IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WESTERN DIVISION

NATIONAL ASSOCIATION OF THE DEAF, on behalf of its members, and C. WAYNE DORE, CHRISTY SMITH, and LEE NETTLES, on behalf of themselves and a proposed class of similarly situated persons, Plaintiffs, v. HARVARD UNIVERSITY, and the PRESIDENT AND FELLOWS OF HARVARD COLLEGE, Defendants.	CIVIL ACTION NO. 3:15-cv-30023-MGM

PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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INTRODUCTION

Harvard's objections to the Magistrate Judge's Report and Recommendation ("R&R") challenge foundational principles of the disability rights laws this case seeks to enforce. *See* 29 U.S.C. § 794 ("Rehabilitation Act" or "Section 504"); 42 U.S.C. § 12181 *et seq.* ("ADA" or "Title III"). Plaintiffs present prototypical claims under Section 504 and the ADA based on the failure of Harvard, a recipient of federal financial assistance (under Section 504) and a public accommodation (under the ADA), to provide deaf and hard of hearing individuals the same benefits as other members of the public enjoy – immediate access to a wide variety of online information "now . . . shared instantly across the world." Obj. 3.

Yet Harvard would have this Court rule, at the pleadings stage, that Harvard can exclude deaf and hard of hearing members of the public from online content that it describes as available to "learners throughout the world." Compl. ¶ 28; *see id.* ¶ 2. It is disingenuous for Harvard, a university that receives millions in federal funds and has been covered by Section 504 for almost 40 years, to feign astonishment at these basic disability rights law concepts. Likewise, the ADA, which reinforced the basic premise that people with disabilities should have access to the benefits, programs, and activities of public accommodations, is more than 25 years old.

Harvard seeks to deliver an innovative education model to the public without regard to disability access. By excluding members of the public who are deaf and hard of hearing from this "bustling 'marketplace of ideas,'" Obj. 2, Harvard undercuts the goals of Section 504 and the ADA. As recognized by Judge Ponsor, depriving people with disabilities access to the digital revolution would set the goal of equality in the ADA on its head. *See Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200-01 (D. Mass. 2012) (captioning case).

While Harvard rails against captioning everything, its actual argument is that it has no obligation to caption *anything*. Its constant refrain that accepting the R&R would require every place of public accommodation, regardless of its size and resources, to caption everything, ignores the Magistrate Judge's repeated recognition that Section 504 and the ADA provide Harvard the opportunity after discovery to present affirmative defenses that may limit its captioning obligations. *See* Obj. 2; R&R 12-14, 28. Harvard's argument relies on speculative, unproven, inherently fact-intensive arguments about defenses that are not appropriate for this stage of the proceeding.[1] The objections reiterate arguments that the Magistrate Judge carefully and thoughtfully addressed, and then rejected. There can be no doubt that Plaintiffs state a *prima facie* case under both Section 504 and the ADA. It is time to move on to discovery and the merits of the case.

ARGUMENT

I. STANDARD OF REVIEW

A party objecting to the report and recommendations of a magistrate judge must make specific objections to warrant de novo review. Fed. R. Civ. P. 72(b). "[I]t is improper for an objecting party to . . . submit[ ] papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge." *Gilday v. Spencer*, 677 F. Supp. 2d 354, 357 (D. Mass. 2009) (citations omitted). As shown below, that is precisely what Harvard does.

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[1] Throwing in a vague, sky-is-falling First Amendment argument – that requiring captions on online content available to the public would "imped[e] academic freedom and the advancement of science" – adds to the speculation, but not the strength, of Defendants' arguments. Obj. 3.

II. PLAINTIFFS STATE A CLAIM OF DISCRIMINATION UNDER SECTION 504

Plaintiffs allege, and Harvard does not dispute, that they are deaf or hard of hearing and thus disabled, that Harvard receives federal financial assistance, and that Plaintiffs, as a result of their disabilities, do not have meaningful access to Harvard's online content. As the Magistrate Judge correctly found, these allegations "fit[] squarely within the parameters of Section 504 . . . ." R&R 11. Indeed, "[t]here is nothing novel about premising Section 504 liability on a federal fund recipient's failure to provide the deaf and hard of hearing with meaningful access to aural communications," a theory "recognized as a paradigmatic example of Section 504 liability." *Id.* (citing cases). Courts have recognized a failure to provide meaningful access as a reasonable accommodation claim under Section 504. *See Nunes v. Mass. Dep't of Corr.*, 766 F.3d 136, 145 (1st Cir. 2014) (recognizing failure to provide "meaningful access" as reasonable accommodation claim); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276-77 (2d Cir. 2003).

Harvard seeks to dismiss the Section 504 claims based on: (1) a fact-specific "fundamental alteration" defense, and (2) an argument that any order requiring it to "preemptively caption" videos would deprive it of its flexibility to decide what auxiliary aids are necessary. Both arguments are inappropriate to resolve on a Rule 12(b)(6) motion.

