23-379

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NICOLE COSTIN, individually and
on behalf of her minor son, BABY A

Plaintiff-Appellant

v.

GLENS FALLS HOSPITAL; KEVIN M. GRASSI, M.D.; STACY L. RALPH; KAREN RANTTILA; LYNETTE M. BISS; NICOLE BENNETT; JENIFFER NIX; AMY HOOPER; JODIE SMITH; STEPHANIE DECHENE; ALYCIA N. GREGORY,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

This case presents an important question regarding the application of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), to hospital policies that target people with opioid-use disorder for unfavorable treatment. The Department of Justice (DOJ) and Department of Health and Human Services (HHS) each have significant responsibility for the enforcement and implementation of Section 504. See 29 U.S.C. 794a(a); 28 C.F.R. Pt. 41; 45 C.F.R. Pt. 84. DOJ has also exercised

its authority under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to investigate public entities and places of public accommodation that discriminate against people with opioid-use disorder, and has secured settlements with a number of such entities, including health-care providers. See, *e.g.*, Settlement Agreement Between the United States of America and Wingate Healthcare, Inc. 1 (2021), available at https://perma.cc/3JXD-CVPB. HHS has similarly investigated and settled several complaints regarding discrimination against people with opioid-use disorder in violation of Section 504. See, *e.g.*, Voluntary Resolution Agreement Between the U.S. Department of Health and Human Services Office for Civil Rights (OCR) and the West Virginia Department of Health and Human Resources Bureau for Children and Families (2020), available at https://perma.cc/22BV-JPJA. Accordingly, the United States has a substantial interest in the proper resolution of this appeal.

The United States files this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUE

Section 504 of the Rehabilitation Act provides that no person "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

receiving Federal financial assistance." 29 U.S.C. 794(a). The United States will address the following question only:

Whether a hospital engages in disability discrimination under Section 504 by enforcing a blanket policy of drug testing all pregnant people who are taking medication for opioid-use disorder and reporting them to state authorities for suspected child abuse based solely on the fact that they are taking such medication.

STATEMENT OF THE CASE

1. Statutory Background

Congress enacted the Rehabilitation Act as a "comprehensive federal program," *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984), to promote, among other things, the integration and inclusion of individuals with disabilities into mainstream American society. 29 U.S.C. 701. To that end, Section 504 of the Act provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

HHS regulations implementing Section 504 specifically prohibit health-care providers that receive federal financial assistance from affording people with disabilities "an opportunity to receive benefits or services that is not equal to that

offered" to others. 45 C.F.R. 84.52(a)(2). In addition, HHS's regulations prohibit recipients of federal financial assistance from "utiliz[ing] criteria or methods of administration" that either (i) "have the effect of subjecting [people with disabilities] to discrimination" on that basis; or (ii) "have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to" people with disabilities. 45 C.F.R. 84.4(b)(4)(i)-(ii); see also 45 C.F.R. 84.52(a)(4) (specifically prohibiting covered health-care providers from "[p]rovid[ing] benefits or services in a manner that limits or has the effect of limiting the participation of" people with disabilities).

2. Factual Background

Costin has been taking medication to treat her opioid-use disorder for over a decade. In the past, when she has not taken her medication, she has "had hallucinations, suffered from paranoia, and experienced severe anxiety and panic attacks." A26.[1] Prior to becoming pregnant in 2020, she had been taking Suboxone, but, early in her pregnancy, she switched to taking Subutex, which is considered a "first-line therapy option[] for pregnant people with" opioid-use

[1] "A__" refers to the parties' joint appendix by page number. Costin's complaint refers to her condition as "substance abuse disorder." A19. Throughout this brief, the United States refers to her condition by the more specific terminology "opioid-use disorder" because Costin alleges that her substance-use disorder involves the use of opioids.

disorder. A26; see also *Treatment for Opioid Use Disorder Before, During, and After Pregnancy*, CDC.gov (Nov. 15, 2022), https://perma.cc/K6F2-CMRN.

