No.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Doe One, Richard Roe, in his capacity as executor for John Doe Two, John Doe Six, and John Doe Seven, on behalf of themselves and all others similarly situated,

Petitioners, v.

CVS Pharmacy, Inc.; Caremark L.L.C.; Caremark California Specialty Pharmacy, L.L.C.; Garfield Beach CVS, L.L.C.; Caremark PCS Health, L.L.C.

Respondents.

PLAINTIFFS/PETITIONERS' PETITION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

On Appeal from the United States District Court for the
Northern District of California
Case No. 3:18-cv-01031-EMC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

John Doe One, Richard Roe, in his capacity as executor for John Doe Two, John Doe Six, and John Doe Seven, on behalf of themselves and all others similarly situated, respectfully petition under Federal Rule of Civil Procedure 23(f) for permission to appeal an order of the district court denying certification of a class under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (c)(4). The trial court's conclusion in its June 13, 2025, order denying Petitioners' motion for class certification (the "Order," attached hereto as Exhibit 1)—that the loss of "meaningful access" under the Affordable Care Act ("ACA") effectively requires a complete deprivation of the benefit at issue—is contrary to the Ninth Circuit's prior ruling in this case.

INTRODUCTION

This is a putative class action alleging disability discrimination. Petitioners are four individuals living with HIV, a group who have historically faced discrimination throughout the healthcare system. Respondents are five subsidiaries of CVS Health Corporation that provide a range of prescription drug benefits and services ("pharmaceutical care services"). As this Court summarized in *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1207–08 (9th Cir. 2020) ("*CVS Pharmacy*"), reversing the District Court's previous dismissal of this action, prior to the plan changes at issue in this action, Petitioners could fill their prescriptions at any in-network pharmacy, where they were able to consult knowledgeable pharmacists who

were familiar with their medical histories and could, *inter alia*, make adjustments to their drug regimens to avoid dangerous drug interactions or remedy potential side effects. However, Respondents designed and implemented a prescription drug benefit program ("the Program") under which they now deliver such specialty medications only by mail, or by drop shipments to CVS-branded retail pharmacies only for pickup. The real and practical effect of this Program (undisputed in the record below) was that HIV positive individuals enrolled in the Program lost access to 87% of network pharmacies, creating an imminent risk that HIV-positive individuals will not be able to access their life-sustaining medications when they are needed.

Before the ACA was signed into law, the business model of health insurance incentivized insurers, and pharmacy benefit managers ("PBMs") such as Respondents, to engage in discriminatory benefit design practices that were not prohibited under anti-discrimination laws at the time. *See, e.g.*, *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 588 (7th Cir. 1999) (lifetime caps on coverage for AIDS did not discriminate based on disability). The ACA purposefully and explicitly eliminated discriminatory limits on access to healthcare. As people living with HIV/AIDS "have suffered disproportionately from lack of healthcare access, Congress included a number of consumer protections [in the ACA] prohibiting

health insurance providers from denying [HIV/AIDS patients] coverage."[1] A central premise of the ACA that was embodied in both its prohibitions against denying coverage due to a pre-existing condition (42 U.S.C. §§ 300gg-1, 300gg-2) and provisions barring discrimination on the basis of disability (42 U.S.C. §§ 300gg-4, 18116; 45 C.F.R. § 92.207(a)–(b)) was to ban companies from imposing discriminatory coverage that undermines meaningful access to care. The need for this latter prohibition is clear. Requiring companies to provide coverage for people living with HIV/AIDS means little if the insurer or PBM is permitted to do so in a manner that puts Petitioners' health and privacy at risk, denies them meaningful access to their prescription drug benefit, and discourages them from remaining enrolled in their healthcare plan.

"In the [ACA], Congress addressed the problem of those who cannot obtain insurance coverage because of pre-existing conditions or other health issues." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547 (2012). With its promises of guaranteed health coverage and protection for individuals with pre-existing conditions, Congress intended to change the landscape of health coverage in the United States by providing meaningful access to healthcare.

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[1] Mark Bolin, *The Affordable Care Act and People Living with HIV/AIDS: A Roadmap to Better Health Outcomes*, 23 Annals Health L. 28, 31 (2014) (http://www.annalsofhealthlaw.com/annalsofhealthlaw/vol_23_issue_1?pg=36#pg36).

Petitioners' lawsuit challenges the Program under the ACA's non-discrimination provision, codified at 42 U.S.C. § 18116 (also known as "Section 1557"). "Section 1557 of the ACA incorporates the anti-discrimination provisions of various civil rights statutes, and prohibits discrimination . . . on the basis of disability pursuant to Section 504 of the Rehabilitation Act (29 U.S.C. § 794)." *CVS Pharmacy*, 982 F.3d at 1208–09. The relevant and common inquiry under Section 504 of the Rehabilitation Act, and thus under Section 1557, is "whether the plan provided meaningful access to the benefit." *Id.* at 1211. Federal regulations implementing the ACA define "meaningful access" to prescription drugs such as at issue here: "A health plan must allow enrollees to access prescription drug benefits at in–network retail pharmacies, unless . . . " the drug is subject to certain conditions not applicable in this action. 45 C.F.R. § 156.122(e).

In this Circuit, it is well recognized that "meaningful access" is denied when a policy disproportionately harms individuals with a disability such that it inadequately accounts for their specific needs and effectively reduces their access to services, programs, or activities. If so, "reasonable accommodations in the grantee's program or benefit may have to be made." *Doe One v. CVS Pharmacy, Inc.*, No. 18-CV-01031-EMC, 2024 WL 1707229, at *4 (N.D. Cal. Apr. 18, 2024) ("*Doe One*") (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). This Court previously ruled that Petitioners "have adequately alleged that they were denied meaningful

access to their prescription drug benefit, including medically appropriate dispensing of their medications and access to necessary counseling." *CVS Pharmacy*, 982 F.3d at 1211.

In their role as a PBM, Respondents established a nation-wide network of pharmacies where consumers obtain their medications under the terms of their healthcare plans, which includes approximately 9,000 CVS-branded retail pharmacies and approximately 59,000 non-CVS branded network pharmacies. Transcript, 85–86; 119, 161. Under the Program, Petitioners can only obtain their HIV/AIDS specialty medications through the mail or by drop-shipment to a CVS-branded pharmacy. In comparison, medications outside the Program may be obtained at any of the 68,000 pharmacies in CVS's pharmacy network, including non-CVS branded pharmacies, with in-person access to a pharmacist and other in-person pharmacy benefits. Transcript of 30(b)(6) Deposition (Sept. 17, 2024), Exh. 2, Decl. of B. Powell, ECF Document 268-1 (filed under seal) ("Transcript"), at 118. Therefore, under the Program, putative class members not only lose access to knowledgeable pharmacists, they also lose access to approximately 87 percent of the network pharmacies available to other enrollees not subject to the Program, thereby decreasing access to HIV medications (1 – 9,000/68,000 = .87). Transcript, at 85–86, 119, 161. Moreover, some states only have a handful of CVS-branded retail pharmacies available for putative class members subject to the Program. Transcript,

at 67:11–68:1.[2] Thus, while Respondents may technically "supply" Petitioners' HIV/AIDS Medications under the Program, it is a common, class-wide question whether providing HIV/AIDS medications in a manner that denies them access to 87 percent of network pharmacies risks their health and privacy and denies them "meaningful access" to the pharmaceutical care services Respondents provide. *Alexander,* 469 U.S. at 301.

As set forth below, the trial court erred in finding that Petitioners could not show that denial of meaningful access was a common question capable of resolution on a class-wide basis. The trial court repeated the error it made in dismissing the action when it denied Petitioners' motion for class certification at issue in this Petition, focusing its analysis on evidence of "*actual* harm" to the putative class, rather than denial of meaningful access and risk of harm. *See* Order at 16:21-23. The Court's June 13, 2025, Order is appropriate for review under Federal Rule of Civil Procedure 23(f) based on the district court's manifest error. *Chamberlan v. Ford Motor Co.,* 402 F.3d 952, 959 (9th Cir. 2005).

This Petition is timely presented under Federal Rule of Appellate Procedure 5, as it is being filed within 14 days of the issuance of the Order.

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[2] *See also* www.CVS.com, "CVS Pharmacy stores by state," https://www.cvs.com/store-locator/cvs-pharmacy-locations (last visited June 25, 2025).

QUESTIONS PRESENTED

1. Whether the district court erred by effectively requiring complete deprivation of access, rather than denial of meaningful access, to Petitioners' pharmaceutical care services.

2. Whether the district court erred in holding that risk of harm is insufficient to establish denial of meaningful access to Petitioners' pharmaceutical care services, and to establish commonality.

