People with disabilities experience significant health disparities in the US. They report worse health outcomes and greater difficulty accessing care than their nondisabled counterparts. These disparities have persisted despite broad federal disability rights protections, including Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. As a result, in 2010 Congress added a prohibition on disability discrimination specifically targeting health care, Section 1557 of the Affordable Care Act (ACA). However, some of these protections have recently been under attack. In December 2021, the Supreme Court was scheduled to hear a case, CVS v Doe, that could have had devastating effects for the health equity of Americans with disabilities.

The plaintiffs in that case were people with HIV/AIDS with employer-sponsored health insurance. These individuals had relied on community pharmacies for their HIV/AIDS medications. To save money, their pharmacy benefit manager changed the health plans to provide in-network pricing for those drugs exclusively through its specialty pharmacy, which offered medications only by mail or by drop-shipment to one of its corporate affiliate pharmacies for pickup. This seemingly innocuous coverage decision had serious implications for the plaintiffs. They could no longer consult knowledgeable community pharmacists, experienced processing and mail delays, had to miss work to avoid package theft, faced privacy concerns, and had their temperature-sensitive drugs left outdoors for extended periods of time. The plaintiffs sued the pharmacies and the benefit manager, asserting that the coverage change violated Section 1557 and other statutes.

The lawsuit included what lawyers call a “disparate impact” claim. In actions for disparate impact, the alleged discriminator may not have intended to discriminate, but the affected individuals may still nonetheless have a legitimate legal claim. The Supreme Court has called this form of unequal treatment discrimination “by effect rather than by design.” For example, it would have a disparate impact on people with mobility impairments if a hospital can only be accessed via a flight of stairs instead of an elevator or ramp, even if that was an oversight on the hospital’s part rather than an explicit intent to discriminate.

To understand why disparate impact claims are so important to health equity for people with disabilities, it is useful to consider why disparities occur in the first place. Of course, at least some inequality is the result of negative stereotypes and overt discrimination. However, a significant swath of these effects occurs unintentionally, simply because our health care system was not designed with people with disabilities in mind.

In 1985, the Supreme Court acknowledged that Section 504, the major disability rights protection at the time, could cover some disparate impact claims. Although the law does not entitle people with disabilities to the same outcome as people without disabilities, covered programs must provide the disabled with “meaningful access” to whatever benefits they offer.

Congress referenced Section 504 in Section 1557, suggesting that Section 1557 also covers actions for disparate impacts. Furthermore, just as the Supreme Court reasoned about Section 504, not allowing disparate impact claims under Section 1557 would make it “difficult if not impossible” to address “much of the conduct that Congress sought to alter in passing the… Act.” However, some have contended the extent to which Sections 1557 and 504 reach disparate impact discrimination. The Supreme Court was going to address this issue head on in CVS v Doe.

In the lower courts, the parties argued over whether relevant statutes applied, and whether the amended plans offered the plaintiffs “meaningful access.” Yet when the case got to the Supreme Court, the defendants challenged the court’s 1985 decision, arguing that the law should not cover...
discrimination by effect. In other words, they asserted that people with disabilities should not be able to sue for disparate impact under Section 504 and Section 1557.

But an unexpected thing happened on the way to the courthouse. Less than a month before oral argument, the parties agreed to withdraw the case from the Supreme Court. Several disability rights groups, who were not parties to the lawsuit, began both publicly and privately urging the defendants to pull the case, citing the harm it could do to both disability rights law and to the pharmacy’s reputation. Suddenly—just a few weeks before oral argument—the defendants and the disability rights groups issued a joint statement in which the defendants agreed to withdraw the case to “pursue policy solutions in collaboration with the disability community.” Although not completely unprecedented,8 it is uncommon for cases to be withdrawn from the Supreme Court after the court has agreed to hear them. It is more infrequent still for the case to be withdrawn from the court without being settled, let alone after a negotiation with groups that are not parties.

Although advocates for disability rights may have breathed a collective sigh of relief, this case demonstrates just how vulnerable people with disabilities are with respect to their health care. It may be only a matter of time before another case presents the same issue, and, when it does, the health equity of people with disabilities will hang in the balance. Given that many justices on the current court have been hostile toward disparate impact claims in other contexts,9 if the court takes up this issue again it is likely that they will decide against people with disabilities and hold that Section 504 and Section 1557 do not apply to disparate impact discrimination. Health policy makers must act now to preserve these legal protections.

For the reasons above, allowing claims for disparate impact is essential to ending health disparities on the basis of disability. The Biden administration has announced that it plans to update Section 1557’s implementing regulations.10 The draft rules should be issued shortly. During the notice and comment period, commenters should make their support for disparate impact actions known. Likewise, health policy makers must ensure that they account for the health care needs of people with disabilities proactively because it could be harder to fight unintentional discrimination after the fact. We must all work together to ensure health equity for all Americans, regardless of disability.


