FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROY PAYAN; PORTIA MASON; NATIONAL FEDERATION OF THE BLIND; NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, *Plaintiffs-Appellees/Cross-Appellants*, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, *Defendant-Appellant/Cross-Appellee.*	Nos. 19-56111 19-56146 D.C. No. 2:17-cv-01697-SVW-SK OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted February 12, 2021
Submission Vacated February 16, 2021
Resubmitted August 17, 2021
Pasadena, California

Filed August 24, 2021

Before: Richard C. Tallman, Consuelo M. Callahan, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge Lee

SUMMARY*

Disability Discrimination

On an appeal and a cross-appeal in a case in which the district court entered a permanent injunction and final judgment in favor of two blind students and two non-profit organizations that advocate for blind persons (collectively, "Plaintiffs"), the panel reversed, vacated, and remanded for further proceedings.

The district court entered the injunction and judgment against Defendant Los Angeles Community College District ("LACCD") following bench and jury trial verdicts finding that LACCD had violated Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act by systemically discriminating against blind students at its Los Angeles City College campus.

The panel first held that the Supreme Court's holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001), does not disturb this court's historical recognition that disparate impact disability claims are enforceable through a private right of action.

The panel then addressed LACCD's argument that the district court erred in applying a disparate impact framework to all of Plaintiffs' disability discrimination claims. Under Title II and Section 504, disability discrimination claims may be based on one of three theories of liability: disparate

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

treatment, disparate impact, or failure to make a reasonable accommodation. The panel explained that the important difference between the latter two theories is that a reasonable accommodation claim is focused on an accommodation based on an individualized request or need, while a reasonable modification in response to a disparate impact finding is focused on modifying a policy or practice to improve systemic accessibility.

LACCD argued that the district court erred in applying a disparate impact framework to Plaintiffs' claims because the accessibility of higher education is fundamentally an issue of individualized reasonable accommodations rather than systemic barriers. The panel wrote that this court's case law provides no justification for limiting disability discrimination claims to only the failure to accommodate theory of liability in the higher education context, and held that the district court erred in requiring Plaintiffs to present all of their claims as disparate impact claims.

The panel wrote that some of Plaintiffs' claims are true disparate impact claims. Allegations of systemic accessibility barriers in campus websites or the library are claims that impact all blind users, not just the two individual plaintiffs, and are appropriately considered under the disparate impact framework. The panel cited as examples (1) that Plaintiffs identified LACCD's facially neutral practice of operating its student web portal through a program that was not compatible with screen reading software as having a disparate impact on blind students, as to which Plaintiffs presented evidence of a remedy through reasonable modifications to the underlying website programming; and (2) Plaintiffs' allegations that LACCD had facially neutral practices of selecting classroom materials from third parties and only evaluating the

accessibility of those materials on an ad hoc, complaint-driven basis rather than in compliance with the campus' Alternate Media Production Policy.

The panel wrote, however, that certain claims specific to the individual plaintiffs should have been considered through the individual failure to accommodate framework. The panel noted that the individual plaintiffs were each approved to receive individual accommodations through the college's Office of Special Services, and presented evidence of specific instances in which those accommodations were denied. The panel held that the district court erred by rejecting these claims on the ground that the individual plaintiffs did not adequately put LACCD on notice that they required specific accommodations, consequently limiting the scope of evidence it permitted Plaintiffs to present on these claims. The panel wrote that certain allegations in the operative complaint thus went underdeveloped despite apparently presenting cognizable failure to accommodate claims.

The panel instructed the district court on remand to reconsider Plaintiffs' individual claims under either the disparate impact framework or the individual failure to accommodate framework, depending on the nature of the specific claim, and to permit Plaintiffs to introduce evidence to support these claims under either framework.

The panel resolved remaining claims on appeal in a concurrently filed memorandum disposition.

Dissenting, Judge Lee disagreed with the majority's holding that Title II and Section 504 allow plaintiffs to sue based on a disparate impact theory. He wrote that the statutes' plain language bars intentional discrimination only,

and the Supreme Court has suggested that the Americans with Disabilities Act and Section 504 do not permit disparate impact claims.

COUNSEL

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OPINION

TALLMAN, Circuit Judge:

Defendant-Appellant Los Angeles Community College District ("LACCD") appeals the final judgment and permanent injunction entered against it following bench and jury trial verdicts finding it had violated Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act ("ADA") by systemically discriminating against blind students at its Los Angeles City College ("LACC") campus. Because the district court erroneously limited the scope of Plaintiffs' disability discrimination claims, we reverse, vacate, and remand for further proceedings.[1]

I

We begin with a brief introduction of the parties. LACCD is a public education entity operating multiple community college campuses in Southern California, including LACC. Plaintiffs Roy Payan and Portia Mason are blind students who took classes at LACC in 2015 and 2016. Plaintiff National Federation of the Blind, Inc. ("NFB") is a non-profit organization that advocates for inclusion of and removal of barriers to equality for blind persons, and Plaintiff National Federation of the Blind of California, Inc. ("NFB-CA") is the California affiliate of NFB.