On March 29, 2021, Costin checked into the maternity ward of Glens Falls Hospital (the Hospital)—a recipient of federal financial assistance—for the labor and delivery of her baby. A24. She disclosed in response to a nurse's intake questions that she takes Subutex. A26. Later that day, without Costin's knowledge or consent, someone submitted her urine for drug screening, which came back positive for cocaine and PCP. A27-A28. Because Costin knew that she had not taken cocaine or PCP during her pregnancy, she requested that the drug test be redone. A28. About an hour later, a second urine sample tested negative for all substances—a result that an off-site laboratory later confirmed in testing the same urine sample. A29, A38. When Costin objected that the initial drug test had been administered without her knowledge or consent, a nurse stated that the Hospital "drug tests pregnant women who take Suboxone or Subutex 'all the time.'" A28. Costin's child was born a few hours later. A29.[2]

Some time after the second drug test came back negative, the Hospital's on-staff social workers contacted the New York State Child Abuse and Maltreatment

[2] Costin also alleges, among other things, that the Hospital denied her an epidural or any other pain-management medication during her labor or postpartum laceration repair, and gave her Pitocin, a drug used to accelerate her labor, all because she took Subutex. A27-A30, A44-A45.

Register, a component of the state's child protective services (CPS) system, to report suspicions that Costin was "responsible for causing or allowing to be inflicted injury, abuse, or maltreatment" on her baby. A33; see also A35.[3] When Costin learned that the report had been made, she told one of the Hospital's doctors that she did not understand why CPS was involved in her hospital care. A38. The doctor responded that "the hospital reports possible child abuse by every patient that comes in on Suboxone." A38.

The social workers' report led CPS to investigate Costin and her family over the ensuing several days. A35-36, A38-A39. CPS eventually concluded that the Hospital's report of suspected child abuse was unfounded. A39.

3. Procedural Background

Costin filed this suit alleging violations of Title III of the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.*, Section 504, and New York tort law. A43-A56. The district court dismissed Costin's federal claims, holding that the complaint did not adequately allege that the Hospital discriminated against Costin on the basis of disability. A478. According to the court, all of the defendants' alleged acts were either "medical determinations motivated by considerations relevant to proper medical decision-making" or were not made on the basis of

[3] Whether the social workers contacted CPS before or after Costin's baby was born is not clear from the complaint.

Costin having opioid-use disorder. A477-A478. The court also declined to exercise supplemental jurisdiction over Costin's state-law claims. A479.

After entry of judgment (A481), Costin filed a timely notice of appeal (A483-A484).[4]

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[4] Costin's complaint includes a state-law claim against defendant Lynnette Biss, a certified nurse midwife who participated in Costin's treatment and was employed by a designated Federally Qualified Health Center. A427-A443. Prior to the case's dismissal, the government certified that Biss was acting within the scope of her employment (A437-A440), and moved to substitute the United States as defendant and to dismiss for failure to exhaust administrative remedies pursuant to the Federal Tort Claims Act. A430; see 28 U.S.C. 2679(d) (requiring substitution); 42 U.S.C. 233 (authorizing certain entities and their employees to be deemed employees of the Public Health Service); A440 (explaining that Biss's employer was so deemed).

The district court denied the United States' motion as moot when the court declined to exercise supplemental jurisdiction over that claim. A480. That decision was error because Westfall Act substitution is mandatory upon certification that the employee was acting within the scope of her employment, although that certification is subject to judicial review. See 28 U.S.C. 2679(d)(1) ("Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment * * * , any civil action or proceeding * * * shall be deemed an action against the United States * * * , and the United States shall be substituted as the party defendant."); *Osborn* v. *Haley*, 549 U.S. 225, 252 (2007) ("Upon certification, the action is 'deemed to be . . . brought against the United States,' unless and until the district court determines that the federal officer originally named as defendant was acting outside the scope of his employment." (citation omitted)); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995) (permitting judicial review of scope certification). The United States reserves the right to renew its motion to substitute and dismiss in any subsequent proceedings before the district court.