A. Harvard's Unsupported Invocation of the Fact-Specific "Fundamental Alteration" Defense Does Not Support Dismissal.

Harvard argues that Plaintiffs' Section 504 claims should be dismissed because the remedy requested by Plaintiffs would constitute a "fundamental alteration" of its online video content. Obj. 13-14. As the Magistrate Judge correctly stated, fundamental alteration is a fact-specific defense inappropriate to resolve on a motion to dismiss. The defendant bears the burden of proving this defense under Section 504, *see, e.g.*, *Nat'l Fed'n of the Blind v. Lamone*, 813

F.3d 494, 508 (4th Cir. 2016), which is an inherently fact-sensitive inquiry.[2] Here, Harvard relies on unsupported factual assertions: having to "caption or remove" its publicly available online content would "imped[e] access to what is now a free and bustling 'marketplace of ideas,'" the "prospect of waiting in a queue for centralized review and captioning would deter faculty and students from producing content," and "the time and expense of captioning would . . . limit and delay the posting of such content."[3] Obj. 2. None of these assertions is supported by evidence, tested by discovery, or cognizable on a motion to dismiss.

Harvard's reliance on *Alexander v. Choate*, 469 U.S. 287 (1985), to argue that the remedy Plaintiffs seek would, as a matter of law, create a fundamental alteration of its programs is misplaced. In *Choate,* the plaintiffs challenged Tennessee's reduction of the number of inpatient hospital days paid for by the state's Medicaid program. They asserted that a reduction to 14 days would have an unlawful disparate impact on persons with disabilities.[4] *See* 469 U.S. at 289-91. The Court held that covered entities are "not require[d] . . . to alter [the] definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." *Id.* at 303. Rather, Section 504 requires covered entities to provide persons with disabilities "meaningful access to the benefit that the grantee offers." *Id.* at 301. Plaintiffs here do not seek the substantive change of benefits rejected in *Choate,* or an expansion of the benefits

[2] *See, e.g.*, *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1267-68 (D.C. Cir. 2008) (noting that "the cases addressing meaningful access are necessarily fact-specific"); *see also* R&R 11 (and cases cited).

[3] Ironically, Harvard is undisturbed that people who are deaf and hard of hearing would experience similar delays by engaging in the individual interactive process it proposes.

[4] While *Choate* was a disparate impact case, Plaintiffs here assert a different theory of discrimination: reasonable accommodation by failing to provide meaningful access or an auxiliary aid. *See, e.g.*, *Henrietta D.*, 331 F.3d at 276-77 (holding that "a claim of discrimination based on a failure reasonably to accommodate is distinct from a claim of discrimination based on disparate impact. Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation"); *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 753 (7th Cir. 2006) (noting that "a plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim under Title II of the ADA") (footnote omitted), *accord McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004).

(such as more deaf-related videos). Rather, they seek meaningful access to the *same* benefits Harvard already chooses to make available to the general public: online video content.[5] As the Magistrate Judge properly concluded, this claim "fits squarely within the parameters of Section 504 as delineated by the Court" in *Choate*. R&R 11 (and cited cases).

Courts have consistently held that a request for an auxiliary aid constitutes a claim for meaningful access to benefits rather than a request to expand benefits. For example, in *Paulson*, which concerned the Treasury Department's failure to design and issue paper currency readily distinguishable to people with visual impairments, the D.C. Circuit stated a general principle for meaningful access cases:

> Where the plaintiffs identify an obstacle that impedes their access to a government program or benefit, they likely have established that they lack meaningful access to the program or benefit. By contrast, where the plaintiffs seek to expand the substantive scope of a program or benefit, they likely seek a fundamental alteration to the existing program or benefit and have not been denied meaningful access.

525 F.3d at 1267. The court held that the plaintiffs' request for accessible currency sought "only to remove an obstacle that the visually impaired confront in using paper currency, and not, as in *Choate* . . . to obtain a substantively different benefit than is already provided by the U.S. currency system."[6] *Id.* at 1268. Similarly, in *American Council of the Blind v. Astrue*, No. C 05-04696 WHA, 2009 WL 3400686, at *19 (N.D. Cal. Oct. 20, 2009), which sought an order

[5] Harvard cites *Greater Los Angeles Council on Deafness, Inc. v. Community Television of Southern California*, 719 F.2d 1017, 1023 (9th Cir. 1983), but that case – decided before *Choate* – did not involve closed captions, the relief sought here. The plaintiffs in *Greater Los Angeles Council on Deafness* sought open captions, which are always visible and cannot be turned off by the viewer. 719 F.2d at 1019. The defendants, which included private broadcasting companies receiving federal funding, contended that "any requirements imposed on them by the Rehabilitation Act can be satisfied by the use of closed captioning." *Id*. The Ninth Circuit agreed, holding that the "Act does not mandate the production and broadcasting of federally funded programs with open rather than closed captions." *Id*.