[1] This opinion addresses only LACCD's claims that the district court erroneously permitted Plaintiffs to pursue disparate impact disability discrimination claims. We resolve the remaining claims on appeal in a memorandum disposition filed concurrently with this opinion.

A

Upon their enrollment at LACC, Payan and Mason each registered for disability accommodations through the college's Office of Special Services ("OSS"). Payan and Mason's approved accommodations included tape-recorded lectures, preferential seating, receiving materials in electronic text, and test-taking accommodations, and Mason received additional accommodations in the form of weekly tutoring. Both Payan and Mason use a screen reading software called Job Access with Speech ("JAWS") to read electronic text. Screen reading software allows blind users to read electronic text by converting electronic text and images into audio descriptions or a Braille display.

Despite being granted individual accommodations, Payan and Mason each encountered accessibility problems while taking classes at LACC. While some of these accessibility barriers affected Payan and Mason individually, others affected blind LACC students generally. Plaintiffs categorized these accessibility barriers into the following five general inaccessibility claim categories: (1) in-class materials; (2) textbooks; (3) educational technology; (4) websites and computer applications; and (5) research databases in the LACC library.

First, Payan and Mason each took LACC classes in which they were not provided with in-class materials, such as handouts and PowerPoint presentations, in an accessible format at the same time that their classmates received the materials. LACC has a general written Alternate Media Production Policy ("AMPP") which requires all instructional materials be made accessible to students with disabilities. Despite this written policy and being approved for individual accommodations, Payan took a philosophy course in which his professor did not provide him with class

handouts in an accessible format. Similarly, Mason took a psychology course in which the professor utilized a handbook for in-class discussion, but Mason was only provided with a paper copy which she was unable to review. Mason took another psychology class in which the professor lectured using PowerPoint presentations, which Mason was able to download for review after class but which were not accessible because they were not fully compatible with screen reading software.

Second, Plaintiffs alleged they were unable to access certain textbooks required for their LACC courses. The AMPP requires that instructional materials purchased from third parties, such as textbooks, be made accessible to students with disabilities, that the college must proactively evaluate the accessibility of its instructional materials, and it establishes a process by which students with disabilities may request inaccessible materials be reproduced to them in an accessible format. Despite this policy and his individual accommodations, Payan enrolled in a math class in which he was not timely provided an accessible version of his textbook. Payan was required to take his math textbook to OSS to have it converted to an accessible format in a piecemeal manner. However, because OSS could not digitize Payan's textbook quickly enough for Payan to keep up with his course, he received his accessible assignments late and fell behind in the course as a result.

Third, despite the requirements of the AMPP and his individual accommodations, Payan took multiple LACC courses which utilized inaccessible computer programs to facilitate class work. Payan's math class required students to complete and submit homework assignments through a computer program called MyMathLab. MyMathLab was not compatible with screen reading software. Because

Payan was unable to complete homework assignments using MyMathLab, and because he was not timely provided with accessible textbook assignments, he fell behind in his coursework.

Fourth, Plaintiffs identified a variety of accessibility barriers to utilizing LACC's website resources which impacted all blind students. LACC's front-facing website, as well as its internal online student portal—operated through a program called PeopleSoft—were not compatible with screen reading software. Plaintiffs put forward evidence that reasonable website programming modifications existed which could resolve these accessibility barriers, and LACCD failed to offer any evidence to rebut or contradict this evidence.

Fifth, Plaintiffs identified accessibility barriers in LACC's library research databases, many of which were not compatible with screen reading software. Despite the AMPP and her individual accommodations, Mason was unable to complete a research paper for a psychology course because the professor required use of an inaccessible research database for the assignment. Although some of the library's online databases were accessible to blind students, the library did not conduct regular accessibility checks and did not test programs for accessibility before the library acquired them, as the AMPP required. Instead, accessibility was only tested when a blind student reported an accessibility problem.

B

Plaintiffs filed their initial complaint on March 2, 2017, alleging that LACCD's individual and systemic failures to remedy accessibility barriers violated Section 504 of the Rehabilitation Act and Title II of the ADA. After several

rounds of briefing, the district court granted partial summary judgment for Plaintiffs. Specifically, after the district court instructed Plaintiffs to reframe their disability discrimination arguments through a disparate impact framework only, it granted summary judgment for Plaintiffs on the claims related to Payan's access to his math textbook and MyMathLab assignments. The district court also found that LACCD discriminated against blind students as a matter of law based on the accessibility barriers present in the LACC websites and library database, but it declined to impose liability at that time because Plaintiffs had not yet met their burden to show reasonable modifications existed to remedy this discrimination.