SUMMARY OF ARGUMENT

The district court erred in dismissing Costin's Section 504 claim. Although the court correctly recognized that Costin's opioid-use disorder constitutes a disability under Section 504, it erred in holding that Costin fails to allege that the Hospital discriminated against her on the basis of that disability. Specifically, the court failed to address Costin's allegations that the Hospital has a blanket policy of drug testing all pregnant people who are taking medication for opioid-use disorder and reporting them to state authorities for suspected child abuse based solely on the fact that they are taking such medication. Instead, the court categorically treated the Hospital's conduct as either medical determinations not subject to Section 504 or as not discrimination on the basis of her opioid-use disorder. That was error.

The Hospital's policy discriminates on the basis of disability by targeting pregnant people taking medication for opioid-use disorder for disparate treatment—specifically drug testing and CPS scrutiny. That disparate treatment imposes burdens on pregnant people taking medication for opioid use disorder—by not only invading their privacy but also exposing them to risk of family separation—that the Hospital does not impose on pregnant people without disabilities. In this way, the policy provides people taking medication for opioid-use disorder with medical services that are "not equal" to those it provides to other patients, 45 C.F.R. 84.52(a)(2), and "utilize[s] criteria or methods of

administration" that have the likely effect of discouraging them from seeking medical care at the Hospital in the first instance, 45 C.F.R. 84.4(b)(4).

To be clear, the question whether a plaintiff makes out a prima facie case of disability discrimination is not the same as whether a defendant has *violated* Section 504. Statutory defenses may provide a defendant with a path for avoiding liability even when a plaintiff has stated a prima facie case. But the Hospital raised no such defense below, and such defenses are often too fact-dependent to succeed at the pleading stage. The primary defense that the Hospital did raise below—that it was legally required to report Costin to CPS—does not even apply to its drug-testing policy. And, even with respect to its CPS-reporting policy, the defense lacks merit. According to the Hospital, the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. 5101 *et seq.*, requires it to report to state authorities on suspicion of child abuse all women taking medication for opioid-use disorder. But the Hospital misstates CAPTA's notification requirement. Under CAPTA, notification is required when an infant is "affected by * * * *withdrawal symptoms* resulting from prenatal drug exposure." 42 U.S.C. 5106a(b)(2)(B)(ii) (emphasis added). Prenatal exposure to a legal drug that *does not* result in any

withdrawal symptoms does not trigger CAPTA's notification requirement. The Hospital's argument thus fails on its own terms.[5]

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING COSTIN'S SECTION 504 CLAIM

A. The District Court Correctly Recognized That Costin's Opioid-Use Disorder Is A Disability

To bring a Section 504 claim, a plaintiff must establish, as a threshold matter, that she is "a qualified individual with a disability." *Wright* v. *New York State Dep't of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016). The district court correctly recognized that Costin's opioid-use disorder is a disability under Section 504. A473-A475.

Under Section 504, a "disability" is "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. 12102(1)(A); see also 29 U.S.C. 705(9)(B) (incorporating by reference 42 U.S.C. 12102 into the Rehabilitation Act). As this Court has recognized, "drug addiction[] is an 'impairment' under the definitions of a disability set forth in * * * the Rehabilitation Act." *Regional Econ. Cmty. Action Program, Inc.* v. *City of*

[5] The United States takes no position on any other issue in this appeal, including whether Costin's allegations concerning the Hospital's denial of pain-management medication or administration of Pitocin establish a cognizable Section 504 claim.

