IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WESTERN DIVISION

NATIONAL ASSOCIATION OF THE DEAF, on behalf of its members, 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 PRESIDENTS AND FELLOWS OF HARVARD COLLEGE, Defendants.	CIVIL ACTION NO. 3:15-CV-30023-MGM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

LEAVE TO FILE MEMORANDUM IN EXCESS OF 20 PAGES GRANTED ON AUGUST 28, 2018

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I. INTRODUCTION

Plaintiffs National Association of the Deaf, *et al*. ("Plaintiffs") filed this action seeking to gain access to the speeches, talks, lectures, courses, and other informational material that Harvard University and the President and Fellows of Harvard College (collectively, "Harvard" or "Defendants") make available to the public online (collectively "Online Content"). Although Harvard markets the content as a gateway for "learners throughout the world" to access the teaching and information exchange happening at the renowned institution -- and notwithstanding that it has taken over $1.7 billion in federal funding in the past six years conditioned on a promise not to discriminate on the basis of disability -- Harvard has failed to provide captions (or provided inaccurate captions) for much of this content, thereby excluding deaf and hard of hearing individuals in violation of Title III of the Americans with Disabilities Act of 1990 ("Title III" or "ADA"), 42 U.S.C. § 12181 *et seq*., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"). Compl., Dkt. 1, ¶ 28 n.5.

Three years after unsuccessfully challenging the sufficiency of the Complaint in a comprehensive motion to dismiss, Harvard once again seeks a premature adjudication of this lawsuit, asking the Court to hold that Plaintiffs can prove no set of facts to support the claims in the Complaint. *See* Mem. of Law in Supp. of Def. President and Fellows of Harvard College's Mot. for J. on the Pleadings, Dkt. 141 ("Motion" or "Mot."). Harvard's arguments have no merit, and its Motion is permeated by factual and rhetorical overreach. The Motion makes unsupported factual assertions that, even had they been accompanied by citations, would be irrelevant in a motion pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. *See* Section II *infra.* And Harvard persists in using the veiled threat "caption or remove" in describing Plaintiffs' antidiscrimination claims. Mot. at 2. One could just as easily assert that Title II of the Civil

Rights Act of 1964, 42 U.S.C. § 2000a, requires places of public accommodation to "integrate or close." Plaintiffs are part of a long history of protected classes seeking inclusion and should not face the threat of retaliation for that effort.

II. LEGAL STANDARD

In evaluating a Rule 12(c) motion, "the court must view the facts contained in the pleadings in the light most favorable to the nonmovant and draw all reasonable inferences therefrom...." *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008) (citations omitted). "[A] court should 'treat[ ] any allegations in the answer that contradict the complaint as false.'" *Santiago v. Bloise*, 741 F. Supp. 2d 357, 360 (D. Mass. 2010) (citations omitted). The First Circuit has cautioned that a Rule 12(c) motion should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Curran v. Cousins*, 509 F.3d 36, 43 (1st Cir. 2007) (citation omitted).

"[T]o state a claim for violation of Section 504 and Title III, a plaintiff must allege (1) that he or she is disabled and otherwise qualified; (2) that the defendant receives federal funding (for Section 504 purposes) and is a place of public accommodation (for ADA purposes); and (3) that the defendant discriminated against the plaintiff based on disability." *Nat'l Ass'n of the Deaf v. Harvard Univ.*, Dkt. 50, 2016 WL 3561622, at *4 (D. Mass. Feb. 9, 2016) ("R&R"), *report and recommendation adopted*, 2016 WL 6540446 (D. Mass. Nov. 3, 2016).

III. ARGUMENT

A. Plaintiffs' Allegations that Harvard Has Denied Them a Full and Equal Opportunity to Enjoy Its Services State a Claim Under Title III.

Harvard's challenge to Plaintiffs' Title III claim rests on a misunderstanding of Plaintiffs' legal theory and a distortion of governing circuit precedent. Properly understood, Plaintiffs' Complaint states a claim under Title III for denial of the services of a place of public

accommodation.[1] This conclusion is consistent with Title III's "comprehensive character" and its "broad mandate" ... "to eliminate discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001); *see also Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003) ("Given the remedial purpose underlying the ADA, courts should resolve doubts ... in favor of disabled individuals").