[6] Harvard asserts that captioning constitutes a modification of "*the nature of the videos*" on its website, since captioning is embedded in a video file rather than, for example, appearing on an accompanying script. Obj. 14. This is a distinction without a difference. Captioning does not change the "content" of the videos any more than a sign language interpreter changes the content of a speaker.

requiring the Social Security Administration to communicate in alternative formats accessible to people who were blind or had vision impairments, the court rejected the argument that *Choate* prohibited the relief sought. It held that "plaintiffs here do not seek to expand the substantive scope of a SSA program or benefit but, rather, seek better notification. They seek forms of notice as easy for them to 'read' as print notices are for everyone else." *Id.*; *see* R&R 13 (and cases cited); infra p. 17. Like the plaintiffs in *Paulson* and *Astrue*, Plaintiffs here do not seek to expand the scope of Harvard's online content. They simply seek auxiliary aids that provide meaningful access to existing content through captioning.

B. The Scope of the Remedy Sought Is Not a Proper Basis for Dismissal.

Even if the Court were to find that the full extent of relief sought here would be a fundamental alteration and is not obtainable under Section 504, this would not support dismissal at this juncture. "A complaint . . . should not be dismissed merely because the remedy it seeks cannot be obtained . . . ." *Pamel Corp. v. P.R. Hwy. Auth.*, 621 F.2d 33, 36 (1st Cir. 1980); 10 Fed. Prac. & Proc. Civ. § 2664 (3d ed.) ("The question is not whether plaintiff has asked for the proper remedy but whether plaintiff is entitled to any remedy."). Every final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c).

Courts have applied this principle to relief sought under Section 504. For example, in *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982), the district court had dismissed the complaint because it sought "massive relief involving extra-ordinary expenditures," not required by Section 504, that would "fundamentally alter" the services sought. 687 F.2d at 649, 650 (citation omitted). The Second Circuit reversed, holding that "if plaintiffs can prove a violation of section 504, the District Court has inherent power to fashion relief appropriate to the situation.

That power is not limited by the fact that plaintiffs may have asked for too much . . . ." *Id*. at 650 (citing Rule 54(c)). The "extreme result of dismissing the claim would be proper only if plaintiffs would not be entitled to any relief, even if they were to prevail on the merits." *Id.* at 649.

Harvard does not argue that if Plaintiffs prevail on the merits, they will not be entitled to any relief. If Harvard is ultimately found liable to Plaintiffs, the Court can fashion relief as appropriate. Objections to the extent of relief sought are not a proper basis for dismissal.

C. The Court Should Reject Harvard's Remaining Section 504 Arguments.

Harvard rehashes several additional arguments in support of its motion to dismiss Plaintiffs' Section 504 claims, none of which has merit. Obj. 15-17.

1. Section 504 Applies to Websites.

Harvard admits that through its online content, it provides an important benefit promoting a "free and bustling 'marketplace of ideas'" and serving the "advancement of science." Obj. 2-3. But it asserts it need not make this content accessible because Section 504 categorically does not apply to websites or online content. *Id.* at 17. Harvard makes no attempt to reconcile this extreme position with a statute that explicitly applies to "all of [Harvard's] operations," and requires the use of "accessible formats" as a means of providing meaningful access to its benefits. 29 U.S.C. §§ 701(c)(2) & 794(b). This broad language easily encompasses benefits provided by colleges through the use of websites.[7] *See* R&R 19.

Substantial authority beyond the language of Section 504 supports this result. First, regulations by the Department of Education ("ED") demonstrate that websites are covered by

[7] *See also Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 8-9 (1st Cir. 2007) (noting that "[s]tatutory interpretation begins with the language of the statute" and that "courts must presume that a legislature says in a statute what it means and means in a statute what it says") (citation omitted).

Section 504. 34 C.F.R. § 104.4(b)(1)(i)-(iii). The Magistrate Judge properly concluded the regulations "are consistent with the requirement of 'meaningful access.'" R&R 15-16.

Second, ED has repeatedly affirmed its view that the regulations require websites and other emerging technologies to be accessible to people with disabilities, notwithstanding that ED does not identify each type of emerging technology. A 2010 Dear Colleague Letter ("DCL") jointly issued by ED and the Department of Justice ("DOJ") makes clear that the "the general requirements of Section 504 . . . reach equipment and technological devices when they are used by" covered entities as part of their programs, services, and activities.[8] ED's "Frequently Asked Questions" reaffirm that: (1) the DCL did not "impose new legal obligations," but "discusse[d] long-standing law;" (2) "all school programs or activities – whether in a 'brick and mortar,' online, or other 'virtual' context – must be operated in a manner that complies with Federal disability discrimination laws;" and (3) the principles of the DCL apply to "online programs that are . . . provided by the school directly or through contractual or other arrangements."[9] Finally, the DOJ/ED Statement of Interest in this case[10] confirms ED's view that Section 504 and ED regulations "require equal access for individuals with disabilities, and not solely students with disabilities, to recipients' websites and online programming." Dkt. No. 33 ("DOJ/ED SOI"), at 25. As the Magistrate Judge correctly found, these views are entitled to deference.[11]

[8] U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter 1 (June 29, 2010), at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.pdf; *see id.* at 2 nn. 3-5 (citing 34 C.F.R. § 104.4(b)(1)(ii)-(iv) and other authorities); Compl. ¶ 77.