Middletown, 294 F.3d 35, 46 (2d Cir.), cert. denied, 537 U.S. 813 (2002); see also 29 U.S.C. 705(20)(C). Here, Costin alleges that her opioid-use disorder, when left untreated, causes her to experience hallucinations, paranoia, severe anxiety, and panic attacks. A26. Those effects impose substantial limits on major life activities and, thus, plainly satisfy the statutory definition of "disability." 42 U.S.C. 12102(1)(A).[6]

That medication helps Costin effectively manage her opioid-use disorder does not mean that she does not have a disability. Under the Rehabilitation Act, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of * * * medication." 42 U.S.C. 12102(4)(E)(i)(I) (incorporated by reference into the Rehabilitation Act at 29 U.S.C. 705(20)(B)); see also 42 U.S.C. 12102(4)(D) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

Although the Rehabilitation Act excludes current illegal drug use from its definition of a "disability," 29 U.S.C. 705(20)(C)(i), that exclusion does not encompass people who are in recovery from a substance-use disorder and no

[6] The United States has secured settlements with medical providers that discriminate against people with opioid-use disorder in violation of Title III of the ADA. See, *e.g.*, Settlement Agreement Between the United States of America and Next Step Healthcare LLC 1 (2022), available at https://perma.cc/7MRD-GTEL.

longer engaging in such use, 29 U.S.C. 705(20)(C)(ii)(I)–(II). In this case, Costin expressly alleges that she was "no longer using illegal substances" at the time of her labor and delivery. A27. Accordingly, Costin's allegations place her squarely within the Rehabilitation Act's definition of an "individual with a disability," 29 U.S.C. 705(20)(C)(i).[7]

B. The Hospital Discriminates On The Basis Of Disability Through Its Blanket Policy Regarding Pregnant People Taking Medication For Opioid-Use Disorder

The district court dismissed Costin's Section 504 claim on narrow grounds. It did not hold that the claim failed because the Hospital's challenged policy is medically "necessary." See generally *Southeastern Cmty. Coll.* v. *Davis*, 442 U.S. 397, 407, 413 (1979) (holding that a nursing program's admissions policy that discriminated against deaf people did not violate Section 504 because "the ability to understand speech without reliance on lipreading" was "indispensable for many of the functions that a registered nurse performs"). Nor did the court hold that the policy is justified by any other defense available under Section 504.[8] Instead, the

[7] In addition to establishing that Costin's condition qualifies as a disability under the Rehabilitation Act, the complaint also supports the inference that she was "regarded as" having a disability, which would independently satisfy the threshold element of a Section 504 claim. 42 U.S.C. 12102(1)(C).

[8] Because most Section 504 defenses are considered "affirmative defense[s]," it often is not possible for a district court to consider them at the pleading stage. See *Chevron U.S.A., Inc.* v. *Echazabel*, 536 U.S. 73, 78 (2002); *Kelly-Brown* v. *Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013) (stating that an

court held that Costin does not adequately allege that the Hospital discriminated against her based on her opioid-use disorder. A478. As explained below, that holding cannot be squared with Section 504's text or with its implementing regulations.

1. Section 504 prohibits covered entities from "deny[ing]" benefits or otherwise "subject[ing]" individuals to "discrimination" on the basis of disability. 29 U.S.C. 794(a). Costin alleges that the Hospital has a blanket policy of treating pregnant people who take medication for opioid-use disorder differently from pregnant people who do not, specifically by: (1) drug testing them and (2) reporting them to state authorities on suspicion of child abuse. A28, A38. By singling out people taking medication for opioid-use disorder for less favorable treatment, the Hospital's policy targets people with that condition. The sole basis for the Hospital's differential treatment is whether a pregnant patient takes medication for opioid-use disorder. Accordingly, the Hospital "subject[s] to discrimination" people with opioid-use disorder "by reason of [their] disability." 29 U.S.C. 794(a).