Title III provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C § 12182(a); 28 C.F.R. § 36.201(a). An "undergraduate, or postgraduate private school, or other place of education" is expressly enumerated as a public accommodation under the ADA. 42 U.S.C. § 12181(7)(J).

Plaintiffs allege that Harvard is an undergraduate and postgraduate private school; such a school is a place of public accommodation; and Harvard's Online Content is among the goods, services, facilities, privileges, advantages, or accommodations of that public accommodation (hereinafter collectively "services"). Compl. ¶¶ 97-101. Plaintiffs further allege that by failing to make its Online Content accessible, Harvard has denied deaf and hard of hearing individuals the full and equal enjoyment of its services in violation of Title III. *Id*. Under the plain language of the statute, Plaintiffs have stated a claim under Title III.

Despite conceding that it is an undergraduate and postgraduate private school, *see* Answer, Dkt. 82, ¶ 27; Mot. at 4, Harvard seeks to avoid the ADA's accessibility requirements

[1] Harvard waived its argument that Title III does not prohibit discrimination in Online Content. It cannot legitimately make this claim when more than three years ago, it conceded that *Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994), established that public accommodations under Title III are not limited to physical structures. Mem. in Supp. of Mot. to Stay or Dismiss ("Mot. to Dismiss"), Dkt. 24, at 29; R&R, 2016 WL 3561622, at *4 n.5; *see also* Section III.A.2 *infra* (analyzing *Carparts* and related authority).

by arguing that "places of public accommodation" are limited to physical structures, that Title III's protections apply only to the services of public accommodations that have a nexus to the physical structures, and that Plaintiffs have not alleged such a nexus. This argument fails for three reasons: Harvard *is* a physical place and its Online Content is one of its services; a nexus between a challenged inaccessible service and a physical place is not required in the First Circuit; and even if a nexus were required, it exists.

1. Harvard is a Physical Place, of which Online Content is a Service.

In addition to contradicting First Circuit precedent, *see infra* Section III.A.2, Harvard's contention that only physical facilities qualify as places of public accommodation under Title III does not advance its argument for dismissal. The Complaint alleges that Harvard University -- a physical space -- is the challenged public accommodation in this matter. *See, e.g.*, Compl. ¶ 98.

The plain language of Title III prohibits discrimination with respect not only to the "facilities" of a public accommodation but to its "services, ... privileges, [and] advantages" as well. 42 U.S.C. § 12182(a). *See Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) ("The ADA covers the services 'of' a public accommodation, not services 'at' or 'in' a public accommodation. ...This distinction is crucial."); *Pallozzi v. Allstate Life Ins. Co.* 198 F.3d 28, 33 (2d Cir. 1999) ("The term 'of' generally does not mean 'in,' and there is no indication that Congress intended to employ the term in such an unorthodox manner."), *amended on other grounds*, 204 F.3d 392 (2d Cir. 2000). Where a "website is offered as a service or privilege of [a] brick-and-mortar location," it is governed by Title III. *Carroll v. FedFinancial Fed. Credit Union*, No. 1:17-CV-1361, 2018 WL 3212023, at *4 (E.D. Va. June 25, 2018).

This conclusion is equally persuasive here. Plaintiffs specifically pleaded that the Online Content -- a service *of* Harvard -- is inaccessible to deaf and hard of hearing people, in violation

of Title III. Compl. ¶¶ 31-32. These allegations alone, accepted as true at this stage of the litigation, are sufficient to defeat the Motion. *See supra* Section II.

2. No Nexus is Required in the First Circuit.

The First Circuit does not require a nexus between services covered by Title III and a physical place to state a claim under Title III. *Carparts,* 37 F.3d 12. There, the court rejected the argument that "public accommodation" under Title III was limited to a physical structure and held that the case could proceed, notwithstanding that the plaintiff had not accessed the defendant's services in a physical structure. *Id.* at 19. The court explained that reading the ADA to limit public accommodations to physical places was at odds with the plain language of the statute and "would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages available indiscriminately to other members of the general public." *Id.* at 20. *Carparts* stands for the proposition that Title III's prohibition against discrimination can apply beyond physical spaces. *Id*. at 19 ("Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities.").