After a two-day bench trial on liability, the district court additionally found that LACCD violated the ADA and Section 504 by providing Mason with an inaccessible handbook in her psychology class and through its use of the inaccessible LACC website and library databases. Then, after a three-day jury trial on damages, the jury found LACCD's discrimination against Payan was deliberately indifferent and awarded $40,000 in compensatory damages to Payan but no damages to Mason.

Following the bench and jury trials, the district court entered a permanent injunction and final judgment in favor of Plaintiffs. The permanent injunction requires LACCD to: (1) come into compliance with its AMPP; (2) evaluate its library databases for accessibility and establish means of alternate access to inaccessible databases for blind students; (3) designate a Dean of Educational Technology; (4) make the LACC website and embedded programs accessible to blind students; and (5) assess educational materials for accessibility before acquisition and to establish means of providing accessible alternative materials to blind students

in a timely manner. LACCD appealed, and Plaintiffs conditionally cross-appealed.

II

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's interpretation of the relevant disability discrimination laws de novo. *Molski v. Foley Ests. Vineyard & Winery, LLC*, 531 F.3d 1043, 1046 (9th Cir. 2008) (citation omitted).

III

LACCD challenges the district court's application of a disparate impact framework to Plaintiffs' disability discrimination claims. As an initial matter, though, we must consider whether Plaintiffs may enforce their disparate impact claims through a private right of action. We recently questioned whether our historical recognition of privately enforced disparate impact disability discrimination claims remains good law in light of the Supreme Court's holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 953–54 (9th Cir. 2020) (questioning but not deciding whether a private right of action to enforce disparate impact disability discrimination claims survives *Sandoval*). Due to this uncertainty, we requested that the parties in this case file supplemental briefing on the question whether a private right of action exists to enforce disparate impact discrimination regulations under Title II of the ADA and Section 504 of the Rehabilitation Act. We now hold that it does.

A

Our consideration of disparate impact claims in the disability discrimination context begins with the Supreme Court's 1985 decision in *Alexander v. Choate*, 469 U.S. 287.[2] When the state of Tennessee proposed cutting its Medicaid services from covering 20 days of inpatient hospital stays per year to only 14 inpatient days, a class of people with disabilities brought a disparate impact disability discrimination claim under Section 504, arguing that the proposal would disproportionately harm people with disabilities. *Id.* at 289–91. The Court considered whether the plaintiffs could state a disparate impact claim and rejected the argument that federal law prohibits only intentional discrimination against people with disabilities. *Id.* at 295 ("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."). And indeed, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach if the Act were construed to proscribe only conduct fueled by a discriminatory intent." *Id.* at 296–97. However, the Court reasoned that disparate impact claims in this context had to strike a balance between "the need to give effect to the[se] statutory objectives and the desire to keep § 504 within manageable bounds." *Id.* at 299. The Court thus assumed without deciding "that § 504 reaches at least

[2] Although *Choate* predates enactment of the ADA, we note that the ADA and Section 504 are interpreted coextensively because "there is no significant difference in the analysis of rights and obligations created by the two Acts." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1098 (9th Cir. 2013) (citation omitted).

some conduct that has an unjustifiable disparate impact on the handicapped." *Id.*

We later considered disparate impact claims in the ADA Title II context in *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996). We relied on both the text of the ADA and prior interpretation of Section 504, including *Choate*, to recognize that disparate impact claims are cognizable as authorized by Title II's implementing regulations:

> When a [public entity's] policies, practices or procedures discriminate against the disabled in violation of the ADA, Department of Justice regulations require reasonable modifications in such policies, practices or procedures "when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."

Id. at 1485 (quoting 28 C.F.R. § 35.130(b)(7)). Following both *Choate* and *Crowder*, we have continuously recognized disparate impact disability discrimination claims. *Rodde v. Bonta*, 357 F.3d 988 (9th Cir. 2004); *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013); *Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020), *cert. granted*, No. 20-1374, ___ S. Ct. ___, 2021 WL 2742790, *1 (July 2, 2021).

B

As noted by the *Schmitt* court, though, it remains an open question whether disparate impact disability discrimination

claims remain enforceable through a private right of action in the wake of *Sandoval*. *Schmitt*, 965 F.3d at 953–54.