2. The Hospital's blanket policy also constitutes discrimination under HHS's regulations implementing Section 504. Those regulations prohibit covered

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"affirmative defense" that "requires consideration of facts outside of the complaint" is inappropriate to resolve on a motion to dismiss").

health-care providers from "[a]ffording" a person with a disability "an opportunity to receive benefits or services that is not equal to that offered" to others. 45 C.F.R. 84.52(a)(2). As courts have recognized in construing an analogous provision in Title III of the ADA, 42 U.S.C. 12182(b)(1)(A)(ii), this prohibition flows from the requirement that covered entities provide "more than mere access to public facilities," but rather "'full and equal enjoyment'" of the services provided. *Baughman* v. *Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (quoting 42 U.S.C. 12182(a)). In order to comply with Section 504, covered entities must therefore "start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience." *Ibid.*; accord *A.L. ex rel. D.L.* v. *Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1290 (11th Cir. 2018); *Argenyi* v. *Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013).[9]

By drug testing all pregnant people taking medication for opioid-use disorder and reporting them to CPS for suspected child abuse, the Hospital does not afford such patients with an experience akin to the kind it provides people without disabilities. Both drug testing and CPS investigations entail significant

[9] In construing Section 504, courts often look to cases interpreting the ADA. As this Court has recognized, the ADA and Section 504's standards "are, in most cases, the same." *Powell* v. *National Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004).

invasions of privacy, as the Supreme Court has stressed in its Fourth Amendment cases. *Ferguson* v. *City of Charleston*, 532 U.S. 67, 78 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."); *Skinner* v. *Railway Labor Execs.' Ass'n*, 489 U.S. 602, 617 (1989) ("[I]t is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable."); see also Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 441 (2005) ("Although child maltreatment investigations clearly serve an essential purpose in the overall CPS scheme, the reporting and investigations process is also an enormous intrusion on individual and family privacy."). Moreover, CPS investigations threaten parents' custody of their children or might interrupt parent-child bonding during a critical period. Such investigations therefore implicate parents' "vital interest in preventing the irretrievable destruction of their family life." *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982).

Pregnant people without disabilities can obtain medical services at the Hospital without experiencing the invasion of privacy occasioned by drug testing and CPS scrutiny or the potential negative ramifications that might flow from

either. Accordingly, medical care that is, as a matter of course, accompanied by drug testing and CPS scrutiny is "not equal" to medical care that is free from such attributes. See 45 C.F.R. 84.52(a)(2).

3. HHS's Section 504 regulations also prohibit covered entities from "utiliz[ing] criteria or methods of administration (i) that have the effect of subjecting [people with disabilities] to discrimination on the basis of handicap, [or] (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to [such] persons." 45 C.F.R. 84.4(b)(4). That regulation resembles a provision in Title III of the ADA that prohibits places of public accommodation from "impos[ing] * * * eligibility criteria that screen out or tend to screen out" people with disabilities. 42 U.S.C. 12182(b)(2)(A)(i); see also 42 U.S.C. 12182(b)(1)(D). This resemblance is not coincidental: Congress expressly modeled the ADA's screen-out provision on Section 504 regulations in order to "make[] it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation." H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 105 (1990) (citation omitted). Among other things, the screen-out concept "prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others." 28 C.F.R. Pt. 36, App. C 959.

Matheis v. *CSL Plasma, Inc.*, 936 F.3d 171 (3d Cir. 2019), provides an example of the screen-out theory's application to a medical-service provider. In that case, the Third Circuit held that a plasma donation center discriminated on the basis of disability (under Title III) through a blanket policy barring prospective donors who use a service animal to manage anxiety. *Id.* at 174. Other courts have found cognizable discrimination claims based on policies in non-medical contexts that screened out or tended to screen out people with disabilities. See *Rendon* v. *Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1286 (11th Cir. 2002) (holding that using an automated telephone hotline for picking game-show contestants screened out people with hearing disabilities and limited finger mobility); *Crowder* v. *Kitagawa*, 81 F.3d 1480, 1482, 1485 (9th Cir. 1996) (holding that Hawaii's policy of requiring carnivorous animals entering the state to quarantine for 120 days discriminated against blind people who rely on guide dogs "by denying them meaningful access to state services, programs and activities" such as streets and transportation systems).