Here, as explained in Section III.A.1, it is unnecessary to rely on *Carparts* to hold that the Complaint properly states a claim under Title III. Unlike the defendant in *Carparts*, Harvard indisputably operates a physical facility. Harvard's argument -- that Plaintiffs' Title III claim is *per se* invalidated because discriminatory services at issue exist apart from its physical facilities -- would run afoul of the most basic proposition from *Carparts*: that Title III's prohibition against discrimination can apply beyond physical structures. *Id.* at 19. *Carparts* is the law of this Circuit and curtails dispute over the viability of this claim. *See* R&R, 2016 WL 3561622, at *4 n.5 ("[W]hether Harvard agrees with it or not, *Carparts* is binding precedent in this Circuit.").

Rather than reckon with this legal authority, Harvard's argument flips *Carparts* on its head. It acknowledges the *Carparts* holding that the definition of public accommodation "would include 'providers of services which do not require a person to physically enter an actual physical structure,'" 37 F.3d at 19, but then argues that this leaves open the possibility that covered services must have a nexus to a physical place. Mot. at 8. It does no such thing, as this Court,[2] Judge Ponsor,[3] and even Harvard itself[4] have recognized.

More fundamentally, Harvard improperly conflates two distinct legal standards in ADA jurisprudence to argue that Plaintiffs must connect the discrimination in its Online Content to a physical facility. The First and Seventh Circuits, as well as district courts in the Second and Eighth Circuits, have held that the ADA prohibits discrimination by public accommodations regardless of whether the discrimination bears any nexus to a physical location.[5] By contrast, the Third, Sixth, and Ninth circuits have held that for an entity to be liable for Title III violations, there must be some nexus between the challenged discrimination and a physical place.[6] Notwithstanding that this lawsuit has been brought in the First Circuit, where there plainly is no nexus requirement, Harvard's Motion relies on cases from various jurisdictions, without acknowledging the differing standards in the circuits in which each case arises. As a result, the

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[2] *See* R&R, 2016 WL 3561622, at *4 n.5 (recognizing that *Carparts* held that "that public accommodations are not limited to actual physical structures").

[3] *Netflix*, 869 F. Supp. 2d at 200.

[4] Mot. to Dismiss at 29 (recognizing that *Carparts* held "that Title III's 'plain meaning [does] not require 'public accommodations' to have physical structures for persons to enter.'").

[5] *See Carparts*, 37 F.3d at 19-20; *Doe v. Mutual of Omaha Ins. Co*., 179 F.3d 557, 559 (7th Cir. 1999); *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 390-93 (E.D.N.Y. 2017) (collecting cases); *Winslow v. IDS Life Ins. Co.*, 29 F. Supp. 2d 557, 563 (D. Minn. 1998).

[6] *See, e.g., Ford v. Schering-Plough Corp*., 145 F.3d 601, 613 (3d Cir. 1998*); Stoutenborough v. Nat'l Football League, Inc*., 59 F.3d 580, 583 (6th Cir. 1995); *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir. 2000).

Motion obscures what in actuality is a clear standard in this circuit: there is no requirement to plead a nexus to a physical facility under Title III. *See, e.g.*, *Netflix*, 869 F. Supp. 2d at 200 (quoting *Carparts* in denying motion for judgment on the pleadings and explaining that "*Carparts*'s reasoning applies with equal force to services purchased over the Internet");[7] *Access Now, Inc. v. Blue Apron, LLC*, No. 17-CV-116-JL, 2017 WL 5186354, at *3 (D.N.H. Nov. 8, 2017) (same). "A rigid adherence to a physical nexus requirement leaves potholes of discrimination in what would otherwise be a smooth road to integration. It would be perverse to give such an interpretation to a statute intended to comprehensively remedy discrimination." *Andrews*, 268 F. Supp. 3d at 397.