In 2001, the Supreme Court held in *Sandoval* that no private right of action exists to enforce the disparate impact discrimination regulations promulgated under Title VI of the Civil Rights Act of 1964. 532 U.S. at 293. LACCD and the dissent argue that *Sandoval* applies with equal force to the ADA and Section 504 because these statutes share statutory language and derive remedies from each other: Section 504 derives its remedies from Title VI of the Civil Rights Act, 29 U.S.C. § 794a(a)(2), and Title II of the ADA, in turn, derives its remedies from Section 504, 42 U.S.C. § 12133. All three statutes also share operative language declaring that the relevant category of protected persons shall not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" by the relevant covered entity. 42 U.S.C. § 2000d (Title VI of the Civil Rights Act); 29 U.S.C. § 794 (Section 504); 42 U.S.C. § 12132 (Title II of the ADA). LACCD and the dissent argue that if this statutory language was insufficient to create a private right of action to enforce disparate impact claims under Title VI of the Civil Rights Act, as *Sandoval* held, then it is similarly insufficient to create a private right of action to enforce disparate impact claims under either Section 504 or Title II of the ADA.[3]

However, a closer read of *Sandoval* reveals that Title VI's limitation to only intentional discrimination is not based

[3] The dissent argues that the dictionary definition of the phrase "by reason of," meaning "because of" or "due to," limits the statute to intentional discrimination. But the dissent's reasoning jumps to this conclusion. Disparate impact discrimination, or accidental discrimination, is still discrimination that occurs "because of" or "due to" an individual's protected status.

on the statutory text of the Civil Rights Act. Before considering the availability of a private right of action to enforce disparate impact claims under Title VI of the Civil Rights Act, *Sandoval* lays out "three aspects of Title VI [which] must be taken as given." 532 U.S. at 279. "First, private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages." *Id.* "Second, it is similarly beyond dispute . . . that § 601 prohibits only intentional discrimination." *Id.* at 280. Third, the Court assumed without deciding that the Department of Justice's disparate impact discrimination regulations promulgated pursuant to § 602 of Title VI were permissible under § 601. *Id.* at 281–82. With these understandings in mind, the Court proceeded to reason that because the Title VI § 602 disparate impact regulations could only be privately enforced to the extent authorized by § 601, and because § 601 was limited to claims for intentional discrimination, the disparate impact regulations exceeded the scope of the congressionally authorized private right of action. *Id.* at 288–93.

Sandoval unequivocally states that Title VI prohibits only intentional discrimination. But this limitation, the second "given aspect" of Title VI, is not created by the statutory language of Title VI. Instead, *Sandoval* supports this proposition by relying on two prior Supreme Court cases which considered the scope of Title VI. *Id.* at 280–81 (citing *Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)). In turn, these two cases both rely on *Washington v. Davis*, 426 U.S. 229 (1976), as the authority supporting the proposition. *Guardians*, 463 U.S. at 589–90; *Bakke*, 438 U.S. at 289 n.27.

Davis considered a disparate impact racial discrimination claim brought by a class of unsuccessful

applicants to the District of Columbia metropolitan police who alleged that the department's qualifying exam disproportionately disqualified black applicants. 426 U.S. at 232–33. Although this disparate impact claim was asserted under the Fifth Amendment's Due Process Clause, the Court considered the claim within the scope of equal protection jurisprudence. *Id.* at 239–48. And that jurisprudence has "not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact." *Id.* at 239. Following this equal protection analysis, the Court later held in *Bakke* that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." 438 U.S. at 287. And Justice White's opinion in *Guardians* connects the dots between these cases by recognizing "that 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." 463 U.S. at 589–90 (internal citation and footnote omitted).

It is this line of reasoning that leads to *Sandoval*'s conclusion that Title VI of the Civil Rights Act could reach only intentional discrimination, not disparate impact discrimination. 532 U.S. at 280–81. Because this limitation is not based on the statutory text of the Civil Rights Act, the similar statutory language in Section 504 and the ADA does not create an analogous limitation on disparate impact disability discrimination claims. *Sandoval*, therefore, does not upset the historical understanding that Section 504 and the ADA were specifically intended to address both intentional discrimination and discrimination caused by

"thoughtless indifference" or "benign neglect," such as physical barriers to access public facilities. *See Choate*, 469 U.S. at 295; *Crowder*, 81 F.3d at 1484; *Cohen v. City of Culver City*, 754 F.3d 690, 694 (9th Cir. 2014). And, as we have previously recognized, "the ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *McGary v. City of Portland*, 386 F.3d 1259, 1268 (9th Cir. 2004) (citation omitted).

