's Workforce Initiatives team has

⁹ See Judith Heumann, https://en.wikipedia.org/wiki/Judith_Heumann; Ted Talks, Judith Heumann, Our fight for disability rights – and why we're not done yet, https://www.ted.com/talks/judith_heumann_our_fight_for_disability_rights_and_why_we_re_not_done_yet?language=en. Description: Four decades ago, Judith Heumann helped to lead a groundbreaking protest called the Section 504 sit-in -- in which disabled-rights activists occupied a federal building for almost a month, demanding greater accessibility for all. In this personal, inspiring talk, Heumann tells the stories behind the protest -- and reminds us that, 40 years on, there's still work left to do. Viewed by more than 1.2 million people, translated into 19 languages.

¹⁰ Sen. Comm. on Lab. & Hum. Res., Rep. 101-116, 6 (Aug. 30, 1989).

¹¹ 42 U.S.C. §§ 12134(b), 12201.

¹² See, e.g., 45 C.F.R. Part 85; 28 C.F.R. Part 39.

¹³ 2020 Corporate Responsibility Report, pp. 14, 18, 62, 63, 66, 67, <https://cvshealth.com/sites/default/files/2020-csr-report.pdf>.

worked for decades to develop relationships with vocational rehabilitation agencies, non-profit organizations, and schools to provide job coaching, mentoring, training and follow-up support through the Abilities in Abundance program.¹⁴ The company was one of the first alliances established by the US Department of Labor's Office of Disability Employment Policy to increase the employment of people with disabilities.¹⁵ But these achievements and commitments are hollow given the attack on disability rights by CVS's lawyers in *CVS v. Doe*.

If CVS's bid to eliminate disparate impact discrimination protections is successful, core disability rights protections will be eviscerated, with particularly dire effects in several key areas, including nondiscrimination in federal government programs and health care. The disability and HIV rights communities are united in our upset and outrage that CVS is seeking to eliminate these core rights.

We understand that CVS has an interest in defending its business operations and programs. If CVS pulls the case from the Supreme Court, it can return to the trial court and defend its interests under existing disability rights principles, including the balanced "meaningful access" test articulated by the U.S. Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985). It can argue and present evidence that the plaintiffs should lose their case (as did the plaintiffs in *Choate*) without asking the Supreme Court to gut decades of disability law.

Again, we urge you to rescind your request that the Supreme Court eliminate foundational portions of the Rehabilitation Act, and we look forward to discussing these concerns with you in more detail at the earliest possible opportunity.

Please contact Maria Town at 985-507-6805, mtown@aapd.com, to schedule a meeting.

Sincerely yours,

The Honorable Dr. Judith Heumann
Former Special Advisor for International Disability Rights, U.S. State Department
Former Assistant Secretary of Education for Special Education and Rehabilitative Services, U.S. Department of Education

Maria Town, President and CEO
American Association of People with Disabilities

¹⁴ CVS Health, Abilities In Abundance, <https://cvshealth.com/about-cvs-health/diversity/workforce-initiatives/abilities-in-abundance>.

¹⁵ CVS/Caremark (CVS), ODEP Alliance, <https://www.dol.gov/agencies/odep/alliances/previous/cvs>.

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Jeff Crowley, Program Director, Infectious Disease Initiatives,
O'Neill Institute for National and Global Health Law, Georgetown Law
Former Director of the Office of National AIDS Policy and Senior Advisor on Disability
Policy, The White House

The Honorable Tony Coelho, Former Member of Congress and Founder
Coelho Center for Disability, Law, Policy and Innovation at Loyola Law School

Heather Ansley, Associate Executive Director, Government Relations
Paralyzed Veterans of America

Julia Bascom, Executive Director
Autistic Self Advocacy Network

Peter Berns, Chief Executive Officer
The Arc of the United States

Lydia Brown, Director of Policy, Advocacy, & External Affairs
Autistic Women & Non-Binary Network

Diane Coleman, President and CEO
Not Dead Yet

Connie Garner, Executive Director
Allies for Independence

Andraéa LaVant, Founder and President
LaVant Consulting, Inc.
Consultant and Impact Producer, Crip Camp: A Disability Revolution

Reyma McCoy-McDeid, Executive Director
National Council on Independent Living

Jesse Millan, Jr., JD, President & CEO
AIDS United

Vincenzo Piscopo, President and CEO
United Spinal Association
Clark Rachfal, Director of Advocacy and Governmental Affairs,
American Council of the Blind

Kevin Rogers, Interim CEO
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Howard Rosenblum, CEO

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National Association of the Deaf

Brad Sears, Associate Dean of Public Interest Law
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Craig E. Thompson, CEO
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Alice Wong, Founder
Disability Visibility Project