3. Although not Required to do so, Plaintiffs Allege a Nexus Between Harvard's Online Content and a Physical Place of Public Accommodation.

At its core, Harvard's Motion urges this Court to disregard more than 20 years of First Circuit jurisprudence and hold that Plaintiffs must establish a nexus between the discriminatory services and a physical facility to sustain a Title III claim. Mot. at 3-10. This argument is unavailing. *See supra* Section III.A.2. Even assuming, *arguendo*, that the nexus test applied here, Plaintiffs' well-pleaded allegations meet that standard as well.

First, Harvard asserts that its Online Content is designed to bring the teachings available to those who attend the university -- a physical campus -- to the rest of the world. "Harvard claims that its online content .. . is part of its 'commitment to equity,' which 'calls on [it] to

[7] Harvard fails to distinguish *Netflix* from the case at bar, arguing primarily that it was "wrongly decided." Mot. at 8-10. Harvard's secondary contention, that *Netflix*'s holding is limited because the case concerned online TV programs and movies that ostensibly would be streamed at physical "rental establishments" or "places of exhibition," ignores that court's admonition that Title III bans discrimination without regard to its connection to a physical place. *Netflix*, 869 F. Supp. 2d at 200-02. In any event, Harvard's Online Content will be viewed in precisely the way Netflix's content will be viewed: on individual consumers' computers.

create effective, accessible avenues for people who desire to learn but may not have an opportunity to obtain a Harvard education.'" Compl. ¶ 2 (quoting Harvard University, "Online Learning- About"). On this same webpage, Harvard goes on to make the connection between its online content and the live instruction that happens on campus by explaining

> [w]hether you are a lifelong learner pursuing personal and intellectual interests, a currently enrolled student, or an educator or researcher, we invite you to explore online learning at Harvard. While nothing can replace the direct, personal interactions of campus-based education, by taking advantage of new technologies and research-based pedagogy we can make teaching and learning better -- *both on campus and online*.[8]

Therefore, Harvard contemplates -- indeed, expects -- that its Online Content will provide a gateway to the learning and exchange of ideas happening on its physical campus *and* that the broad exchange of information with "learners throughout the world" will, in turn, impact the educational offerings occurring in its live classrooms. *Id.*

Second, the Complaint's descriptions of challenged Online Content allege that much of the content that Harvard has failed to make accessible are lectures, meetings, or talks given by Harvard personnel -- many of them on campus. For example, Plaintiffs allege that "Harvard@Home" presentations are designed to "bring [users] inside the Harvard classroom to hear current, real-life lectures or provide [them] with a front-row seat at recent University panels, Alumni forums, and other special events." Compl. ¶ 47. As another example, the Complaint challenges Harvard's failure to caption videos of a campus Q&A with Bill Gates and Sheryl Sandberg's graduation address to Harvard Business School. *Id.* ¶ 42. And to the extent individual professors or departments post inaccessible content to Harvard platforms that relates to the research, teaching, or training they provide on Harvard's physical campus, this presents yet

[8] https://online-learning.harvard.edu/about (last visited Aug. 28, 2018) (emphasis added).

another link to Harvard's physical facilities. *See id.* ¶¶ 29, 53-56 (describing original work, such as performances, poetry, comics, etc., by Harvard faculty or students that may be featured on the Online Content). Accordingly, Plaintiffs have alleged a direct link between Harvard's physical campus and the alleged discrimination.

Finally, Harvard's attempt to distinguish between content produced by the university and content produced by third parties is unpersuasive. Harvard seeks to insulate its Online Content from Title III coverage -- to the detriment of deaf and hard of hearing "lifelong learners" -- in the name of academic freedom. Mot. at 11. Title III, which expressly identifies schools as covered entities, makes no such exception. Nor should it, as Title III's application to Harvard's services does not depend upon the content of those services. Indeed, neither the text of the ADA nor the relevant case law excludes from ADA coverage the services of a public accommodation that contain content produced or created by another entity. As a result, it is of no consequence that some of the content on Harvard's Platforms may have originated with a third party. Once Harvard made that content available on its Online Content, the university was obligated to make the material accessible pursuant to Title III. *See also* Section III.D *infra*.[9]