If we follow *Sandoval* through the equal protection jurisprudence governing disability-based classifications, the outcome remains the same. Unlike race-based distinctions, which are "inherently suspect and thus call for the most exacting judicial examination," *Bakke*, 438 U.S. at 291, legal classifications based on disability are subject only to rational basis review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985); *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 855 (9th Cir. 2001). In fact, the Supreme Court in *Cleburne* specifically declined to define disability as a quasi-suspect class because the state has a legitimate interest in affirmatively legislating to provide for people with disabilities, reasoning that legal "special treatment" for people with disabilities "is not only legitimate but also desirable" to remedy past discrimination. 473 U.S. at 444. Unlike Title VI's prohibition of race-based discrimination, the equal protection jurisprudence surrounding disability-based classifications permits civil rights statutes to prohibit disparate impact discrimination.

We therefore reject LACCD's invitation to limit the enforceability of disparate impact disability discrimination claims based on inapplicable reasoning found in cases

interpreting Title VI. Instead, we hold that *Sandoval* does not disturb *Choate* and *Crowder*, and disparate impact disability discrimination claims remain enforceable through a private right of action. Plaintiffs here may therefore assert their disparate impact disability discrimination claims under Title II of the ADA and Section 504 and their implementing regulations.

IV

Having concluded that Plaintiffs may bring disparate impact disability discrimination claims, we move to LACCD's argument that the district court erred in applying a disparate impact framework to all of Plaintiffs' disability discrimination claims. We hold that it did.

A

Title II of the ADA prohibits public entities from discriminating on the basis of disability. 42 U.S.C. § 12132. Section 504 similarly prohibits disability discrimination by recipients of federal funds. 29 U.S.C. § 794. The two laws are interpreted coextensively because "there is no significant difference in the analysis of rights and obligations created by the two Acts." *K.M.*, 725 F.3d at 1098 (citation omitted). To state a prima facie case for a violation of Title II, "a plaintiff must show: (1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001) (citation omitted). The elements of a prima facie Section 504 claim are similar, with the additional requirement that the plaintiff

prove that "the program receives federal financial assistance." *Id.* (citation omitted). The only element in dispute in this case is whether LACCD's actions, practices, and policies discriminated against Plaintiffs.

Title II's implementing regulations prohibit disability discrimination in a number of forms. *See* 28 C.F.R. § 35.130. These regulations "should be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *K.M.*, 725 F.3d at 1096 (citation omitted). Prohibited forms of disability discrimination include denying individuals with disabilities the opportunity to participate in a program or service, providing an unequal opportunity to participate in the program or service, or providing the entity's program or service in a way that is not effective in affording the individual with a disability an equal opportunity to obtain the same result as provided to others. 28 C.F.R. § 35.130(b)(1). The regulations further require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[4] *Id.* § 35.130(b)(7)(i).

A disability discrimination claim may be based on "one of three theories of liability: disparate treatment, disparate impact, or failure to make a reasonable accommodation." *Davis v. Shah*, 821 F.3d 231, 260 (2d Cir. 2016) (citation omitted); *see also McGary*, 386 F.3d at 1265–66. To assert

[4] "Although Title II of the ADA uses the term 'reasonable modification' rather than 'reasonable accommodation,' these terms create identical standards" and may be used interchangeably. *McGary*, 386 F.3d at 1266 n.3 (citation omitted).

a disparate impact claim, a plaintiff must allege that a facially neutral government policy or practice has the "effect of denying meaningful access to public services" to people with disabilities. *K.M.*, 725 F.3d at 1102 (citing *Crowder*, 81 F.3d at 1484). "A plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim." *McGary*, 386 F.3d at 1266 (citations omitted).

Although disparate impact and failure to accommodate are distinct theories of liability, they share some overlap. If a public entity's practices or procedures deny people with disabilities meaningful access to its programs or services, causing a disparate impact, then the public entity is required to make reasonable modifications to its practices or procedures. *Crowder*, 81 F.3d at 1485 (citing 28 C.F.R. § 35.130(b)(7)). Thus, although failure to make a reasonable accommodation and disparate impact are two different theories of a Title II claim, a public entity may be required to make reasonable modifications to its facially neutral policies which disparately impact people with disabilities. *Id.* at 1484–85.

The important difference between these two theories is that a reasonable accommodation claim is focused on an accommodation based on an individualized request or need, while a reasonable modification in response to a disparate impact finding is focused on modifying a policy or practice to improve systemic accessibility. *Compare McGary*, 386 F.3d at 1265–66 (considering reasonable accommodation claim against city over its failure to grant individual disabled plaintiff additional time to clean his yard before enforcing nuisance abatement code), *and Updike v. Multnomah County*, 870 F.3d 939, 949–53 (9th Cir. 2017) (considering reasonable accommodation claim against

county over its denial of an ASL interpreter and auxiliary aids to individual deaf pretrial detainee), *with Crowder*, 81 F.3d at 1485–86 (considering reasonable modifications to Hawaii law requiring 120-day quarantine of all dogs entering the state, which was found to have a disparate impact on blind users of guide dogs), *and Rodde*, 357 F.3d at 995–98 (considering disparate impact claim against county over proposal to close county hospital providing rehabilitation and medical services to people with chronic disabilities).