PROCEDURAL BACKGROUND

The trial court initially dismissed the complaint in this case on the basis that, *inter alia*, the "loss of meaningful access" standard effectively requires plaintiffs to suffer a complete deprivation or denial of access to a benefit. *Doe One v. CVS Pharmacy, Inc.*, 348 F. Supp. 3d 967, 984 (N.D. Cal. 2018) ("[E]ven accepting that the Program does disproportionately impact enrollees with HIV/AIDS, that impact is not so significant as to constitute a denial of 'meaningful access' to Petitioners' prescription drug benefits."). The Ninth Circuit reversed that decision in part, finding that Petitioners stated viable causes of action under the ACA, and under California's Unfair Competition Law to the extent that claim relied on an ACA violation. *CVS Pharmacy*, 982 F.3d at 1212, 1214.

Specifically, the Ninth Circuit found *"that the meaningful access standard . . . does not require Does to allege that their deprivation was unique to those living*

with HIV/AIDS, nor that the deprivation was severe—only that they were not provided meaningful access to the benefit." *Id.* at 1212 (emphasis added). Respondents appealed, and the Supreme Court granted certiorari; however, Respondents withdrew the case after briefing but before oral argument. *CVS Pharmacy, Inc. v. Doe, One*, 142 S. Ct. 480 (2021). The trial court later found that Petitioners had stated claims for "intentional disability discrimination under the ACA." *Doe One*, 2024 WL 1707229, at *6, *13.

STANDARD OF REVIEW

Under Rule 23(f), this Court has "unfettered discretion" to review a certification order based on "any consideration [it] finds persuasive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005) (internal quotation marks and citation omitted). Among other criteria, this Court considers whether a certification order "presents an unsettled and fundamental issue of law relating to class actions" that will likely evade end-of-case review or is "manifestly erroneous." *Id.* at 959. Because the "decision to permit interlocutory appeal is, at bottom, a discretionary one," any one of these factors may suffice for a case to merit review. *Id.* at 959-60.

REASONS FOR GRANTING REVIEW

I. COMMONALITY REQUIRES THAT THE CLASS MEMBERS' CLAIMS DEPEND UPON A COMMON CONTENTION THAT WILL RESOLVE A CENTRAL ISSUE IN ONE STROKE.

In a civil rights action, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001). As this Court has previously found,

> Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality imposes only a "limited burden" upon the plaintiff, given that it "only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012), *overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022).

> The Supreme Court has recently emphasized that commonality requires that the class members' claims "depend upon a common contention" such that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." The plaintiff must demonstrate "the capacity of class wide proceedings to generate common answers" to common questions of law or fact that are "apt to drive the resolution of the litigation."

Id. at 588–89 (*quoting Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).). As recognized in a leading treatise, "class suits for injunctive or declaratory relief by their very nature often present common questions satisfying Rule 23(a)(2)." 7A

Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1763 (4th ed. 2022).

II. THE DISTRICT COURT MANIFESTLY ERRED IN HOLDING THAT THE ACA DOES NOT PROTECT HIV PATIENTS FROM THE RISK OF HARM ASSOCIATED WITH DISCRIMINATORY BENEFIT PROGRAM DESIGNS.

The trial court's class certification ruling is based on a fundamental legal error—that denial of access to 87 percent of in-network pharmacies and knowledgeable pharmacists is insufficient to establish denial of "meaningful access" on a class-wide basis.[3] This decision is at odds with the plain language of the ACA, its implementing regulations, the guidance provided by HHS, other district court decisions interpreting Section 1557 of the ACA, as well as Section 504 of the Rehabilitation Act, its implementing regulations, and traditional anti-discrimination principles applied by this Court.

"A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell,* 135 S. Ct. 2480, 2496 (2015); *see also id.* at 2493 ("We cannot interpret federal statutes to negate their own stated purposes."). Congressional intent must be gleaned in light of the remedial nature of the ACA,

[3] The trial court held that Petitioners provided no proof of harm to the putative class (Order at 14), thereby implicitly deciding that the loss of 87 percent of in-network pharmacies was not sufficient to result in a loss of meaningful access for purposes of commonality under the trial court's erroneous "complete deprivation" standard.

since comprehensive remedial statutes like the ACA are generally accorded "a sweep as broad as (their) language." *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971).

A central premise of the ACA embodied in both its prohibitions against denying coverage due to a pre–existing condition (42 U.S.C. §§ 300gg-1, 300gg-2) and provisions barring discrimination on the basis of disability (42 U.S.C. §§ 300gg-4, 18116; 45 C.F.R. §§ 92.207(a)–(b)) is to ban companies from imposing discriminatory coverage that undermines meaningful access to care. The ACA also explicitly prohibits insurers and PBMs from employing health insurance benefit designs that discriminate on the basis of disability or otherwise discourage individuals with significant healthcare needs from enrolling in, or remaining enrolled in, healthcare plans. *See, e.g.*, 45 C.F.R. §§ 156.110(d); 156.122(e); 156.125(a).

Particularly relevant here, Department of Health and Human Services ("HHS") regulations implementing the ACA further help to specifically define what constitutes meaningful access to prescription drug benefits, ***providing that Petitioners must be able to obtain their medications at all in-network pharmacies***. 45 C.F.R. § 156.122(e).[4] As noted by HHS, "making drugs available only by mail-order could discourage enrollment by, and thus discriminate against . . . individuals

[4] Though 45 C.F.R. § 156.122(e) may not directly regulate all healthcare plans at issue in this action, it does provide this Court an important benchmark for defining "meaningful access" to pharmacies and prescription drugs.

who have conditions that they wish to keep confidential. We also believe that this provision is important to ensure uniformity in benefit design and consumer choice." 80 Fed. Reg. 10,750 10,820–22 (Feb. 27, 2015); *see also Cal. Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1236 (N.D. Cal. 2013) ("[W]hen considering the 'meaningful access requirement,' courts in the Ninth Circuit are guided by the specific implementing regulations of the [statute at issue].").

Accordingly, a PBM cannot single out a benefit that Petitioners disproportionately rely on—access to their HIV/AIDS medications at in-network pharmacies from knowledgeable pharmacists "because of their unique needs" and effectively reduce access to the benefit. *Rodde v. Bonta*, 357 F.3d 988, 998 (9th Cir. 2004); *see Alexander*, 469 U.S. at 301, 302 n.22; *see also* 45 C.F.R. § 85.21(b)(3)(ii) (Recipients of federal financial assistance "may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would . . . defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps."). Yet, as set forth above, this is exactly what Respondents have done here.

The ACA generally, and Section 1557 in particular, expressly expanded and strengthened existing protections against discrimination for individuals living with HIV, as the ACA was intended "to expand access to care and coverage and eliminate barriers to access." 81 Fed. Reg. 96, 31376–77 (May 18, 2016). The protections

under Section 1557 were specifically intended to end discrimination against patients with HIV and AIDS.

A recipient of federal financial assistance such as Respondents must do more than provide individuals with disabilities mere access to the benefits it offers. 45 C.F.R. §§ 85.21(b)(1)(ii)–(iii); *see also Alexander,* 469 U.S. at 301 ("[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers."); *Bassilios v. City of Torrance, CA*, 166 F. Supp. 3d 1061, 1071 (C.D. Cal. 2015) ("Section 504 require[s] that disabled persons receive 'meaningful access' [to a benefit], not merely 'limited participation.'"). The finding required under the "meaningful access" standard thus must properly focus on whether the defendant's actions prohibited the plaintiff from meaningfully benefitting under the service or program or having their needs adequately served. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1482 (9th Cir. 1996) ("[T]he state's quarantine requirement denies visually-impaired persons the ability to make meaningful use of services the state provides. . . . Without their dogs to guide them, the plaintiffs are severely restricted in their ability to use state services."). In *Rodde*, this Court found that if the county closed the hospital at issue, "it will reduce, and in some instances eliminate, necessary medical services for disabled Medi-Cal patients . . . ." 357 F.3d at 997–98.

Moreover, Section 504's protections must be interpreted in the context of the ACA. "Section 1557 of the ACA *extends* the protections of Section 504 of the Rehabilitation Act . . . *in the context of the ACA*." *Huffman v. Univ. Med. Ctr. Mgmt. Corp.,* 2017 WL 4960268, at *2 (E.D. La. Nov. 1, 2017) (emphasis added). This, among other reasons, is why "the ACA created a tectonic shift in the nation's health insurance market." *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 19 (2017).

III. THE DISTRICT COURT MANIFESTLY ERRED IN HOLDING THAT DENIAL OF ACCESS TO 87 PERCENT OF NETWORK PHARMACIES IS NOT A COMMON QUESTION.

The trial court erred in finding that the question of whether denying access to 87 percent of network pharmacies causes a loss of meaningful access to Respondents' pharmaceutical care services could not "'generate common answers' to common questions of law or fact that are 'apt to drive the resolution of the litigation.'" *Mazza*, 666 F.3d at 588-589 (*quoting Wal-Mart Stores, Inc.*, 564 U.S. at 350). This finding was based on a manifest legal error that loss of meaningful access requires a complete deprivation of Petitioners' pharmaceutical care services.