[9] Harvard's claim that "members of its academic community" use its Online Content to pursue their interests "without central control" or regulation by the university -- in contrast to an online entity like Netflix that intentionally "curates its online content," Mot. at 11 -- is an unsupported factual assertion inadmissible and irrelevant in the context of a Rule 12(c) motion. The Complaint alleges that Harvard's Online Content is made available, controlled, and/or administered by Harvard; indeed, the Complaint alleges that the university markets this content to the public and that, in turn, the content is identifiably related to Harvard. Compl. ¶¶ 28-30; 40-59. The Complaint further alleges that the content is not developed by happenstance but instead results from "administrative methods, practices, procedures and policies." *Id.* ¶ 36. In this context, the court is required to treat these allegations as true, and the unsupported assertions in Harvard's brief as false. *See supra* Section II.

4. Harvard's "Places" Argument Misreads Plaintiffs' Complaint and Misunderstands the Internet.

Harvard asserts that Plaintiffs' "Complaint rests entirely on the notion that a university's entire web presence is itself a 'place' of 'public accommodation,'" Mot. at 10, and argues that, under Title III, "places" are limited to "facilities," which must be physical, *id*. at 4-5. As is clear from the Complaint and Section III.A *supra*, this is not Plaintiffs' claim; nevertheless, as is also clear from Section III.A.2, such a claim would be well within the bounds of First Circuit precedent. *See Carparts*, 37 F.3d at 19; R&R, 2016 WL 3561622, at *4 n.5; *Netflix*, 869 F. Supp. 2d at 200. Several other courts have held that websites themselves are public accommodations governed by Title III. *See, e.g., Del-Orden v. Bonobos, Inc.*, No. 17 CIV. 2744 (PAE), 2017 WL 6547902, at *7 (S.D.N.Y. Dec. 20, 2017) ("A commercial website itself qualifies as a place of 'public accommodation' to which Title III of the ADA affords a right of equal access."); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (holding that online digital library is a place of public accommodation under Title III).

Although, as noted above, this is not an open question in this Circuit, it is interesting to note that Harvard's "places" argument attempts to create a distinction between "physical" and "virtual" places that exists in neither fact nor law. It recites the Title III definition of "facility" -- including "all or any portion of buildings, structures, sites, ... equipment, ... or other real or personal property, including the site where the building, property, structure, or equipment is located," 28 C.F.R. § 36.104 -- and announces that it is "unambiguously limited to physical, not virtual places." Mot. at 4-5. This is premised on a misunderstanding of the internet as some sort of metaphysical or magical space divorced from the physical world. In fact, the internet has a physical existence, relying on "equipment" and "personal property" -- such as servers, cabling, and modems -- that are located in buildings, structures, and real property. Indeed, the Supreme

Court has recognized that the "physical presence" necessary to require a company to collect sales taxes could be established through the "'physical' aspects of pervasive modern technology," for example, "a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. . . . Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2095 (2018); *cf. Access Now, Inc. v. Otter Prods., LLC*, 280 F. Supp. 3d 287, 293 & n.4 (D. Mass. 2017) (holding, in case challenging inaccessible website under Title III, that personal jurisdiction over Colorado company existed in Massachusetts because "the harm -- the barred access to the website -- occurred here;" citing *Carparts* and *Netflix*).

B. Harvard is Required by Section 504 of the Rehabilitation Act to Make its Online Content Accessible to Deaf and Hard of Hearing People.

This Court has already held that Plaintiffs' Complaint states a claim under Section 504. R&R, 2016 WL 3561622, at *2-10. This holding was based on the language of the statute, and on both the general Department of Education ("DOE") antidiscrimination regulation, 34 C.F.R. § 104.4 -- prohibiting recipients from excluding or discriminating against people with disabilities -- and Department of Justice ("DOJ") coordination regulations specifically requiring Harvard to "'take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired ... hearing,'" R&R, 2016 WL 3561622, at *9 (quoting 28 C.F.R. § 41.51(e)).