B

LACCD argues that the district court erred in applying a disparate impact framework to Plaintiffs' claims because the accessibility of higher education is fundamentally an issue of individualized reasonable accommodations rather than systemic barriers. While LACCD overstates the law, it correctly argues that the district court erroneously categorized some of Plaintiffs' claims. Our case law provides no justification for limiting disability discrimination claims to only the failure to accommodate theory of liability in the higher education context. But here, the district court erred in requiring Plaintiffs to present all of their claims as disparate impact claims.

Some of Plaintiffs' claims are true disparate impact claims. Allegations of systemic accessibility barriers in campus websites or the library are claims that impact all blind users, not just the two individual plaintiffs in this case. To consider an example in the Title II framework, Plaintiffs identified LACCD's facially neutral practice of operating its student web portal through the PeopleSoft program as having a disparate impact on blind students because the program was not compatible with screen reading software. This accessibility barrier denied blind students an equal opportunity to manage their education independently by

reviewing their grades or registering for classes through the student portal. 28 C.F.R. § 35.130(b)(ii). And Plaintiffs presented evidence that this accessibility barrier could be remedied through reasonable modifications to the underlying website programming. This claim was appropriately considered under the disparate impact framework.

The same goes for Plaintiffs' allegations that LACCD had facially neutral practices of selecting classroom materials from third parties and only evaluating the accessibility of those materials on an ad hoc, complaint-driven basis rather than in compliance with the campus' AMPP. Systemic barriers call for systemic reasonable modifications. Where a plaintiff challenges a program's policy or practice of failing to remedy systemic barriers, rather than the individual's experience with requesting accommodations to address those barriers, this type of claim is more appropriately evaluated under the disparate impact framework than the failure to reasonably accommodate framework.

However, LACCD correctly argues that certain claims specific to the individual plaintiffs in this case should have been considered through the individual failure to accommodate framework. Payan and Mason were each approved to receive individual accommodations through OSS, including receiving materials in accessible e-text and certain classroom accommodations. They also presented evidence of specific instances in which those accommodations were denied, including Payan's experience of being unable to timely receive his math textbook in e-text format and Mason's experience with only being provided a paper copy of her psychology classroom handouts. Because these claims focused on individual accommodations, they

should have been evaluated under the failure to accommodate framework.

Despite acknowledging the individual accommodations to which OSS determined Payan and Mason were entitled, the district court rejected these claims as failure to accommodate claims because the district court found that Payan and Mason did not adequately put LACCD on notice that they required specific accommodations. This was error. And because the district court erroneously rejected the failure to accommodate framework early in the litigation, it consequently limited the scope of evidence it permitted Plaintiffs to present on these claims. Thus, certain allegations in the operative complaint, such as LACCD's alleged failures to provide test-taking accommodations or an in-class notetaker, went underdeveloped through the course of the case, despite apparently presenting cognizable failure to accommodate claims. Because these allegations concern discrete instances in which Payan and Mason were denied specific individualized accommodations, the district court should have evaluated these claims under the failure to accommodate framework.

On remand, the district court is instructed to reconsider Plaintiffs' individual claims under either the disparate impact framework or the individual failure to accommodate framework, depending on the nature of the specific claim, and to permit Plaintiffs to introduce evidence to support these claims under either framework.

V

Having concluded that the district court erroneously limited Plaintiffs' claims to the disparate impact framework only, we **REVERSE, VACATE, and REMAND** for further proceedings consistent with this opinion and corresponding

memorandum disposition. Each party is to bear its own costs.

LEE, Circuit Judge, dissenting:

This case presents a perplexing legal issue fraught with public policy implications: Do Title II of the American with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 allow plaintiffs to sue based on a disparate impact theory of discrimination?

On the one hand, as the majority points out, disabled individuals often face obstacles because of "benign neglect," not intentional discrimination. Ruling out disparate impact claims could limit the remedies sought by plaintiffs. On the other hand, many facially neutral laws disproportionately affect the disabled. And adopting a disparate impact theory here could "lead to a wholly unwieldy administrative and adjudicative burden," as the Supreme Court cautioned. *Alexander v. Choate*, 469 U.S. 287, 298 (1985).