[9] U.S. Dep't of Educ., Frequently Asked Questions about the June 29, 2010, Dear Colleague Letter 1, 4 (May 26, 2011), at http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf.

[10] The Magistrate Judge characterized the Statement of Interest as submitted only on behalf of DOJ, R&R 19, but ED jointly submitted it, making clear it reflects ED's views as well.

[11] *See* R&R 17-20 (and cases cited). Harvard relies on *Doe v. Mutual of Omaha Insurance Co*., 179 F.3d 557 (7th Cir. 1999), to contend that the Court should not defer to the DOJ's and ED's brief. Obj. 17 n.12. In *Doe*, the Seventh Circuit refused to defer to DOJ's amicus brief because it found DOJ's interpretation of the ADA's regulation of health insurance contrary to the language and history of the ADA, and thus a "radical stance" that made deference inappropriate. 179 F.3d at 563. In contrast, the position of DOJ and ED here is certainly not a

In Harvard's view, unless and until a Section 504 regulation specifically addresses the accessibility of websites, websites are not subject to Section 504 or its regulations. Obj. 15-17. The Magistrate Judge rejected this argument, consistent with courts rejecting virtually identical arguments, as well as ED's position that Section 504 applies to online programming. R&R 15-17; *see, e.g.*, *Fortyune v. City of Lomita*, 766 F.3d 1098, 1106 (9th Cir. 2014) (holding that the ADA requires local governments to maintain accessible on-street public parking despite lack of specific regulations); *Hammond v. City of Red Bluff*, No. 2:14-CV-01136-TLN, 2014 WL 6612059, at *3-4 (E.D. Cal. Nov. 20, 2014) (determining that lack of specific regulations in Section 504 and other laws did not foreclose on-street parking claim); DOJ/ED SOI 23-24.

2. Harvard's Obligations under Section 504 Are Not Limited to Students.

The statute is not limited to students. ED has stated that Section 504 "appl[ies] to individuals with disabilities who are not students, such as . . . members of the public seeking information from, or access to, the services, programs, and activities of the public school."[12] Further, as set forth in the DOJ/ED Statement of Interest, ED's general antidiscrimination regulations apply to "qualified individuals with disabilities," and are not limited to "students with disabilities." DOJ/ED SOI 23 (quoting 34 C.F.R. § 104.4). "Where, as here, Harvard offers its online programming to *all* members of the general public, Plaintiffs are 'qualified' to avail

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"radical stance," nor have the agencies "unaccountably failed to address" these issues in their rulemaking. The Statement of Interest here is consistent with the statute, regulations, and both Departments' public statements and guidance.

[12] U.S. Dep't of Justice and U.S. Dep't of Educ., Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools 2, 13 (Nov. 2014), at http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf. Although the FAQ addresses the obligations of public elementary and secondary schools, the conclusions are based on generally applicable requirements of Section 504 discussed in the introductory paragraphs.

themselves of Harvard's service because they 'meet[] the essential eligibility requirements for the receipt of such services.'" *Id.* (quoting 34 C.F.R. § 104.3(l)(4)).

III. THE COURT SHOULD REJECT HARVARD'S CONTENTION THAT THE SECTION 504 AND ADA CLAIMS MUST BE DECIDED INDIVIDUALLY FOR EACH DEAF MEMBER OF THE PUBLIC

Harvard argues that Plaintiffs' Section 504 and Title III claims should be dismissed because Plaintiffs have requested captioning – a specific auxiliary aid – and therefore, have deprived Harvard of a flexible, interactive process to choose a reasonable accommodation for a particular person. Obj. 9, 15. This is a straw man argument that should be rejected for several reasons.

First, on a motion to dismiss, the issue is whether Plaintiffs allege that Harvard discriminates against them by denying them effective communication to access its online content. Compl. ¶ 100. Critically, Harvard does not argue that Plaintiffs can access the aural content of Harvard's online videos, or that it provides another auxiliary aid that ensures equal access to that content.[13] The Magistrate Judge correctly rejected this argument because the flexibility that the statutes envision does not permit Harvard to provide no auxiliary aid at all.[14] R&R 20, 24.

[13] Harvard asserts that Harvard's Massive Open and Online Courses (MOOCs) are available with rolling transcripts. Obj. 8. The Court cannot consider facts outside of the complaint on a motion to dismiss, but even if Harvard's assertion is true, the Complaint encompasses many types of and platforms for Harvard's online content, with many specific examples of content with no or inaccurate captions. *See*, *e.g.*, Compl. ¶¶ 40-56.

[14] Harvard also relies on a statement from ED that a university's obligation to its students does not include maintaining a complete Braille library. Obj. 15. A university could have many policies and procedures short of maintaining a complete Braille library to ensure students with disabilities are not denied or provided unequal advantages of its libraries. The advantages of a university library are very different from those of videos posted on the Internet, in which immediate access is a key characteristic. Likewise, having all books in Braille would more than double the inventory of a library, whereas adding closed captions to existing digital content requires no increase in inventory. Finally, the scope of Harvard's obligation to make its online content accessible requires an analysis of facts outside the Complaint, which is not appropriate on a motion to dismiss.