The Court erred because the meaningful access standard does not require Petitioners or the putative class to wait until they have suffered serious harm to their health in order to obtain relief when there is a significant risk that they will be denied meaningful access as a result of the Program. *B.K. v. Snyder*, 922 F.3d 957, 976–78

(9th Cir. 2019) ("As a conceptual matter, we agree with the plaintiffs that Rule 23's commonality requirement can be satisfied in a statutory case by a common risk of a future violation that flows from the same state-wide policy or practice."); *J.N. v. Oregon Dep't of Educ.*, 338 F.R.D. 256, 271 (D. Or. 2021) ("To establish a common risk of statutory harm theory of commonality, plaintiffs do not, as defendants contend, need to prove that shortened school days are *per se* violations of federal law . . . [i]nstead, they must demonstrate that the policies and practices expose all class members to the same significant, imminent risk of IDEA, ADA, and Section 504 violations."); *Tinsley v. Faust*, 411 F. Supp. 3d 462, 483 (D. Ariz. 2019) ("[T]he Court finds that the risk that a child in the Medicaid Subclass will not receive timely and adequate EPSDT services is significant, and that for purposes of class certification there is a common question whether every member of the Medicaid Subclass is exposed to a significant risk of an imminent future Medicaid violation.").

The first, and critical, step in the "meaningful access" analysis is how the challenged benefit is defined. As the Supreme Court in *Alexander* warned, "[a]ntidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit." *Alexander*, 469 U.S. at 301 n.21. Courts must be scrupulous and precise when addressing the issue of defining the benefit. *Id*. ("The 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 . . . .").

The "benefit" that Petitioners allege they are denied meaningful access to is the prescription drug benefit as a whole, which includes, *inter alia*, (1) access to network pharmacies and (2) knowledgeable pharmacists that provide medically necessary counseling. These aspects of the prescription drug benefit are available for medications not subject to the Program and used to treat non-disabled enrollees. The trial court's ruling ignores that because of the Program, Petitioners and others similarly situated lost access to 59,000 pharmacies where they would otherwise be allowed to access those in-network providers. In finding that denial of access to 87 percent of network pharmacies does not amount to denial of meaningful access, the trial court effectively applied a complete deprivation standard. This standard is manifestly erroneous.

While courts "need not define precisely the severity of the deprivation that a plaintiff must experience in accessing a program benefit . . . to demonstrate a denial of meaningful access" (*Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008)), courts have routinely recognized that "[a]ccess alone, despite defendants' arguments to the contrary, is insufficient." *Marisol A. by Forbes v. Giuliani*, 929 F. Supp. 662, 685 (S.D.N.Y. 1996) (citing *Alexander*, 469 U.S. at 301), *aff'd sub nom.* 126 F.3d 372 (2d Cir. 1997). In *Marisol A.*, the court rejected

defendants' argument that plaintiffs' ADA and Section 504 claims should be dismissed because they still had the opportunity to participate in foster care services, since plaintiffs alleged the city agency failed to provide a child with HIV/AIDS "proper medical attention to allow [him] to function while in foster care . . . ." 929 F. Supp. at 684 (finding plaintiffs sufficiently alleged a denial of meaningful access to New York City's child welfare system); *Accord Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 207 (E.D.N.Y. 2000) (City denied individuals with HIV/AIDS meaningful access to public assistance program because "[a]s the Second Circuit has observed, '[i]t is not enough to open the door for the handicapped . . . ; a ramp must be built so the door can be reached.'"), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).

Neither plaintiff in the Ninth Circuit's seminal decisions *Crowder* or *Rodde* were found to have experienced a complete deprivation or denial of access to a program benefit. Rather, the analysis in those cases applying the meaningful access standard was whether the defendants' actions prohibited the plaintiffs from *meaningfully using* the service or program or having their needs *adequately served* by severely restricting or reducing their access. *See Crowder*, 81 F.3d at 1482 ("[T]he state's quarantine requirement denies visually-impaired persons the ability to make *meaningful use of services* the state provides. . . . Without their dogs to guide them, the plaintiffs are *severely restricted* in their ability to use state services.")

(emphasis added). In *Rodde*, this Court found that if the county closed the hospital at issue, "it will *reduce,* and in *some instances* eliminate, necessary medical services for disabled Medi-Cal patients . . . ."). 357 F.3d at 997–98 (emphasis added). The *Rodde* Court concluded that "[w]hile the disabled could theoretically seek service from the remaining facilities, the evidence suggested . . . that the services . . . would not *adequately serve the unique needs of the disabled*, who therefore would be effectively denied services that the non-disabled continued to receive." *Id.* at 998 (emphasis added). *See also Alexander*, 469 U.S. at 302 ("[N]othing in the record suggests that the handicapped in Tennessee will be unable to *benefit meaningfully* from the coverage they will receive under the 14-day rule."); *id*. at n.22 (A practice that impedes a medical condition "*occurring with greater frequency among*" certain individuals with disabilities from being "effectively treated, at least in part," could constitute a denial of meaningful access.) (emphasis added); *Cal. Found. for Indep. Living Ctrs. v. City of Sacramento*, 142 F. Supp. 3d 1035, 1061 (E.D. Cal. 2015) ("A policy may deny meaningful access by imposing a disproportionate burden on the disabled.").

In this Circuit, it is well recognized that meaningful access is denied when a policy disproportionately harms individuals with a disability such that it inadequately accounts for their specific needs and effectively reduces their access to services, programs, or activities. For example, in *M.S. v. Cty. of Ventura*, 2017 WL

10434015, at *18–19 (C.D. Cal. Mar. 7, 2017), the court denied defendant's motion to dismiss plaintiffs' Section 504 disparate impact claim alleging defendants failed to provide mental health services *in a reasonable time*. Similarly, in *Scott v. Garcia*, 370 F. Supp. 2d 1056, 1075 (S.D. Cal. 2005), the district court denied defendants' motion for summary judgment on an inmate's claim he was denied meaningful access to the Department of Correction's prison food service where he was not permitted *sufficient time* to eat his meals.

In each of the decisions referenced above, the "meaningful access" standard was not one of complete deprivation or denial of access to a benefit. Rather, the factual finding in those cases applying the meaningful access standard was whether an individual with a disability would be unable to benefit reasonably because defendants' actions prohibited the plaintiffs from meaningfully using the service or program or having their needs adequately served by severely restricting or reducing their access based on a consideration of all the relevant circumstances.

CONCLUSION

For the foregoing reasons, this Court should grant review of the district court's order denying class certification.

Dated: June 27, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing petition complies with the requirements of Ninth Circuit Rule 5-2(b), namely that the total word count of this document, excepting those parts excluded by Fed. R. App. P. 28(f) is 4,407 words, which when divided by 280 as provided by Circuit Rule 32-3, yields a page count less than or equal to twenty pages as required by Circuit Rule 5-2(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 pt. Times New Roman.

Dated: June 27, 2025

/s/ Alan M. Mansfield
Alan. M. Mansfield

PROOF OF SERVICE

STATE OF ALABAMA, COUNTY OF JEFFERSON

I, Suzanne Perry York, am employed in the County of Jefferson, State of Alabama. I am over the age of 18 and not a party to the within action; my business address is 2001 Park Place North, Suite 1000, Birmingham, Alabama 35203.

On June 27, 2025, I served the document described as "**PLAINTIFFS/PETITIONERS' PETITION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)"** upon the interested parties in this action addressed as follows:

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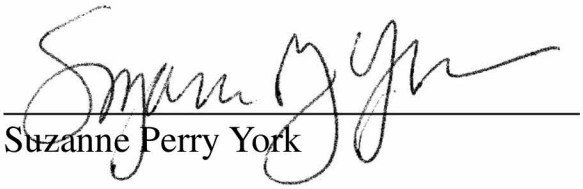
By forwarding a portable document file to the electronic email addresses for the above from electronic mail address syork@whatleykallas.com at 2001 Park Place North, Suite 1000, Birmingham, Alabama 35203.

I declare under penalty of perjury under the laws of the United State of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Dated: June 27, 2025



Suzanne Perry York

Exhibit 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE ONE, et al.,

Plaintiffs,

v.

CVS PHARMACY, INC., et al.,

Defendants.