Faced with this difficult question, the majority today rules that Title II and Section 504 allow plaintiffs to sue based on a disparate impact theory. While I respect the majority's careful analysis, I still must dissent. The statutes' plain language bars intentional discrimination only, and we must abide by Congress' policy choice. The Supreme Court has also suggested that the ADA and Section 504 — much like Title VI of the Civil Rights Act of 1964 — do not permit disparate impact claims. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

I. The plain language of Title II and Section 504 bars only intentional discrimination.

We need to start, as we must, with the statutory text of Title II and Section 504. The plain language makes clear that the statutes only forbid intentional discrimination. Nothing in the text remotely suggests that it encompasses a disparate impact theory, which holds that even facially neutral laws are discriminatory if they have an unintended disproportionate effect on certain groups.

Title II of the ADA provides that "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." 42 U.S.C. § 12132 (emphasis added). The phrase "by reason of" means "because of" or "due to." Merriam-Webster Dictionary, *available* at https://www.merriam-webster.com/dictionary/by%20 reason%20of. Put another way, Title II bars only discrimination "because of" or "due to" disability status. It thus requires intentional discrimination based on disability and does not contemplate disparate impact.

Section 504 of the Rehabilitation Act makes this even clearer. It prohibits discrimination "*solely by reason* of her or his disability." 29 U.S.C. § 794a (emphasis added). That cannot include disparate impact. So, for example, the Los Angeles Community College District's use of the PeopleSoft program to operate its web portal may have a disproportionate effect on blind students because PeopleSoft is not compatible with screen-reading software. But in choosing to use the PeopleSoft program, the District did not discriminate against blind students "solely by reason of" — or "because of" or "due to" — their disability status.

The Sixth Circuit similarly held that Section 504 does not contemplate a disparate impact theory. *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 240–242 (6th Cir. 2019). After noting that the statutory language requires intentional discrimination, it contrasted Section 504 with other statutes that permit disparate impact: "[W]hen the Court has found that a statute prohibits disparate-impact discrimination, it has relied on language like "otherwise adversely affect" or "otherwise make unavailable," which refers to the consequences of an action other than an actor's intent. That language is missing from § 504." *Id.* at 242.[1]

For better or worse, Congress apparently barred only intentional discrimination against the disabled. It did not permit a disparate impact theory, and we should not infer a private right of action that Congress did not authorize. *Cf. Lampf, Plea, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365, 111 S.C. 2773, 115 L.Ed.2 321 (1991) (Scalia, J., concurring in part and concurring in judgment) ("Raising up statutory causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

II. The Supreme Court in *Sandoval* suggested that a disparate impact theory is unavailable under Section 504 and Title II.

But as the majority notes, we are not writing on a clean slate. Despite the plain language of Title II and Section 504,

[1] *But see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2526–27 (2015) (Thomas, J., concurring) (stating that the foundation for the "disparate-impact regime . . . is made of sand" because the phrase "otherwise adversely affect" does "not eliminate [the statute's] mandate that the prohibited decision be made 'because of' a protected characteristic.").

courts have hesitated to give meaning to the unambiguous text. In *Alexander v. Choate*, the Supreme Court "assume[d] without deciding that § 504 [of the Rehabilitation Act] reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." 469 U.S. 287, 299 (1985). Our court relied on that language to allow disparate impact claims under § 504. *See Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996) (applying disparate impact analysis for Section 504 claims).

But the Supreme Court gets the last word on federal law, not us. And in *Alexander v. Sandoval*, the Supreme Court rejected a private cause of action for disparate impact under Title VI of the Civil Rights Act of 1964. 532 U.S. 275, 280 (2001). The Court's *Sandoval* decision left open whether a disparate impact claim survives under statutes analogous to Title VI or those directly depending on it. As the majority notes, last year we identified this persistent open question of whether *Sandoval* effectively overruled *Crowder v. Kitagawa*. Maj. Op. 13–14 (citing *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 953–54 (9th Cir. 2020)). We, however, did not address it because it was unnecessary to resolve the case.[2]

Similarly, most circuits have danced around this issue,[3] or, confusingly, have not addressed the effect of *Sandoval* in

[2] Last December, we failed to reach this question a second time in *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204 (9th Cir. 2020). We relied heavily on *Crowder* in holding that disparate impact applies but did not acknowledge *Sandoval* or the question flagged in *Schmidt*. The Supreme Court has since granted writ of certiorari in that case.