Second, even if there are alternatives to captioning which would provide equally effective communication, the Magistrate correctly concluded that "the flexibility to provide a reasonable accommodation is an affirmative defense and not an appropriate basis upon which to dismiss the action." R&R 25 (citing *Nat'l Fed'n of the Blind v. Target*, 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006)). Harvard's objection to providing the particular auxiliary aid of captioning is simply premature.[15]

Third, an individualized inquiry process is not necessary where, as here, the need for an accommodation is obvious.[16] *See, e.g.*, *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1196-98 (10th Cir. 2007); *see also Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) (holding that a request is generally required unless the need for accommodation is obvious).

Fourth, a requirement of individualized assessment would make class actions under Section 504 (or the ADA) "categorically impossible." R&R 21 (citing *Paulson*, 525 F.3d at 1259). This result is contrary to a wide range of case law in class actions and other systemic relief cases.[17]

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[15] Harvard asserts that the lack of an interactive process regarding an accommodation "is an independent ground for dismissal," Obj. 9, but the cases it cites do not stand for that broad proposition, were decided on a developed factual record after a trial or summary judgment, and concerned individuals rather than a proposed class action. *See e.g.*, *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 301, 309-10 (1st Cir. 2003) (affirming district court's judgment after a bench trial that liquor store's "hard-and-fast" rule regarding sales to customers perceived as being intoxicated discriminated against plaintiff with disability); *Goldstein v. Harvard Univ.*, 77 Fed. Appx. 534, 537 (1st Cir. 2003) (per curiam) (unpublished opinion affirming summary judgment).

[16] Captions are a universally recognized means of making online content accessible to people who are deaf and hard of hearing. *See, e.g.*, 47 U.S.C. § 613(c)(2)(A) (requiring captions on video programming exhibited on television); 47 C.F.R. § 79.4 (same).

[17] *See, e.g.*, *Lamone*, 813 F.3d at 508 (affirming district court's finding that modification of online ballot marking tool was a "reasonable modification" to state's absentee voting policies to ensure access for blind voters); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 658-659 (S.D.N.Y. 2013) (finding in a class action that New York City violated the ADA and Section 504 by failing to provide people with various disabilities meaningful access to its emergency preparedness program in several ways, including that certain programs did not sufficiently accommodate needs of people with disabilities); *Civic Ass'n of Deaf of N.Y.C., Inc. v. Giuliani*, 915 F. Supp. 622, 639 (S.D.N.Y. 1996) (certifying class, entering declaratory judgment that New York

Finally, the proposed individualized procedure that Harvard proposes would redefine the benefit sought, an argument the Supreme Court rejected in *Choate*. *See* 469 U.S. at 301 ("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; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."). The Fourth Circuit recently affirmed this principle in rejecting a defendant's attempt to redefine the benefit sought in *National Federation of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016), which concerned access to absentee voting for people who are blind. Relying on *Choate*, the Fourth Circuit rejected the defendant's attempt to redefine the benefit as voting as a whole, and concluded that the proper focus was the specific absentee voting program that plaintiffs sought to access. *See id.* at 504. Here, Plaintiffs seek the access others enjoy – instantly at the click of a mouse – to whatever video a person chooses to watch. Harvard would redefine this benefit, proposing that a deaf person should go through a cumbersome process to be able to enjoy a particular video at some point in the future.

Harvard's assertion that it must use an individualized inquiry process is a construction of Section 504 and the ADA that "results in absurdities or defeats [their] underlying purpose." *United States v. Cardoza*, 129 F.3d 6, 10 (1st Cir. 1997) (citation omitted); *see Sierra Club v. Sec'y of Army*, 820 F.2d 513, 522 (1st Cir. 1987). Section 504 and Title III's goals include "equality of opportunity," "full inclusion," and "full participation" for people with disabilities, 29 U.S.C. §§ 701(a)(6)(B) &(c)(3), 42 U.S.C. § 12101(a)(7), and the statutes prohibit the

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City's system for reporting emergencies from public places was inaccessible to deaf people and violated the ADA and Section 504, and enjoining removal of street alarm boxes).

provision of benefits that are not equal to or as effective as those provided to others.[18] Harvard acknowledges the important benefits that result from its online content, including "[s]cientific discussions . . . shared instantly across the world" and "[l]ive footage of newsworthy campus events." Obj. 2-3. But Plaintiffs and millions of people who are deaf or hard of hearing do not enjoy this instant access to "thousands of video and audio tracks" available "[w]ith only a few keystrokes." Compl. ¶ 1. Such access is provided by captioning. Harvard's proposed case-by-case approach, which would require a deaf person to request captions for a particular video, and then engage in an interactive process and then have Harvard determine whether an equally effective auxiliary aid is available and then begin the process of generating the auxiliary aid, would, at best, provide inferior and unequal access.[19] This argument defeats the purposes of Section 504 and Title III and should be rejected.[20]

IV. PLAINTIFFS STATE A CLAIM OF DISCRIMINATION UNDER THE ADA

As the Magistrate Judge correctly determined, Plaintiffs state a claim under Title III of the ADA that Harvard – a public accommodation – has discriminated against deaf and hard of hearing individuals by failing to provide auxiliary aids or services – specifically captioning –

[18] *See* 34 C.F.R. § 104.4(b)(1)(ii), (iii). Further, Harvard's assertion that an "actual individualized request for accommodation" to view a "particular video or category of videos" is required before it provides access to millions of deaf and hard of hearing people, Obj. 9-10, ignores the language of Title III and its accompanying regulations, which broadly requires Harvard to "take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services . . . ." 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(c)(1) ("[a] public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities").