Case No. 18-cv-01031-EMC

ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Docket No. 268

I. INTRODUCTION

This is a disability discrimination case by Plaintiffs John Does One, Two (through his executor Richard Roe), Six, and Seven who are people living with HIV/AIDS, against Defendants. The Defendants include subsidiaries of CVS Health Corporation and companies that manage prescription drug benefits on behalf of health insurers. Plaintiffs challenge Defendants' prescription-drug benefit program ("Program"), which requires that participants receive their HIV/AIDS medications ("HIV/AIDS Medication") only by mail or by drop shipment to CVS Specialty pharmacies and forecloses the opportunity to fill their prescriptions at any network pharmacy. Plaintiffs argue that the structure of the Program discriminates against people living with HIV/AIDS and denies them meaningful access to their benefits because the Program exposes them to privacy concerns, inadequate pharmaceutical counseling, and delivery issues, among other issues, and Defendants do not provide the option to opt-out of the Program. Plaintiffs allege that the Defendants' involvement is integral to the design of the health plans, and that Defendants were aware of Plaintiffs' problems with the plan but were indifferent to their rights. Specifically, Plaintiffs argue that Defendants did not make available the opportunity to seek reasonable accommodations in the form of the option to opt-out of the Program (and thus the ability to obtain

their medications at a local pharmacy). Plaintiffs request injunctive relief to receive this option.

Before the Court is Plaintiffs' motion for class certification under Rules 23(b)(1) or (b)(2) as well as certification of an issue class regarding Defendants' liability for deliberate indifference under Rule 23(c)(4). For the following reasons, Plaintiffs' motion is **DENIED**.

II. BACKGROUND

A. Factual Background

1. The Program

Plaintiffs John Doe One, John Doe Two, John Doe Six, and John Doe Seven are four individuals, proceeding anonymously, who allegedly take medicines that treat HIV/AIDS. Third Amended Complaint ("TAC"), Dkt. 241 ¶¶ 9–12. Defendants are five direct or indirect subsidiaries of CVS Health Corporation. Three of them are pharmacies: CVS Pharmacy, Inc., Garfield Beach CVS, L.L.C., and CVS Caremark California Specialty Pharmacy, L.L.C. (the "Pharmacy Defendants"). Two of them are pharmacy benefit managers, or "PBMs," which administer health plans for their employer clients: CVS Caremark, L.L.C. and CaremarkPCS Health, L.L.C. (the "PBM Defendants"). *Id.* ¶¶ 14–17. Plaintiffs received prescription drug coverage through health plans, sponsored by their (or their spouses') current or former employers, which they allege either were or currently are administered by CVS Caremark. *See, e.g., id.* ¶¶ 20, 32, 53.

Plaintiffs specifically challenge a plan requirement that they must receive their HIV/AIDS medication by mail through Caremark or by shipment to a CVS retail pharmacy for pick-up to obtain in-network pricing for "specialty medicines." *Id.* ¶ 98. Plaintiffs refer to this plan requirement as the "Program." Under the Program, a member must pay out-of-network prices if he or she fills their specialty prescriptions at other pharmacies—namely at retail pharmacies. *Id.* ¶¶ 1, 97. Plaintiffs allege they did not want mail delivery or drop shipment of prescriptions because of actual or "imminent harm" and additional financial costs associated with participating in the Program. *Id.* ¶ 3. They requested to opt-out of the Program and be allowed to receive their HIV/AIDS medications instead at their preferred pharmacies at in-network prices. *Id.* Plaintiffs allege that by restricting their access to effective treatment, the Program denies them meaningful

access to their health care plans' prescription drug benefit because the Program compromises their privacy rights and creates inconvenient and ineffective means of obtaining their medication. *See id*. at ¶ 215.

a. Privacy and Liberty Concerns.

First, the Program raises numerous "privacy and personal liberty concerns." *See id.* at ¶ 103. The mail delivery option can result in "lost or stolen" medication, which threatens the members' privacy. *Id.* For example, John Doe One was away from home several days a week for work, and if his medications were delivered to his home, they would be left on this doorstep. *Id.* at ¶ 29. Plaintiffs also allege that class members who live in apartment buildings or require medication deliveries to their workplace "have expressed alarm that neighbors and coworkers, who do not know that the recipient has HIV/AIDS, will come to suspect they are ill." *Id.* at ¶ 103. It is well-known that people living with HIV/AIDS experience stigma, prejudice, and discrimination. *See id.* The Program's pick-up at a CVS retail pharmacy option also raises privacy concerns. For example, John Doe Two explained:

> At my retail specialty pharmacy, they have a little alcove for privacy. I can take my medications out and match it with a list I have of all my drugs. I can meet with my pharmacist and explain any changes I have felt and ask any questions I have. At CVS, I am within hearing distance of everyone waiting in line, including many people who do not have HIV/AIDS. I can hear other patients' questions and the pharmacists' answer. I am concerned with other people finding out about my HIV-positive status.

Id. at ¶ 34.

b. Inconvenient and Ineffective Obtainment of Medication

Next, the Program's two options for members to obtain their HIV/AIDS medication both are inconvenient and ineffective ways for members to obtain their HIV/AIDS medication. The mail delivery option can experience delivery errors or, as stated above, stolen medication. John Doe Seven explained that he placed a refill order that was to be delivered two days later, but was delayed an additional two days due to inclement weather. *Id.* at ¶ 84. This led to John Doe Seven not having his daily dose of HIV medication. *Id.* Further, he was leaving the country on the day the medication was supposed to be delivered and would not be able to retrieve it until he returned. He would miss at least four doses of his daily HIV/AIDS medication, and the medication would be

on his doorstep for multiple days, where it could have been stolen or exposed to the summer heat. *Id.*

The Program's pick-up option at a CVS retail location is not preferable to Plaintiffs' local retail pharmacy of choice. Plaintiffs allege that they paid thousands of dollars out-of-pocket each month to purchase medications at their local retail pharmacy of choice. *Id.* at ¶ 215. Plaintiffs allege that their preferred pharmacies are "best positioned" to provide "advice and counseling" to patients through "face-to-face interactions"; detect "adverse drug interactions"; and "immediately provide new drug regimens as their disease progresses." *Id.* ¶ 99. John Doe Two said that he had to travel roughly 50 miles round trip to go to a CVS retail location with a private pick-up area, incurring a loss of at least $250, and requiring his husband to drive since he could not. *Id.* at ¶ 35. John Doe Two also frequently experienced issues with missing or inadequate amounts of medication when picking up his HIV/AIDS medication. *Id.*

2. Awareness

Plaintiffs allege that Defendants collectively were "deliberately indifferent" to a violation of Plaintiffs' rights. The TAC points to several facts as evidence of the Defendants' awareness of an alleged rights violation:

1. John Doe Two's complaint in 2016 to a state regulator,

2. Similar litigation waged against insurance companies from 2013-2017 and ensuing media coverage,

3. A pre-lawsuit settlement demand Plaintiffs' counsel made of Caremark, and

4. Evidence supposedly showing Defendants' employees were aware "that the design of the Program was suboptimal for HIV/AIDS Medications and likely discriminatory against people living with HIV."

See id. ¶¶ 147–56.

3. The Program Opt-Out

Plaintiffs also allege that the Program's failure to enable them to opt-out, which effectively denies them reasonable access to HIV/AIDs medication, violates federal law. Additionally, Plaintiffs allege that when they attempted to opt-out by contacting CVS Caremark's customer

service representatives, *id.* ¶¶ 142–45, they were told that only their employer plan sponsors (who are not Defendants), had the authority to do so. *Id.* ¶¶ 150, 162. While it is not disputed that the employer plan sponsors have the ultimate authority to allow Plaintiffs to opt-out, Plaintiffs allege that Defendants are integral to the creation of those employer plans and thus bear responsibility therefor.

B. Procedural Background

Does One through Five filed their initial complaint alleging, *inter alia*, disability discrimination under the Affordable Care Act. This Court dismissed their complaint, and the Ninth Circuit affirmed the dismissal except as to their ACA claim, which it revived. The Ninth Circuit held that Plaintiffs "adequately alleged that they were denied meaningful access to their prescription drug benefit, including medically appropriate dispensing of their medications and access to necessary counseling" because of Defendants' program. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1211 (9th Cir. 2020). The Supreme Court granted certiorari on the limited question of whether the ACA provides a disparate impact cause of action for plaintiffs alleging disability discrimination, but the parties withdrew the case after briefing but before oral argument. *CVS Pharmacy, Inc. v. Doe,* 141 S.Ct. 2882, 2883 (2021).

In the intervening time, Does Two to Four passed away, Doe Five was dismissed for failure to prosecute, and Doe One is no longer enrolled in the challenged program. Does Three and Four were voluntarily dismissed from the case after their deaths, but Doe One and the estate of Doe Two remain. Defendants then sought to dismiss the case as moot, arguing that Plaintiffs no longer had standing to seek an injunction.