The Hospital's blanket policy imposes "criteria or methods of administration" on pregnant patients taking medication for opioid-use disorder that it does not place on other patients: Among other things, it subjects them to drug testing and exposes their families to a potential CPS investigation. 45 C.F.R. 84.4(b)(4); Pt. B.2, *supra*. The Hospital's blanket policy therefore has the "effect

of subjecting [people with disabilities] to discrimination" by targeting them for intrusive and potentially family-altering procedures. 45 C.F.R. 84.4(b)(4)(i). The policy also has the "effect of defeating or substantially impairing accomplishment of the objectives of the [Hospital's] program or activity with respect to" pregnant people taking medication for opioid-use disorder by discouraging them from seeking medical care there. 45 U.S.C. 84.4(b)(4)(ii).

4. Notwisthanding the Rehabilitation Act's safeguards for people in recovery from substance-use disorder, the statute does not prohibit "*reasonable* policies or procedures, *including but not limited to drug testing*, designed to ensure that an individual [in recovery] is no longer engaging in the illegal use of drugs." 29 U.S.C. 705(20)(C)(ii) (emphases added). But the Hospital has not established that drug testing *all* pregnant people taking medication for opioid-use disorder is "reasonable," and a court generally would be unable to make such a determination at the pleading stage. The Hospital has made no attempt to argue that its challenged drug-testing policy is covered by Section 705(20)(C), much less that it satisfies that provision's reasonableness requirement.[10]

[10] Evaluation of a Section 705(20)(C) defense theoretically might be possible if uncontroverted, judicially noticeable material establishes the medical appropriateness of such a policy. The Hospital offered no such material in support of its motion to dismiss.

C. The Hospital Did Not Drug Test Costin As Part Of Individualized Medical Diagnosis Or Treatment, And Federal Law Did Not Require The Hospital To Report Her To State Authorities

If a plaintiff makes out a prima facie case of discrimination on the basis of disability, a defendant can avoid Section 504 liability by establishing that its challenged policy is "necessary" for the provision of its services or is justified by some other applicable defense. See *Davis*, 442 U.S. at 407. But the Hospital did not raise any such Section 504 defense below, and the district court did not rely on them in dismissing Costin's claim. Instead, the court relied on cases holding that the ADA and Section 504 cannot be used to bring what amount to medical malpractice claims in federal court. A476-A477 (citing *McGugan* v. *Aldana-Bernier*, 752 F.3d 224, 234 (2d Cir. 2014), cert. denied, 575 U.S. 938 (2015); *Reed* v. *Columbia St. Mary's Hosp.*, 915 F.3d 473 (7th Cir. 2019); *Sawabini* v. *McConn*, No. 5:20-cv-1157, 2021 WL 878731 (N.D.N.Y. Mar. 9, 2021)). That rationale was erroneous.

1. Costin alleges that the Hospital violated Section 504 in various ways. Although some aspects of her claim may be construed as challenging the Hospital's administration or withholding of treatment, see note 3, *supra*, that is not so with regard to her allegations concerning the Hospital's blanket policy of drug testing and reporting to CPS on suspicion of child abuse all pregnant people taking medication for opioid-use disorder. Simply put, a blanket policy applied without

any individualized medical determination does not fall within the line of cases on which the district court relied.