Without acknowledging either the holding above or the regulations and analysis on which it was based, Harvard asks the Court to revisit this question, again arguing that the Complaint fails to state a claim under Section 504. Mot. at 12-15. This argument is based on Harvard's interpretation of one subsection of the DOE regulations: it argues that Harvard's Online Content is not an "aid, benefit, or service" within the meaning of 34 C.F.R.

§ 104.4(b)(1)(i). Mot. at 13. That is, Harvard argues that the phrase "aid, benefit, or service" in section 104.4(b)(1)(i) limits the breadth of the statutory mandate that "the term 'program or activity' means *all of the operations of* ... a college [or] university." 29 U.S.C. § 794(b)(2)(A) (emphasis added). *See* Mot. at 13. Harvard provides no support for this narrowing of the statutory language and, in any event, this Court has already held that Plaintiffs have pleaded a Section 504 claim that satisfies both section 104.4 generally and subsections 104.4(b)(1)(i)-(iii) in particular. R&R, 2016 WL 3561622, at *7, *9.

Section 504 prohibits recipients of federal financial assistance from excluding people with disabilities from participation in, denying such people the benefits of, or subjecting them to discrimination under any of the recipient's programs or activities. 29 U.S.C. § 794(a). The statutory language sets forth this general prohibition, and instructs each agency to promulgate implementing regulations. *Id.* As this Court recognized, "[o]ne of the explicit policies underlying the enactment of Section 504 was to ensure that 'all programs, projects, and activities receiving assistance ... [are] carried out in a manner consistent with the principles of ... respect for the privacy, rights, and equal access (including the use of accessible formats), of ... individuals [with disabilities].'" R&R, 2016 WL 3561622, at *2 (quoting 29 U.S.C. § 701(c)(2)).

Since February 6, 2012,[10] Defendants have received more than 1,900 grants totaling more than $1.7 billion from at least 20 federal agencies, including the Departments of Health and Human Services, Defense, Energy, Justice, State, Commerce, Housing and Urban Development, Interior, and Education; the National Science Foundation; and the National Aeronautics and

[10] This date is two years before the effective date of the tolling agreement signed by the parties. Decl. of Amy F. Robertson in Supp. of Pls.' Opp'n to Defs.' Mot. for J. on the Pleadings ("Robertson Decl.").

Space Administration.[11] As required by Section 504 and the DOJ's coordination regulations, 28 C.F.R. § 41.4(a),[12] each of these agencies has issued regulations implementing Section 504 as to recipients of federal funding, each of which includes a general provision prohibiting recipients from excluding people with disabilities from participation in, denying them the benefits of, or "otherwise subjecting them to discrimination" under any program or activity receiving federal financial assistance.[13] As this Court recognized, the DOJ coordination regulations specifically require that Defendants "take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired ... hearing," R&R, 2016 WL 3561622, at *9 (quoting 28 C.F.R. § 41.51(e)). A similar requirement is also included in the implementing regulations of a number of Harvard's agency funders.[14]

With no statutory or regulatory support, Harvard attempts to limit the scope of the general antidiscrimination regulation by defining "aids, benefits, and services" in terms of a recipient's "function," and then asserts that Harvard's "function" does not include providing online content. Mot. at 13-14.[15] This definition is unsupported and incorrect; it is also contrary to the words of Harvard's provost, Steven E. Hyman: "The goal of university research is the creation, dissemination, and preservation of knowledge. At Harvard, where so much of our research is of global significance, we have an essential responsibility to distribute the fruits of

[11] *See* Robertson Decl. ¶¶ 3-9 and Ex. 1. *See also Santiago*, 741 F. Supp. 2d at 361 (court may consider facts susceptible to judicial notice in evaluating a Rule 12(c) motion).

[12] "Each agency shall issue ... a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part."

[13] Robertson Decl. Ex. 1, Column E.

[14] *Id.* Column G.