The Court previously granted Plaintiffs' motion to amend the complaint to add Doe Six, who is still subject to the challenged program, and to allege that Defendants were deliberately indifferent in their failure to provide meaningful access or reasonable accommodations in support of monetary damages. Dkt. 230 (Order). Plaintiffs filed their Third Amended Complaint "TAC" on September 11, 2023 with the additions as the Court ordered, but also with an additional Doe Seven. Dkt. 241. Defendants moved to dismiss the TAC on all claims and the addition of Does Six and Seven. Dkt. 242. On April 18, 2024, the Court granted in part and denied in part

Defendants' motion to dismiss. As is relevant here, the Court held the following:

- Does Six and Seven had adequately pled a basis for standing for injunctive relief because as of "August 21, 2023," Doe Six "has been denied the ability to opt-out of the Program in which he continues to be a member" and Doe 7 is a current member of the Program;[1] they were "denied meaningful access to their HIV prescription drug benefits under Defendants' Program;"
- The addition of Does Six and Seven did "not unfairly prejudice the Defendants;"
- Plaintiffs had sufficiently alleged that Defendants acted with deliberate indifference (to establish a claim for damages under the Rehabilitation Act) because, *inter alia,* Plaintiffs had adequately alleged that (1) "Defendants had knowledge that there was a substantial likelihood The Program discriminated against people with HIV, and that a harm to a federally protected right was substantially likely," and (2) "Defendants' failure to afford a reasonable accommodation to patients needing HIV/AIDS medication [in the form of a right to opt-out of the Program] violated federal law and that their failure was intentional or done with deliberate indifference."

Dkt. 251 (Order on Motion to Dismiss).

Now before the Court is Plaintiffs' motion for class certification. Dkt. 268 (Mot.). Plaintiffs' proposed class definition is:

> All persons currently or previously enrolled in or covered by a health plan since January 1, 2015, in which the prescription drug benefit is or was administered by CVS and who: (i) obtain or obtained HIV/AIDS Medications; and (ii) have been required to participate in the Program with no right to seek reasonable accommodations or notice of their rights, but not including individual claims for personal injury or bodily harm.

Dkt. 268 at 4 (Mot.). While not an exact figure of the proposed class size, the CVS 30(b)(6) deposition established that there are "45,052 Caremark patients or members filling HIV medications…between the dates…January 1, 2018, and December 31[], 2023." CVS 30(b)(6)

[1] *See Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017) (Where a plaintiff seeks injunctive relief, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy") (internal citation omitted).

Dep. Trs. at 85:5-11 (Dkt. 268-1).

III. LEGAL STANDARD

Although expressly authorized by Rule 23, the "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). "In order to justify departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer the same injury as [her fellow] class members.'" *Id.* (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

Accordingly, before certifying a class, the Court "must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Zinser v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1186, amended 273 F.3d 1266 (9th Cir. 2001) (*overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022)). The Supreme Court has made it clear that Rule 23 "does not set forth a mere pleading standard." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart*, 564 U.S. at 349). Rather, the party seeking certification must "affirmatively demonstrate" her compliance with the requirements of both Rules 23(a) and 23(b). *See Wal-Mart*, 564 U.S. at 349.

Rule 23(a) permits plaintiffs to sue as representatives of a class only if (1) "the class is so numerous that joinder of all members is impracticable" ("numerosity" requirement); (2) "there are questions of law or fact common to the class" ("commonality" requirement); (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class" ("typicality" requirement); and (4) "the representative parties will fairly and adequately protect the interests of the class" ("adequacy" requirement). Fed. R. Civ. P. 23(a)(1)-(4). The purpose of Rule 23(a)'s requirements is largely to "ensure[ ] that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate," and to "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Wal-Mart*, 564 U.S. at 349 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

If each of the Rule 23(a) requirements are satisfied, the purported class must also satisfy

one of the three prongs of Rule 23(b). Here Plaintiffs seek certification under Rules 23(b)(1) and (2). Rule 23(b)(1) requires the Court to find that:

> [P]rosecuting separate actions by or against individual class members would create a risk of:
>
> > (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> >
> > (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Fed. R. Civ. P. 23(b)(1).

Rule 23(b)(2) requires the Court to find that:

> [T]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]

Fed. R. Civ. P. 23(b)(2).

Additionally, Plaintiffs seek certification of an issue class under Rule 23(c)(4). Rule 23(c)(4) recites:

> When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

Fed. R. Civ. P. 23. Rule 23(c)(4) provides a mechanism to certify class actions based on specific issues.

The underlying merits of the case, while admittedly relevant at the class certification stage, should not overly cloud the Court's certification analysis—the only question presently before the Court is whether the requirements of Rule 23 are met. See *Comcast*, 569 U.S. at 33–34. The fact that certain elements of proof may favor the defendant on the merits does not negate class certification; the issue is whether the proof is amenable to class treatment. Indeed, once a class is certified, the party prevailing on the merits can benefit from certification, be it Plaintiffs or Defendant.

Moreover, so long as plaintiff establishes the factual predicates to certification, "[n]either the possibility that a plaintiff will be unable to prove [her] allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong,

is a basis for declining to certify a class which apparently satisfies the Rule." *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

IV. DISCUSSION

Because Plaintiffs fail to "affirmatively demonstrate" their compliance with the commonality requirement of Rule 23(a)(2), class certification is improper. *See Wal-Mart*, 564 U.S. at 349. To satisfy Rule 23(a)(2)'s commonality requirement, a plaintiff must "affirmatively demonstrate" that their claims depend upon at least one common contention the truth or falsity of which "will resolve an issue that is central to the validity" of each one of the class members' "claims in one stroke." *Wal-Mart*, 564 U.S. at 350. That is, the lawsuit must call upon the court or jury to decide at least one factual or legal question that will generate a common answer "apt to drive the resolution of the litigation." *Id.*; *see also id.* at 359 (holding that "[e]ven a single [common] question" will suffice to satisfy Rule 23(a)) (quoting Nagareda, The Preexistence Principle and the Structure of the Class Action, 103 Colum. L. Rev. 149, 176, n. 110 (2003)).

Plaintiffs argue that the following "core" legal question satisfies the requirement: "[D]oes the Program violate the ACA's non-discrimination requirements?" Dkt. 268 at 22.[2] Plaintiffs assert that commonality is satisfied because the question of whether "the Program violate[s] the ACA's non-discrimination requirements" can be answered by a yes or a no for the class as a

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[2] Plaintiffs also offer six secondary questions. However, the parties focus their moving papers on the questions of meaningful access and a reasonable accommodation. Plaintiffs' secondary questions are:

(1) whether Defendants are "covered entities" under Section 1557;
(2) whether Defendants' pharmaceutical care services constitute a "health program or activity" subject to Section 1557;
(3) whether Defendants receive federal financial assistance;
(4) whether Defendants' administration of the Program failed to make reasonable accommodations available to individuals prescribed HIV/AIDS Medications;
(5) whether Defendants acted with deliberate indifference to a likely violation of class members' rights;
(6) whether Defendants must comply with the requirements of Section 1557 regardless of the terms of the contracts entered into with their employer and health plan clients.

Id. at 22-23.

whole. Dkt. 268 at 22. Plaintiffs argue that "Defendants adopted policies and procedures barring individuals living with HIV from seeking reasonable accommodations that they require." Dkt. 292 at 8 (Reply). Specifically, Plaintiffs argue that Defendants did not provide "individuals receiving HIV/AIDS Medications" with meaningful access because Defendants' Program and policies did not provide them with the "option…to opt out and receive their HIV/AIDS Medications from an in-network pharmacy in the same manner as other CVS enrollees." *Id.* at 10.[3]

"[A]s in all class actions, commonality cannot be determined without a precise understanding of the nature of the underlying claims." *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (citing *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.")). In disability cases brought under § 1557 of the ACA, which incorporates § 504 of the Rehabilitation Act, the central inquiry is whether the defendant has afforded the plaintiff "with meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985).[4] In the case at bar, the Ninth Circuit applied *Choate* to Plaintiffs' allegations regarding this Program and held that Plaintiffs had "adequately alleged that they were denied meaningful access to their prescription drug benefit…because the Program prevents them from receiving effective treatment for HIV/AIDS." *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1212 (9th Cir. 2020). The court so found because Plaintiffs alleged that "the structure of the Program as it relates to HIV/AIDS drugs" prevented them from "receiv[ing] effective treatment," "including medically appropriate

[3] Plaintiffs' proposed core question engages both the 'meaningful access' and the 'reasonable accommodation' inquiries for an ACA violation. As explained below, a defendant violates the ACA if their service is designed in "a way that effectively denies otherwise qualified [disabled] individuals the meaningful access to which they are entitled." *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Further, "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.*

[4] In *Choate*, the Court determined that certain facially neutral benefit designs can violate § 504 if they effectively deny meaningful access (even if there is no discriminatory intent). *See id.* (holding 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").

dispensing of their medications and access to necessary counseling." *Id.* at 1211.[5] As is relevant here, the court held that the Plaintiffs had sufficiently "allege[d] the structure and implementation of the Program discriminates against them on the basis of their disability by preventing HIV/AIDS patients from obtaining the same quality of pharmaceutical care that non-HIV/AIDS patients may obtain in filling non-specialty prescriptions, thereby denying them meaningful access to their prescription drug benefit." *Id*. The court continued:

> Does have alleged that even though the Program applies to specialty medications that may not be used to treat conditions associated with disabilities, the Program burdens HIV/AIDS patients differently because of their unique pharmaceutical needs**.** Specifically, they claim that changes in medication to treat the continual mutation of the virus requires pharmacists to review all of an HIV/AIDS patient's medications for side effects and adverse drug interactions, a benefit they no longer receive under the Program.