The district court relied principally on this Court's decision in *McGugan*, which held that a doctor does not commit unlawful discrimination by administering or withholding medical treatment when "the doctor's medical training leads her to conclude that the treatment is medically appropriate (or inappropriate)[,] * * * even if the doctor's medical understanding is flawed and her knowledge is deficient." 752 F.3d at 231. But *McGugan* made clear that a plaintiff can bring a Section 504 claim against "a doctor who inflicts or withholds a type of medical treatment for reasons having no relevance to medical appropriateness—reasons dictated by bias rather than medical knowledge." *Ibid.*

Thus, in *Bragdon* v. *Abbott*, the Supreme Court held that a dentist's policy against filling cavities of his HIV-infected patients would violate Title III of the ADA unless it could be justified by a "risk assessment * * * based on medical or other objective evidence." 524 U.S. 624, 649 (1998). Similarly, in *Green* v. *City of New York*, this Court held that a district court erred in dismissing a claim under Title II of the ADA where a reasonable jury could find that a patient with ALS was hospitalized over his objections "based on a stereotypical view of [his] abilities." 465 F.3d 65, 78 (2d Cir. 2006). And even where a non-discriminatory factor such as medical judgment plays some role in a covered entity's actions, the conduct may

still violate Section 504 where "the plaintiff['s] disabilities were a substantial cause of [her] inability to obtain services, or that * * * inability was not so remotely or insignificantly related to [her] disabilities as not to be 'by reason' of them." *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003), cert. denied, 541 U.S. 936 (2004).

The district court incorrectly treated the Hospital's initial decision to drug test Costin as a product of an individualized medical determination. A477 (stating that defendants' decision to "drug test Plaintiff after she informed them that she was taking Subutex" was a "medical determination[] * * * relevant to proper medical decision-making"). But Costin plausibly alleges that the Hospital did not administer the drug test as part of individualized medical diagnosis or treatment, but rather pursuant to a blanket policy. A28 (alleging that a nurse told her that the Hospital "drug tests pregnant women who take Suboxone or Subutex 'all the time'"). The Hospital did not argue below that its policy of drug testing all pregnant people taking medication for opioid-use disorder was based on "medical knowledge." *McGugan*, 752 F.3d at 231. And even if it had made such an argument, the district court had no basis for ruling out that the Hospital's policy rested at least in part on the "stereotyped view," *Green*, 465 F.3d at 78, that people with opioid-use disorder cannot be trusted to reliably disclose to medical professionals. See *Henrietta D.*, 331 F.3d at 279 (holding that Section 504 liability

attaches when a plaintiff's disability is a "substantial cause," among others, for the covered entity's challenged conduct). Nor could the court have ruled out that the drug-testing policy stemmed at least in part from the Hospital's misunderstanding of what it was required to report to state authorities—a legal consideration "having no relevance to medical appropriateness." *McGugan*, 752 F.3d at 231.

As to the Hospital's CPS-reporting policy, the district court itself correctly recognized that the decision to report suspected child abuse to CPS was not a "medical determination[]." A477-A478. But the court nonetheless concluded that the CPS report was not discriminatory because the Hospital made it based on Costin's initial false-positive test for cocaine and PCP. A478. Even if the false-positive test played some role in the Hospital's decision to report Costin to CPS, however, that would not defeat Costin's claim: Once again, Costin alleges that the Hospital made the report based on its blanket policy of reporting *all* pregnant people taking medication for opioid-use disorder. A38 (alleging that a doctor told Costin that "the hospital reports possible child abuse by every patient that comes in on Suboxone"). In other words, the complaint supports a "reasonable inference" that the Hospital would have reported Costin to CPS irrespective of the drug tests' results. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Indeed, the Hospital conceded as much in its motion to dismiss, which stated that the Hospital's social workers would have been required to make the report "independent of the

toxicology screen" because Costin's baby "was prenatally exposed to opioids *by virtue of Subutex*." A79 (emphasis added); see also Pt. C.2, *infra* (explaining why the Hospital's understanding of the reporting requirement is erroneous).

In short, both the Hospital's decision to drug test Costin and its decision to report her to CPS stemmed from a blanket policy—not individualized medical diagnosis or treatment.

2. As mentioned above, the Hospital argued in its motion to dismiss that it was required to report Costin to CPS by the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. 5101 *et seq.* A78-A79. The Hospital's reading of CAPTA is wrong.