[15] This argument is tantamount to announcing that, since Harvard's "function" is not to act as a plumber, it is not required to provide accessible restrooms.

our scholarship as widely as possible." Harvard Library, Office for Scholarly Communication, "Open Access Policies," https://osc.hul.harvard.edu/policies/ (last visited Aug. 27, 2018).

Finding no support for its definition of "aids, benefits, and services" in Section 504 or its implementing regulations, Harvard looks to cases interpreting Title II of the ADA, prohibiting disability discrimination by public entities, 42 U.S.C. § 12131 *et seq*. ("Title II"). *See* Mot. at 13. This is entirely appropriate, R&R, 2016 WL 3561622, at *2 ("Section 504 and the ADA are 'frequently read in sync.'"), and supports Plaintiffs' Complaint rather than Harvard's Motion.

Although Title II "speaks of 'services, programs, or activities' denied to an individual with disabilities, in reality this provision 'has been interpreted to be a catchall phrase that prohibits all discrimination by a public entity.'" *Doe v. Mass. Dep't of Corr.*, No. CV 17-12255-RGS, 2018 WL 2994403, at *8 (D. Mass. June 14, 2018) (citations omitted). Title II's "'broad language brings within its scope anything a public entity does.'" *Id.* (quoting *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1172-1173 (9th Cir. 2002)); *see also* "Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. pt 35, app. B, at 687 (2018) ("[T]itle II applies to anything a public entity does."). Because providing Online Content is something Harvard "does," the analogy to Title II strongly supports this Court's original conclusion that Plaintiffs' claim "fits squarely within the parameters of Section 504 as delineated by the [Supreme] Court" and is a "paradigmatic example of Section 504 liability." R&R, 2016 WL 3561622, at *5.

Defendants' argument is ultimately that "aids, benefits, and services" are narrower than "programs and activities." This not only fails for the reasons above, it ignores the broad language in the statute and regulations that Defendants are generally prohibited from "subject[ing] to discrimination" people with disabilities. That same language in Title II "is 'a catch-all phrase

that prohibits all discrimination by a public entity, regardless of the context.'" *Haberle v. Troxell*, 885 F.3d 170, 180 (3d Cir. 2018) (quoting *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997)). This phrase "should avoid the very type of hair-splitting arguments the [Defendants] attempt[ ] to make here." *See Innovative Health*, 117 F.3d at 44-45.

Defendants do not address the "everything a public entity does" line of cases or the broad "subject to discrimination" language of Section 504 and Title II. Rather, Defendants rely on a trio of cases alleging violations of Title II and/or Section 504 by state or municipal agencies charged with regulating or licensing an industry; in each case, the court holds that the services provided by the regulated industry are not aids, benefits, or services of the regulatory agency. Neither the Colorado Public Utilities Commission[16] nor the New York City Taxi and Limousine Commission[17] provide transportation services; they regulate, respectively, buses and taxis. Similarly, the Texas Education Agency does not provide driver education; it merely licenses driver education programs.[18] None of these cases are relevant here, where Plaintiffs have alleged and Defendants have admitted that the Online Content at issue is produced, maintained, hosted, and/or made available by Defendants. *See, e.g.*, Answer ¶¶ 1, 28, 29, 49, 50.

Harvard is not a regulatory agency. It is a major, modern university that takes billions of dollars in federal funding yet fails to take basic steps to ensure that the content it makes available to everyone is accessible to deaf or hard of hearing people.

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[16] *Reeves v. Queen City Transp., Inc.*, 10 F. Supp. 2d 1181, 1184 (D. Colo. 1998), *cited in* Mot. at 13.

[17] *Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 71 (2d Cir. 2012), *cited in* Mot. at 14.

[18] *See Ivy v. Williams*, 781 F.3d 250, 256, 257-58 (5th Cir. 2015), *vacated as moot sub nom. Ivy v. Morath*, 137 S. Ct. 414 (2016), *cited in* Mot. at 14.