Id., 1211-12. Accordingly, at the motion to dismiss stage, Plaintiffs had sufficiently alleged that the Program denies them as HIV/AIDS patients such pharmaceutical counseling, thus denying them meaningful access to effective treatment for HIV/AIDS. The question now presented in the context of the instant motion for class certification is whether Plaintiffs have presented sufficient facts to establish that the issue of denial of meaningful access can be decided on a classwide basis in one stroke. Is there sufficient commonality among the class to decide this question on a classwide basis? Or must the question of denial of meaningful access be decided on an individual basis based on individual circumstances? Because Plaintiffs fail to demonstrate on the basis of the record presented herein that there is a common answer to the question of meaningful access, Plaintiffs fail to satisfy Rule 23(a)(2)'s commonality requirement.

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[5] To be sure, Plaintiffs allege that both "the structure and implementation of the Program discriminates against them…." *Id.* "[T]he meaningful access inquiry" can be satisfied by demonstrating that an "'issuer does not provide [essential health benefits] if its benefits design, or *the implementation of its benefits design,* discriminates based on an individual's…disability.'" *Id.* (citing 45 C.F.R. § 156.125(a)) (emphasis in original). Thus, either a structural or applied challenge can suffice.

1. Insufficient Evidence of a Common Answer

Rule 23(a) "requires proof that there are 'in fact ... common questions of law or fact,'" yielding common answers. *Parsons*, 754 F.3d at 683. Plaintiffs fail to provide proof that the Program or Defendants' administration of the Program commonly denies HIV/AIDS patients meaningful access to effective treatment for HIV/AIDS. That is, Plaintiffs do not demonstrate that all (or even a substantial portion of) class members face a similar injury from the Program or Defendants' administration of the Program, such that the proposed legal question can be answered for all "in one stroke." *Wal-Mart*, 564 U.S. at 350.

The four named Plaintiffs assert that all class members face common harms from the Program's denial of meaningful access to their prescription-drug benefit.[6] Specifically, Plaintiffs attest to categories of harms and risks allegedly unique to HIV/AIDS patients subject to the Program such as inadequate counseling;[7] privacy exposure;[8] delivery failures causing missed, potentially compromised, or stolen doses;[9] logistical challenges in retrieving their medications;[10] stress impacting health;[11] and financial costs[12] from the structure of the Program and Defendants' policies and procedures of not providing the option to opt-out of the Program.[13] However, as discussed below, there are substantial proof problems, both as to the actual experience of the Doe Plaintiffs and as to whether their experience was in fact common to the class.

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[6] Defendants argue that Plaintiffs' declarations are unreliable because they include similar language and were drafted by attorneys. Opp'n at 29-31. While the declarations include some shared language, they still reflect class representatives' reasonable efforts in participating in discovery (i.e. specific examples of their challenges with the structure of the Program and inability to opt-out when desired). *See Senne v. Kansas City Royals Baseball Corp.,* 315 F.R.D. 523, 571 (N.D. Cal. 2016), *aff'd in part, rev'd in part and remanded on other grounds*, 934 F.3d 918 (9th Cir. 2019) ("While boilerplate declarations can cast doubt on the adequacy of the class representatives, the declarations here are not so similar as to suggest that the class representatives did not review them or that counsel was remiss in including such stock language."). There is no basis for disregarding entirely this evidence.

[7] *See* Doe One Decl. ¶¶ 7, 10, 15, Dkt. 268-3; Roe Decl. ¶ 13, Dkt. 268-6; Doe Six Decl. ¶¶ 17, 19, Dkt. 268-4; Doe Seven Decl. ¶ 15, Dkt. 268-5.

[8] *See* Doe One Decl. ¶ 14; Roe Decl. ¶ 7; Doe Six Decl. ¶ 14. Doe Seven Decl. ¶ 2.

[9] *See* Doe One. Decl. ¶ 9; Roe Decl. ¶ 8; Doe Six Decl. ¶ 13; Doe Seven Decl. ¶¶ 10-12, 18, 32.

[10] *See* Doe One Decl. ¶ 12; Roe Decl. ¶¶ 8, 15, 18; Doe Six Decl. ¶¶ 12, 18; Doe Seven Decl. ¶¶ 9, 14, 18, 22, 28.

[11] *See* Doe One Decl. ¶ 16; Roe Decl. ¶ 24; Doe Six Decl. ¶ 23; Doe Seven Decl. ¶¶ 21, 23, 29

[12] *See* Doe One Decl. ¶ 10; Doe Six Decl. ¶ 32; Doe Seven Decl. ¶¶ 19-20.

[13] *See* Doe One Decl. ¶¶ 5, 13; Roe Decl. ¶¶ 20, 23; Doe Six Decl. ¶¶ 9, 24; Doe Seven Decl. ¶¶ 2, 30.

a. Insufficient Evidence of a Common Answer Amongst Representative Plaintiffs

As a factual matter, the deposition testimonies of the Doe Plaintiffs are inconsistent with the allegations of the complaint and their declarations.[14] While they assert they experienced the primary harms that they allege are common to the class – inadequate counseling, delivery issues, and privacy concerns – their deposition testimony suggests otherwise.

First, regarding inadequate counseling, Doe One admitted that he was "never deprived of the opportunity to ask a CVS pharmacist to consult on side effects of [his] HIV medication." Doe One Trs. 130:22-131:131:4 (Dkt. 282-2). Further, he could not "think of an instance when [he] asked a CVS pharmacist, whether that's a specialty pharmacist or a brick-and-mortar retail pharmacist, for a consultation, and the pharmacist would not or did not answer [his] question." *Id.* at 130:7-132:3. Similarly, Doe Six could not "recall ever asking a question to a pharmacist at the CVS Specialty Pharmacy when [he was] asked do you want to speak with a pharmacist." Doe Six Trs. 69:25-70:3 (Dkt. 282-4). Further, even though "CVS Specialty Pharmacy…asked if [he had] any questions for the CVS Specialty pharmacist," Doe Six could not "think of a time" when he had "a question that [he] asked the CVS Specialty pharmacist." *Id.* at 88:4-12. Moreover, Doe Six admitted that there was "nothing" "specific about [his] HIV medication or [his] HIV disease that [he] wanted to talk to a CVS Specialty pharmacist about but [he] didn't do…because the discussion would not have been a face-to-face interaction and instead would have taken place over the phone." *Id.* at 148:21-149:3. Finally, Doe Six could not "recall" "any instance when [he] went in for a pickup of [his] HIV medication at a CVS retail pharmacy and asked to speak with a CVS pharmacist to ask a question and [he was] denied the opportunity to do [so]." *Id.* 149:4-10. Likewise, Doe Seven admitted that, contrary to his declaration, he could not recall "any way in which a conversation with a CVS pharmacist that [he had]…on May 9, 2023, was rushed and

[14] Doe Two passed away and is now represented by Richard Roe, his partner and executor of his estate. *See* Dkt. 268-6 at 1 (Roe Decl.). Accordingly, Defendants did not depose Doe Two. To the extent Doe Two submitted declaration testimony regarding harm suffered from the Program, since he will no longer be able to provide admissible testimony, the Court does not consider that testimony in the context of the class certification motion.

fundamentally different" than his "consultations with other pharmacists at different in-network non-CVS pharmacies." Doe Seven Trs. 140:21-142:4 (Dkt. 282-5).

Second, regarding delivery-related issues, Does One, Six, and Seven also admit that they have had, at most, one delivery issue (if at all). Doe One was not even "aware that the shipment to a home was an option." Doe One Trs. 120:14-15. Doe Six admitted that "there was only one day in the nine years that [he] got HIV medication shipped for pickup at…a CVS retail pharmacy when the medication…couldn't be found by the retail store, and in that case the specialty pharmacy FedEx'd overnight a replacement prescription that [he] got the next day." Doe Six Trs. 149:24-150:6. Doe Seven stated that there was one time where "somebody stole" his medication delivered to home and he "did not" "suffer any medication problems from that." Doe Seven Trs. 166:3-167:10.

Third, Plaintiffs' privacy concerns related to receipt of effective treatment of HIV/AIDS are not evident. Doe One admitted that he could not name "any aspect of privacy expectations that [he] had that CVS retail breached." Doe One Trs. 156:6-12. Doe Six's privacy concerns are not tied to receipt of effective treatment of HIV/AIDS, but to mail delivery in general. Doe Six Trs. 73:3-15 ("[E]ven if" "the exterior [of the package] does not reveal what medication is in the box", "I'm still reluctant to use that kind of service…I don't want stuff ordered and opened by my neighbor, period."). Doe Seven stated that there is "no" "aspect of the packaging that [he] believe[s] is a breach of privacy." Doe Seven Trs. 173:9-12.