CAPTA authorizes grants from HHS to states to help them improve their CPS systems. 42 U.S.C. 5106a(a). As a condition of receiving such funding, a state must certify to HHS, among other things, that it has various safeguards in place to protect children from neglect and abuse. 42 U.S.C. 5106a(b)(1)(A) and (2)(B)(ii). Specifically, the state must certify that it has policies and procedures to

> address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants.

42 U.S.C. 5106a(b)(2)(B)(ii).

The Hospital argued below that CAPTA requires it to report suspected child abuse to CPS any time that it has reason to believe that an infant has been *exposed* to *any* drug—legal or illegal. A79. But CAPTA's text makes clear that it requires no such thing. Instead, the statute requires CPS notification only when an infant is "*affected by* [1] *substance abuse or* [2] *withdrawal symptoms* resulting from prenatal drug exposure." 42 U.S.C. 5106a(b)(2)(B)(ii) (emphasis added). As one treatise has recently explained, "CAPTA nowhere equates a positive test for drugs or alcohol with being 'affected by substance abuse.'" 2 Zeese, Drug Testing Legal Manual § 9:2 (2d ed. 2022) (observing that "some state and local medical staff and actors within welfare agencies have misinterpreted CAPTA and have adopted practices of notifying CPS whenever pregnant patients test positive for typical drugs of abuse, including medically recommended and ordered opioids such as methadone or buprenorphine").

In its motion to dismiss, the Hospital stressed (A79) that Congress amended CAPTA in 2016 to require CPS notification when an infant is affected by "substance abuse" of *any* kind—not just "illegal substance abuse," as the statute previously provided. Comprehensive Addiction and Recovery Act of 2016, Pub. L. No. 114-198, § 503(b)(1), 130 Stat. 695; see also 42 U.S.C. 5106a(b)(2)(B)(ii) (2015). But the complaint does not allege that Costin's baby was "*affected by*" substance abuse of any kind, nor does it allege any other facts

that could be construed to support the Hospital's reporting decision. 42 U.S.C. 5106a(b)(2)(B)(ii) (emphasis added). Moreover, the 2015 amendment to CAPTA did not alter the statute's requirement that, in the absence of "substance abuse," an instance of "prenatal drug exposure" requires notification of CPS only if it "result[s]" in "withdrawal symptoms." 42 U.S.C. 5106a(b)(2)(B)(ii). Nothing in Costin's complaint suggests that her baby had been affected by withdrawal symptoms either.

Furthermore, even under the Hospital's own (incorrect) understanding of CAPTA, its actions went beyond what the statute requires. According to the complaint, the Hospital's social workers did more than merely "*notify*" CPS. 42 U.S.C. 5106a(b)(2)(B)(ii) (emphasis added). Instead, Costin alleges that the social workers reported "suspicions that Ms. Costin was 'responsible for causing or allowing to be inflicted injury, abuse, or maltreatment'" to her baby. A33. Nothing in CAPTA requires such reports. Dep't of Health & Human Servs., *Child Welfare Policy Manual* § 2.1F (last updated Oct. 11, 2016), https://perma.cc/ZJX2-4LDX (stating that a "notification" required by CAPTA "need not be in the form of a report of suspected child abuse or neglect"). On the contrary, the statute expressly provides that the required notifications "shall not be construed to * * * establish a definition under Federal law of what constitutes child abuse or neglect." 42 U.S.C. 5106a(b)(2)(B)(ii)(II); see also 2 Zeese § 9:2 ("[T]he purpose for CPS

notification [under CAPTA] is to identify whether the family needs care or services, not to trigger neglect or abuse investigations."). Thus, CAPTA provides no defense for the Hospital's alleged conduct.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the district Court's dismissal of Costin's Section 504 claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5761 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, in 14-point Times New Roman font.

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Date: July 7, 2023

CERTIFICATE OF SERVICE

I certify that on July 7, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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