[19] *See also* 28 C.F.R. § 36.303(c)(1)(ii); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35566 (July 26, 1991) (under Title III "communication with persons with disabilities [that] is as effective as communication with [non-disabled individuals]"); 34 C.F.R. § 104.4(b)(1)(iii) (Section 504 regulation prohibiting qualified individuals with disabilities from being provided with "an aid, benefit, or service that is not as effective as that provided to others").

[20] Harvard cites *Wynne v. Tufts University School of Medicine*, 976 F.2d 791 (1st Cir. 1992), which found that "what is reasonable in a particular situation may not be reasonable in a different situation." 976 F.2d at 795. *Wynne*, however, involved a student who failed courses required by his medical program. The defendant university provided multiple accommodations to Mr. Wynne, but refused to waive a multiple-choice test or create a different way to test his proficiency. Here, Harvard proposes to do nothing.

necessary to ensure effective communication and equal access to its online video content. R&R 22; *see* 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(a)-(c); Compl. ¶¶ 104-105; *Jacobs v. Soars*, No. 14-12536-LTS, 2014 WL 7330762, at *4 (D. Mass. Dec. 19, 2014) (listing elements of Title III claim). Harvard does not and cannot dispute that Plaintiffs lack equal access to Harvard's online content. Instead, Harvard, as with Section 504, misconstrues the requirements for a Title III claim and attempts to bypass the development of a factual record to prove its affirmative defense that providing captions would be an undue burden or a fundamental alteration of Harvard's services and programs. Obj. 9-10. Those arguments should be rejected for the reasons above. In addition, Harvard incorrectly relies on the inventory exception to assert that it need not caption its online content.

A. The Narrow "Inventory" Exception Does Not Apply.

As a remedial statute, the ADA must be broadly construed to effectuate its purpose – providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Arnold v. United Parcel Servs. Inc.*, 136 F.3d 854, 861 (1st Cir. 1998) (citing 42 U.S.C. § 12101(b)(1)). Exemptions to a remedial statute "are to be construed narrowly to limit exemption eligibility." *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177, 182 (1st Cir. 1994). Despite this well-established canon of statutory construction, Harvard attempts to drastically expand the scope of the "inventory exception" in 28 C.F.R. § 36.307 to avoid providing Plaintiffs access to its public online content.[21] Obj. 4-6.

This narrow exception was meant to guard against an interpretation of Title III that would require a public accommodation to expand its inventory to include accessible goods, or

[21] Harvard asserts that its arguments are based on the language of Title III, but it cites no provision or language in the statute that supports its position. The language of Title III is very broad and goes beyond goods and services to include "privileges, advantages, or accommodations." 42 U.S.C. § 12182(a).

fundamentally change the nature of the public accommodation's business. 28 C.F.R. § 36.307; 28 C.F.R. Pt. 36, App. C § 36.302 ("the rule enunciated in § 36.307 [inventory exception] is consistent with the 'fundamental alteration' defense to the reasonable modifications requirement of § 36.302"); ADA Title III Technical Assistance Manual III-4.2500 ("The ADA does not require the bookstore to expand its inventory to include large print books or audio tape."). Plaintiffs do not ask Harvard to add to or change its existing inventory of online content. Rather, Plaintiffs plead a "prototypical" auxiliary aids case seeking access to the same online benefits that Harvard offers other members of the public. R&R 27; *see* DOJ/ED SOI 22.

First, this Court should reject Harvard's denial that its online programming is a service, because it merely functions like a library providing the public with an online "library" of videos. Obj. 6. Harvard acknowledges that it provides a service, or "a means of delivering digital goods, like videos, from Harvard-hosted sites to the public." *Id.* at 7. Harvard ignores the Magistrate Judge's reasoned assessment of Title III case law and her conclusion that streaming videos is a "service" rather than a "good" subject to the inventory exception.[22] *See* R&R 25-26 (citing *Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 24 (D.D.C. 2003)); *Netflix*, 869 F. Supp. 2d at 202 (noting that "[d]efendant may not discriminate in the provision of the services of that public accommodation — streaming video"); Compl. ¶ 28 (Harvard "controls, maintains and/or administers webpages, websites and other Internet locations . . . on *which online content is made available* to the general public") (emphasis added).

[22] Instead of acknowledging this relevant Title III authority, Harvard advocates adopting a definition of "goods" and "services" under state laws and the Uniform Commercial Code, citing consumer and breach of contract cases involving sales of software. Obj. 6-7. None of the cited cases concerned the ADA's inventory exception, and there is no indication that Congress or the Department of Justice referred to the UCC when it drafted the ADA or its regulations.