Thus, in contrast to the allegations of the complaint and assertions in their declarations, upon examination at their depositions, representative Plaintiffs offer little, if any, evidence of actual harm – that any of them were in fact deprived of meaningful access to effective treatment under the Program.

2. Insufficient Evidence of Policy Commonly Affecting Class Members

More fundamentally, Plaintiffs fail to establish that class members commonly experience a denial of meaningful access to effective treatment for HIV/AIDS. They present no specific examples of other individuals with HIV/AIDS having significant problems obtaining effective treatment under the Program. They present no survey evidence or sampling of participants in the

Program. There is no evidence as to the magnitude or prevalence of the access problem. Query: what percentage of the class have experienced delivery problems? What percentage have had real difficulty in timely and securely obtaining medication from their local CVS retail store? How many had problems obtaining private medication advice from CVS pharmacists? Despite extensive discovery, we do not know. Although Plaintiffs had the opportunity to propound interrogatories and take Rule 30(b)(6) depositions to probe whether problems of participants obtaining HIV/AIDS medication were widespread and common, Plaintiffs failed to tender any evidence to the Court on this critical question.

Plaintiffs' expert relies on the specific Plaintiffs' experiences to infer commonality. She opines:

> The declarations of John Doe One, Richard Roe, John Doe Six, and John Doe Seven raise clinically significant issues resulting from the Program, and my expert opinion is that Defendants' actions are clearly undermining the health and well-being of people living with HIV/AIDS by refusing to allow network pharmacy choice and forcing HIV/AIDS patients to only utilize CVS mail-order pharmacy or retail pharmacy locations to obtain their HIV medications and PrEP regimens.

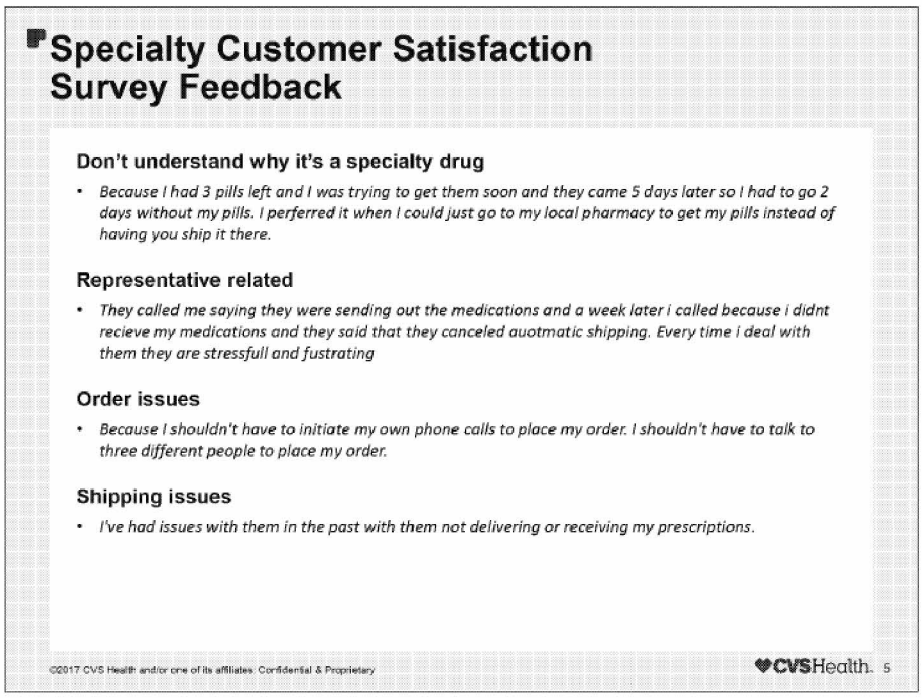
Sherman Rep. ¶ 63 (Dkt. 268-7). Yet, this expert provides no opinion on how common or prevalent these experiences are. Nor do Plaintiffs cite to any portion of the expert report in which the expert explains how commonality amongst a sample of four experiences (which for the reasons stated above are now less than convincing) can rise to the level of "clinically significant" determinations regarding access to effective care for HIV/AIDS patients. *Id.*

Plaintiffs' best evidence suggesting a systemic problem is an internal CVS slide deck titled "Member Satisfaction Improvement Initiative EES" from May 2017. Dkt. 268-1 at 791 (Ex. 10 to Powell Decl.). The slide deck indicates that satisfaction scores for those "who fill HIV medications at CVS Specialty" declined over a 2 ½ year period. *Id.* at 793. Specifically, the slide deck states that Specialty customer satisfaction scores have declined from 98% in 2014 to 96% in 2015 to 93% in 2016. *Id.* at 794. In response to "lagging" satisfaction scores, the slide deck specifies a goal to "[i]mprove [the] HIV member satisfaction score" by "2 percentage point[s]" from "79% to 81%." *Id.* at 793. But the evidence of dissatisfaction does not identify the bases of any dissatisfaction. We do not know whether dissatisfaction is due to *e.g.* high prices generally, a

modest inconvenience of not being able to go to the closest or favorite pharmacy, or a more substantial impediment as alleged in the complaint. Again, we do not know how common the access problems are.

Second, the slide deck provides excerpts from CVS Specialty customer satisfaction survey responses attesting to four issues: 1) "Don't understand why it's a specialty drug," 2) "Representative related," 3) "Order issues," and 4) "Shipping issues." *Id.* at 796. The four anecdotal excerpts align with the harms Plaintiffs allege.

Case 3:18-cv-01031-EMC Document 268-1 Filed 11/01/24 Page 796 of 828



Id. While these complaints align with the allegation of harms alleged in the complaint, again there is no indication of how representative or prevalent these anecdotes are.

To establish commonality, Plaintiffs must demonstrate that the proffered legal question can yield a common answer for all class members that is "apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350. Based on the record evidence assembled by Plaintiffs, they have failed to establish class members had the common experience of being denied meaningful access to effective treatment for HIV/AIDS. In contrast to the Rule 12(b)(6) standard that Plaintiffs met at the motion to dismiss stage, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 564 U.S. at 350. Instead, at the motion for class certification stage, Plaintiffs "must be prepared to

prove that there are *in fact*…common questions of law or fact." *Id.* (emphasis in original). Where plaintiffs seeking class certification "provide no convincing proof of a [uniform] policy," they fail to "establish[] the existence of any common question." *Id.* at 359.

Similar to *Wal-Mart* where the court found that anecdotal evidence in the form of "120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members" was insufficient evidence of a uniform policy of discrimination because the anecdotes spoke to only "235 out of Wal–Mart's 3,400 stores," the four Plaintiffs' anecdotal experiences are insufficient to prove that the Program exposes all HIV/AIDS patients to similar harms. *Id.* at 358. "Even if every single one of these accounts is true, that would not demonstrate that the" Program necessarily precludes on a classwide basis HIV/AIDS patients "from obtaining the same quality of pharmaceutical care that non-HIV/AIDS patients may obtain in filling non-specialty prescriptions." *Id.* and *Doe*, 982 F.3d at 1211. There is insufficient evidence of common injury and thus a common classwide answer to the question whether the Program violates the rights of class members.

This instant case stands in contrast to *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), where the Ninth Circuit held that commonality is met where plaintiffs "challenge[] a system-wide practice or policy that **affects all of the putative class members**," even if there are "individual factual differences among the individual litigants or groups of litigants," because "**all…suffer similar harm** from the [systemic policy]." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (*abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05 (2005)) (emphasis added). In *Armstrong,* disabled prisoners and parolees challenged policies and practices for parole and parole revocation proceedings. More specifically, members of the class included "prisoners and parolees with sight, hearing, learning, developmental and mobility disabilities." *Id.* at 869.[15] They alleged that the "state's policies and practices…discriminated against them on the basis of disability in violation of the Americans with Disabilities Act (ADA) and section 504 of the

[15] The Ninth Circuit instructed that the district court had improperly included those with kidney disabilities because, after amendment, the class did not include "a named plaintiff with a kidney disability." *Id.*

Rehabilitation Act, as well as violated the due-process clause of the Fourteenth Amendment." *Id.* at 855. For example, the Board of Prison Terms:

> [F]ailed to provide effective American Sign Language interpretation services to hearing impaired prisoners and parolees, failed to provide Braille materials, large print materials, audio tapes or qualified readers for visually impaired prisoners and parolees, failed to provide qualified readers for learning disabled prisoners and parolees, and failed to provide trained staff capable of effectively communicating with mentally retarded or learning disabled prisoners and parolees."

Id. The court found that commonality was satisfied because "the challenged conduct is a policy or practice that **affects all class members**" and that "the differences…[did] not justify requiring groups of persons with different disabilities…to prosecute separate actions," as they "**all…suffer[ed] similar harm** from the Board's failure to accommodate their disabilities." *Id.* at 868 (emphasis added).