[3] *See, e.g.*, *CG v. Pennsylvania Dept. of Educ.*, 734 F.3d 229, 236 n.13 (3d. Cir. 2013) (assuming the existence of a disparate impact cause

relying on pre-*Sandoval* case law.[4] Only one circuit appears to have affirmatively held that the Rehabilitation Act still allows a disparate impact claim, despite *Sandoval*, because the Rehabilitation Act has a "different aim" and was enacted in a "different context" from the Civil Rights Act of 1964. *Robinson v. Kansas*, 295 F.3d 1183, 1186–87 (10th Cir. 2002), *abrogated on other grounds as recognized by Arbogast v. Kansas, Dept. of Lab.*, 789 F.3d 1174 (10th Cir. 2015). Perhaps because *Sandoval* had been issued after the parties had briefed the case and the defendants there did not argue that *Sandoval* barred disparate impact claims under the Rehabilitation Act, the Tenth Circuit did not provide a lengthy analysis. *See id.*

On the other side of the ledger, the Sixth Circuit provided a detailed and persuasive opinion holding that *Sandoval* precludes disparate impact claims under Section 504. *See Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 at 240–242 (recognizing that "Title VI . . . doesn't prohibit disparate-impact discrimination . . . It's unlikely that Title IX, which was patterned on Title VI, does so either . . . [And thus] § 504 [of the Rehabilitation Act] does not prohibit disparate-impact discrimination") (internal citations omitted). The Fifth Circuit in unpublished opinions has also reached a similar conclusion. *See, e.g.*, *Kamps v. Baylor Univ.*, 592 Fed.App'x. 282, 285 (5th Cir. 2014) ("[t]he [analogous Age Discrimination Act of 1975] does not

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of action in denying plaintiffs' meaningful access challenge to Pennsylvania's school funding formula, but did not decide the issue).

[4] *See, e.g.*, *Valencia v. City of Springfield*, 883 F.3d 959 (7th Cir. 2018) (stating that disparate impact claims are permissible under the Rehabilitation Act without mentioning the impact of *Sandoval*).

prohibit policies that have a disparate impact"). I believe they got it right.

To understand how *Sandoval* applies, we need to trace the cascading relationship among the ADA, Rehabilitation Act, and Title VI of the Civil Rights Act. As we noted in *Crowder*, the ADA contains an "explicit mandate . . . that federal regulations adopted to enforce the statute be consistent with the Rehabilitation Act." *Crowder*, 81 F.3d at 1484. Indeed, the statute states that "[t]he remedies, procedures, and rights set forth in [section 794a of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of . . . this title." 42 U.S. C. § 12133. In turn, § 794 of the Rehabilitation Act provides that "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 200d et seq.) . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." 29 U.S.C. § 794(a)(2).

Relying on the Court's *Alexander* decision, we announced in *Crowder* that "[i]t is . . . clear that Congress intended the ADA to cover at least some so-called disparate impact cases of discrimination." *Crowder*, 81 F.3d at 1483. But the Court in *Sandoval* held that it is "beyond dispute . . . that § 601 [of title VI] prohibits only intentional discrimination," that the "authorizing portion of § 602 reveals no congressional intent to create a private right of action [to enforce disparate-impact regulations]," and, finally, "that no such [private] right of action [to enforce disparate-impact regulations] exists." *Sandoval*, 532 U.S. at 280–293.

In other words, there is a domino effect: If Title VI does not allow a disparate impact claim, then the Rehabilitation Act cannot (because it derives its remedies and rights from Title VI), and the ADA cannot either (because it, in turn, relies on the Rehabilitation Act for its remedies and rights). This domino effect is unavoidable because the Rehabilitation Act and the ADA both rely on the same statutory language in Title VI for their causes of action. And the Supreme Court, interpreting its own precedent, held that it is "beyond dispute . . . that [Title VI] prohibits only intentional discrimination." *Sandoval*, 532 U.S. at 281.

The majority argues that the Supreme Court's decision in *Sandoval* "is not created by the statutory language of Title VI," and analyzes several older Supreme Court cases cited in *Sandoval.* While I do not necessarily disagree with the analyses of those cited cases, I think ultimately our answer lies in *Sandoval*'s clear guidance on how to determine whether a statute confers a private right of action: "[T]he interpretive inquiry begins with the text and structure of the statute . . . and ends once it has become clear that Congress did not provide a cause of action." *Id.* at 288 n.7. We start with the "rights creating" language and structure, and, if that does not clearly imply the cause of action, then we end our inquiry. This is so even when regulations provide rights-creating language. *Id*. at 291 ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not"). And by its text, Section 504 only prohibits discrimination against an individual "*solely by reason* of her or his disability." 29 U.S.C. § 794a (emphasis added). Though "the ADA must be construed broadly," we cannot construe it more broadly than the text allows. *McGary v. City of Portland*, 386 F.3d 1259, 1268 (9th Cir. 2004) (citation omitted). And the ADA only prohibits

discrimination "*by reason of such disability*." 42 U.S.C. § 12132 (emphasis added).

The Supreme Court told us that the text embodies Congress's intent, and "[h]aving sworn off the habit of venturing beyond Congress's intent, we [should] not accept [Plaintiffs'] invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

I respectfully dissent.