Moreover, even if this Court determines that Harvard's online programming is a "good," the "inventory exception" is nonetheless inapplicable. First, far from advocating a change in the nature of Harvard's online content, Plaintiffs seek access to content and a program that Harvard has touted as available to "learners throughout the world." *Id*. As the Magistrate Judge correctly noted, if Harvard "chooses to make videos available online . . . to the general public, then it cannot discriminate against deaf and hard of hearing individuals in the 'full and equal enjoyment' of that service." [23] R&R 27-28 n.15 (citing 42 U.S.C. § 12182(a)). Second, unlike requiring a bookstore to stock all books in Braille, which would more than double its inventory, adding closed captions would not cause any increase in inventory here. *See* DOJ/ED SOI 19-21; *supra* n.14. Third, it cannot be assumed, as a matter of law, that captioning would constitute an undue burden. As Judge Ponsor concluded, the ADA must be interpreted in light of existing technology. *Netflix*, 869 F. Supp. 2d at 200-01. The Court needs a developed factual record to assess the asserted burden of the requested remedy. *See Nat'l Fed'n of the Blind v. Scribd*, 97 F. Supp. 3d 565, 574 (D. Vt. 2015) (noting that "Congress intended that the [ADA] be responsive to changes in technology, at least with respect to available accommodations" and that an "important area of concern is information exchange") (citing H.R. Rep. 101-485 (II), at 108 (1990)).

[23] The legislative history of the ADA echoes this determination – "[p]laces of public accommodations that provide film and slide shows to impart information are required to make such information accessible to people with disabilities." S. Rep. No. 101-116, at 59 (1989); Letter from Stewart B. Oneglia, Department of Justice, Chief, Coordination and Review Section, Civil Rights Division (Sept. 17, 1992), at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal183.txt (contrasting video establishments, which are not required to stock closed-captioned videos, with public accommodations "that impart verbal information through soundtracks on films, video tapes, or slide shows," which "are *required* to make such information accessible to persons with hearing impairments," and noting that "[c]aptioning is one means to make the information accessible to individuals with disabilities") (emphasis added).

Finally, the insurance cases cited by Harvard,[24] which stand for the proposition that Title III does not require public accommodations to change and expand the terms of the policy or service to accommodate all the needs of people with disabilities, are inapplicable here.[25] *See* DOJ/ED SOI 19. This case is more similar to a situation where blind individuals need alternative methods, such as large print, to read the contents of a policy or materials disseminated by a defendant. *Astrue*, 2009 WL 3400686, at *19, *21 (inaccessible notices and communications from the SSA); *see Paulson*, 525 F.3d at 1267 (inaccessible currency); DOJ/ED SOI 19, 21. Accepting Harvard's argument would result in the inventory exception swallowing the ADA requirement that public accommodations must provide auxiliary aids and services. R&R 27-28; *Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 672 (9th Cir. 2010).

That this case does not fit into the "inventory exception," which incorporates an irrebuttable presumption of fundamental alteration, does not mean that Harvard has lost its defense on the merits. As the Magistrate Judge correctly determined, the inapplicability of the "inventory exception" in this case "does not mean that Harvard must provide captioning as a matter of law. Harvard nevertheless may be able to demonstrate that providing captioning, or any other available auxiliary aid or service, 'would fundamentally alter the nature' of its service or result in an undue burden." R&R 27-28 (citing 42 U.S.C. § 12182(b)(2)(A)(iii)).

B. This Court May Interpret the General Prohibition in Title III to Require Captions Absent Website-Specific Regulations from the Department of Justice.

Harvard argues that only federal agencies can "impos[e] specific accessibility

[24] Obj. 4-5 (citing *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000); *Doe*, 179 F.3d at 560; *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000), all considering whether Title III required an insurance company to alter *the substantive content* of its goods or insurance services).

[25] This is the issue decided in *Choate*, which drew the distinction between changing the benefit and having access to the benefit offered. *See supra* pp. 4-6.

requirements on public accommodations in advance of any request for accommodation . . . ." Obj. 11. As discussed above, courts have repeatedly rejected this argument, relying on the text of the ADA and general provisions in the regulations. *See supra* p. 9 (discussing the Ninth Circuit's rejection of the defense in *Fortyune* that absent the adoption of ADA regulations specifically targeted toward on-street parking, a city was not required to provide accessible on-street parking in light of general requirement that governmental services be accessible).[26] Harvard's concession that the general prohibition against discrimination on which Plaintiffs rely could give rise to such a regulation, Obj. 11, reinforces that this Court can decide this issue. *See also* DOJ/ED SOI 9, 11 (noting that "the ADA and the title III regulation, since their enactment and promulgation, have always required that public accommodations provide effective communications to persons with disabilities through the provision of auxiliary aids and services, including, where appropriate, closed captioning" and that this Court should reject the "attempt to convert a clear-cut ADA claim into something dependent on future rulemaking"). Congress intended private enforcement actions, like this one, to be a significant mechanism for applying the ADA's anti-discrimination provisions, with oversight by the DOJ. *See Dudley*, 333 F.3d at 307; 42 U.S.C. § 12188.