Similarly, in *Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010), the Ninth Circuit held that commonality was met where a putative class challenges a uniform policy such that "the constitutional issue at the heart of each class member's claim for relief is common." *Rodriguez v. Hayes*, 591 F.3d 1105, 1123 (9th Cir. 2010) (*abrogated on other grounds by Garland v. Aleman Gonzalez*, 596 U.S. 543 (2022)). In *Rodriguez*, the petitioner challenged the Immigration and Customs Enforcement's practice of detaining aliens during immigration proceedings for more than six months without a bond hearing. There, the class included those subject to the following immigration statutes: "8 U.S.C. § 1226 [on the apprehension and detention of aliens], 8 U.S.C. § 1225(b) [on the inspection of applicants for admission], and 8 U.S.C. § 1231(a) [on the detention, release, and removal of aliens ordered removed]." *Id.* at 1113. The court held that commonality was satisfied because "the question of whether…an individual [may] be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns…**will be posed by the detention of every member of the class** and their entitlement to a bond hearing will largely be determined by its answer." *Id.* (emphasis added).

In each of these cases, the injury suffered by all class members was common and the issues pertaining to the asserted violations causing the injuries could be decided in one stroke. Because the alleged violation and resulting injury here – the denial of meaningful access to effective treatment for HIV/AIDS – cannot be similarly decided in one stroke given the lack of evidence of common injury amongst class members, these cases are distinguishable.

To be sure, plaintiffs need not demonstrate that every class member is subject to a common injury in order to obtain class certification. A class seeking injunctive relief may be certified under Rule 23(b)(2) even if it includes uninjured individuals; indeed, the Ninth Circuit has held that even if the number of uninjured class members is more than *de minimis*, a Rule 23(b)(2) class may be certified. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). But the term commonality implies there is at least a substantial degree of prevalence. *See* "common," Merriam-Webster Dictionary (2025) (defining "common" as "widespread" and "occurring or appearing frequently"). Certainly, if only *e.g.* 5% of the class experiences the alleged injury sufficient to establish violation of a legal right, it cannot be said that their experience and the legal issue flowing therefrom are "common." As noted above, there is no evidence of prevalence or commonality of the denial of meaningful access to effective treatment within the Program.

It is therefore not surprising that Plaintiffs do not really argue that all or even most class members experience a denial of actual access to effective treatment of HIV/AIDS. Rather, they contend that the denial of meaningful access lies in the Program's denial of a *choice* to opt-out. But the denial of a choice is unlawful only if the lack of choice leaves the complainant with only an unlawful choice. It begs the question whether the sole alternative (the Program) in the absence of the opt-out choice is unlawful. If it is not, the lack of choice is not legally consequential. Scrutiny of a claim of harm cannot be avoided by casting the harm as a lack of choice.[16]

There are situations wherein the alleged conduct itself violates law without showing any

[16] In a similar vein, because Plaintiffs have not established that the Program systematically causes common harms, Plaintiffs fail to demonstrate that relief in the form of an option to opt-out would cure the denial of meaningful access to effective HIV/AIDS treatment.

particularized harm to any individual class member. For instance, a ramp in a public establishment whose slope exceeds ADA Accessibility Guidelines violates the ADA regardless of whether a particular individual with a mobility impairment can surmount that ramp. In those circumstances, the question of whether the defendant complies with the Guidelines (where non-compliance constitutes a violation of the ADA regardless of the particular impact on an individual class member) applies to the entire class of those with mobility disability. In contrast, the question of whether one is denied meaningful access to medical treatment turns on particularized facts. So, the ramp analogy, cited by Plaintiffs' counsel is inapt.

The Court recognizes that there are situations where the *risk* of injury (without the certainty of injury) may be sufficient to obtain classwide relief. For instance, an Eighth Amendment violation for inadequate health care in a prison system may be established not only by an actual injury from substandard care, but also by the *risk* of such substandard care. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment"). Thus, in *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), involving challenges to medical care in Arizona's prison system, the court held that commonality is met when plaintiffs challenge "statewide policies and practices **to which all members of the class are subjected**" because "either each of those policies and practices is **unlawful as to every inmate** or it is not." *Id.* at 678 (emphasis added). The *Parsons* court found that commonality was satisfied because "every single [Arizona Department of Corrections] [("ADC")] inmate faces a *substantial risk of serious harm* if ADC policies and practices provide constitutionally deficient care for treatment of medical, dental, and mental health needs." *Id.* at 679 (emphasis added). Because the policies and practices impacted every class member's Eighth Amendment rights, the legal question of whether "ADC policies and practices of statewide and systemic application expose all inmates in ADC custody to a substantial risk of serious harm" could be answered on a class-wide basis. *Id.* at 676. Here, Plaintiffs cite no case law establishing that the risk (and not the actuality) of being denied meaningful access to treatment violates the ACA.

There are also instances where the legal violation results not simply in the risk of harm (as

in the Eighth Amendment context) but the fact of harm, and yet courts have certified classes based on the risk of a violation. For instance, in *Connor v. Maryland Dep't of Health*, No. CV MJM-24-1423, 2025 WL 1167846 (D. Md. Apr. 22, 2025), a district court certified a class of "mobility-impaired residents of Medicaid- and Medicare-participating nursing facilities in Maryland." *Connor v. Maryland Dep't of Health*, No. CV MJM-24-1423, 2025 WL 1167846, at *2 (D. Md. Apr. 22, 2025). Asserting ADA Title II and Rehabilitation Act Section 504 claims, these plaintiffs "allege[d] that they have been deprived of 'meaningful access to and the benefit of [Maryland Department of Health's ("MDH's)] nursing facility oversight and enforcement activities.'" *Id.* at *3. *Connor* held that the plaintiffs demonstrated "that MDH's failures disparately **subject the entire class** of mobility-impaired nursing facility residents **to a common set of harms and heightened risks**," such that "some variation among the specific personal harms and risks of harm suffered by members of the proposed class" did not defeat commonality. *Id.* at *10-11 (emphasis added). In particular, the plaintiffs alleged that the "lack of MDH oversight ha[d] unique impacts on [them] due to their heightened need for care by, and increased reliance upon, nursing facility staff, which stem from their mobility impairments." *Id.*, at *2. For example, those plaintiffs "rel[ied] on nursing staff assistance for hygiene and incontinence care, socialization, receipt of pain medication, and even, in some instances, to eat and drink water, which ma[de] them uniquely vulnerable to performance failures and staffing shortages at their facilities." *Id.* The plaintiffs presented evidence that over 78% of the relevant nursing facilities lacked MDH oversight at issue in their case. Further, the data the plaintiffs relied on "also reflect[ed] findings of numerous specific deficiencies at Maryland nursing facilities that specifically and uniquely impact mobility-impaired residents, including deficiencies in assistance with personal hygiene, incontinence care, repositioning, transfers, prevention and management of skin breakdown, response to call lights, and care planning." *Id.* Thus, the court found that the plaintiffs had proved the commonality of their question of "whether MDH's administration of its oversight and enforcement obligations under the NHRA deny mobility-impaired residents of nursing homes in Maryland the benefit of a service, program, or activity based on their disability, in violation of ADA Title II and RA Section 504." *Id.*, at *9. The common question was predicated, not necessarily on actual medical injury

suffered by members of the class, but the substantial *risk* of such harm flowing from the lack of oversight.

Here, as noted, the asserted violation lies in the denial of meaningful access to effective treatment for HIV/AIDS. Unlike in *Parsons*, the risk of denial of meaningful access itself is not the violation. Instead, the situation is more akin to *Connor* where plaintiffs claim that even though actual harm must be established to prove a violation, an injunction may be warranted to prevent that risk. But unlike *Connor*, Plaintiffs failed to demonstrate that the "entire class" was subject to "a common set of harms and heightened risks." *Id.* at 10. Whereas 78% of the facilities (and presumably of the class) lacked oversight and thus subjected all patients to the heightened risk of harm, Plaintiffs in the instant case present no data on the prevalence of *e.g.* problematic mail delivery, unavailability of adequate pharmaceutical counseling, or violation of medical privacy. *Cf.* Rule 23(b)(2) (final injunctive relief must be "appropriate respecting the class as a whole").

Therefore, whether the Program or Defendants' administration of the Program denies HIV/AIDS patients meaningful access to effective treatment is not a "common contention…capable of classwide resolution" because the determination of such denial "central to the validity of [Plaintiffs' ACA] claim [cannot be determined] in one stroke." *Wal-Mart*, 564 U.S. at 350. Thus, although it is theoretically possible that a class can be certified in an ACA case such as this, particularly under Rule 23(b)(2), the lack of a sufficient record herein precludes a finding of commonality required by Rule 23(a)(2).

V. CONCLUSION

For the reasons above, Plaintiffs' motion for class certification is **DENIED**.

IT IS SO ORDERED.

Dated: 6/13/2025

EDWARD M. CHEN
United States District Judge