V. THIS CASE IS NOT A "RARE INSTANCE" WARRANTING A STAY UNDER THE PRIMARY JURISDICTION DOCTRINE

After a thoughtful analysis of the purposes of the primary jurisdiction doctrine and an evaluation of the relevant factors in detail, the Magistrate Judge properly declined to stay or dismiss this case. *See* R&R 28-44. Harvard rehashes four arguments the Magistrate Judge

[26] Other courts have taken this approach. *See, e.g., Coppi v. City of Dana Point*, 88 F. Supp. 3d 1122, 1129 (C.D. Cal. 2015) ("[E]ven in the absence of a specific regulation, public entities must still provide reasonable access to public facilities under the ADA," such as the outdoor beach trail portions at issue); *Access Now, Inc. v. Holland Am. Line-Westours, Inc.*, 147 F. Supp. 2d 1311, 1312-13 & n.4 (S.D. Fla. 2001) (determining that "the ADA . . . contemplates access actions even in the absence of specific regulations" and ordering suit to go forward even before long-awaited DOJ regulations on cruise ships).

rejected and urges this Court to reach the opposite conclusion. The Court should adopt the Magistrate Judge's extensive analysis and reject Defendants' attempt to delay this case.

First, the Magistrate Judge correctly concluded that "determination of the issues raised by Plaintiffs' complaint does not lie at the heart of the task assigned to DOJ by Congress," and would not "run the risk of undermining the consistency of DOJ's regulatory interpretation." R&R 33, 34; *see* DOJ/ED SOI 9-12. Plaintiffs seek an adjudication on liability – whether Harvard "has violated the ADA's prohibition against disability-based determination" – as well as injunctive relief, neither of which the DOJ has power to provide. R&R 33, 34; *see* DOJ/ED SOI 13 (noting that DOJ "has no adjudicative procedures or authority"). The Magistrate Judge also correctly determined that the resolution of fact-intensive defenses is unique to Harvard, R&R 33, not "all universities," as Harvard contends, Obj. 18.

Second, the Magistrate Judge correctly concluded that agency expertise is not required to unravel "intricate technical facts." R&R 36-39. As the Magistrate Judge determined after a lengthy analysis, there is no "inherent reason for concluding that DOJ has any specialized technical expertise regarding internet accessibility." R&R 37. The Court is well-equipped to address the factual issues and can seek input from experts if necessary.[27] *Id.* at 37-38. This is consistent with the Statement of Interest. *See* DOJ/ED SOI 14-17.

Third, while the Magistrate Judge noted that potential proposed regulations "might shed light" on the issues here, she concluded that any aid to the Court from potential proposed regulations "is likely to be quite limited." R&R 40. The DOJ has taken the position for nearly twenty years that the ADA applies to websites, and the Court already has access to the DOJ's

[27] *Cf. Palmer Foundry, Inc. v. Delta-HA, Inc.*, 319 F. Supp. 2d 110, 112 (D. Mass. 2004) (finding case "a rare instance in which the doctrine of primary jurisdiction" applied, since the court could not determine – *after* weighing proffered expert testimony – whether "alkyd resin manufactured by the defendant was not an oxidizer as a matter of law," and referring the issue to OSHA).

views through its statement of interest in this and other cases.[28] R&R 40-42. Even if the DOJ's potential proposed regulations would *materially* aid the Court here – an argument the Magistrate Judge rejected – this factor is not determinative in the primary jurisdiction analysis. *New Eng. Legal Found. v. Mass. Port Auth.*, 883 F.2d 157, 172 (1st Cir. 1989).

Finally, and most significantly, the Court should reject Harvard's attempt to discount the harm resulting from additional delay. Obj. 20 ("[A]ll [Plaintiffs] will have to do is wait"). The ongoing discrimination Plaintiffs experience from the denial of equal access to services and benefits Harvard makes freely available to the general public is not lessened by the fact that Plaintiffs have not paid for the services. *Id.* The ADA contains no such limitations.

CONCLUSION

For the reasons above, Harvard's objections should be overruled. The Court should adopt the Report and Recommendation denying Harvard's Motion to Stay or Dismiss.

Dated: April 8, 2016

Respectfully submitted,

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[28] *See* DOJ/ED SOI 9-10 n.6 (listing DOJ's enforcement efforts of Title III's effective communication requirement to Internet and web-based goods and services, including statements of interest and settlement agreements); *see also* Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, DOJ, to Tom Harkin, U.S. Senator (Sept. 9, 1996), at http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt (expressing DOJ's position that Title III applies to public accommodations that use the Internet for communications regarding their programs, goods, or services). In light of DOJ's consistent position, the Court should not credit Harvard's speculation that "[t]he DOJ may well issue regulations stating that Title III does not apply to website content like Harvard's . . . ." Obj. 19.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of April 2016, the foregoing document was served upon all counsel of record through this Court's electronic filing system as identified in the Notice of Electronic Filing.

/s/ Thomas P. Murphy
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