C. The Pleadings Appropriately Allege that Harvard is Liable for Content Posted with Third Parties.

Neither the ADA nor Section 504 permits a covered entity to avoid its nondiscrimination obligations by contracting responsibility to a third party. 28 C.F.R. §§ 36.202 and 36.204 (prohibiting discrimination and discriminatory methods of administration "directly, or through contractual, licensing, or other arrangements"); Robertson Decl. Ex. 1, Column F (listing relevant Section 504 regulations containing "directly or through contractual, licensing, or other arrangements" language). When Harvard uses a third party such as YouTube, iTunes, or SoundCloud to provide services, it remains responsible for ensuring that those services comply with Title III and Section 504.

Harvard argues that it "has no control over what captioning options [these services] provide." Mot. at 15. This factual assertion is unsupported, inappropriate in a Rule 12(c) motion, and irrelevant. It does not matter what captioning options these services provide when Harvard has the ability to caption the Online Content it chooses to post there. The regulations cited above mandate that the responsibility remain with Harvard to ensure that the content it posts on third party sites is accessible and that it only uses third party sites where accessibility can be ensured. This is true even of SoundCloud, an audio-hosting site. While there is no video on which to provide captions, it is a very straightforward matter to prepare and make available a transcript of the audio in question.[19] This step in making Harvard's Online Content accessible to deaf and hard of hearing people is required even when Harvard uses the services of third party.

[19] Again with no supporting evidence and inappropriate in the context of a Rule 12(c) motion, Harvard uses SoundCloud to launch a parade of horribles: under Plaintiffs' theory, no public accommodation could *ever* use SoundCloud, it declares. Mot. at 16. Given that any public accommodation or federal funding recipient can provide a transcript of audio content, the "broad ramifications" Harvard fears will not come to pass.

The question whether these platforms are themselves public accommodations is also irrelevant. Harvard uses them to provide services, which it currently provides in a manner that violates (among others) 28 C.F.R. §§ 36.202 and 36.204, and relevant Section 504 regulations.

The *Stoutenborough* case provides no support for Harvard's position, because the alleged discriminatory conduct -- the NFL's "blackout rule" -- "applie[d] equally to both the hearing and the hearing-impaired populations." 59 F.3d at 582. *See, e.g., Castillo v. Jo-Ann Stores, LLC*, 286 F. Supp. 3d 870, 876-77 (N.D. Ohio 2018) (distinguishing *Stoutenborough* on the grounds that plaintiff had adequately alleged that defendant's website was discriminatory because it treated those with visual impairments differently than those without visual impairments). Here, the Complaint similarly alleges that Harvard has engaged in disability discrimination by "directly, or through contractual, licensing, or other arrangements afford[ed] deaf and hard of hearing people opportunities to participate in and benefit from its aids, benefits and services that are not equal to, or as effective as, that afforded others." Compl. ¶ 99. This is sufficient to defeat Harvard's Motion.

D. Plaintiffs have Stated a Claim under Title III and Section 504 Alleging that Harvard Hosts or Embeds Inaccessible Content on its Websites and Platforms.

Harvard attempts to draw an artificial distinction that has no basis in either the ADA or Section 504 between online content that "Harvard itself" creates and posts, and "content posted by third parties that is merely made available through a Harvard-controlled website." Mot. at 1, 3. The Complaint adequately alleges that *all* such content is "Harvard's Online Content," Compl. ¶ 28, and that Harvard uses and/or fails to use administrative methods, practices, procedures, and policies that render much of that content inaccessible to deaf and hard of hearing people. Compl. ¶¶ 33-37. This is sufficient to defeat Harvard's Rule 12(c) Motion.

In addition, putting aside the impracticality of clearly defining the term "Harvard itself,"[20] this argument fails as a matter of law because Harvard admits that the university controls the websites on which inaccessible content appears.[21] All of Harvard's activities are subject to antidiscrimination laws, not just those of its central administration or leadership. Furthermore, even if the Court were to draw an unnecessary distinction between content that Harvard administration creates and content created by all others associated with Harvard, the Defendants' arguments regarding hosting content fail.

1. Section 230 of the Communications Decency Act Does Not Provide Absolute Immunity For Hosting or Maintaining Inaccessible Content.

The Communications Decency Act of 1996, 47 U.S.C. § 230 *et seq*. ("CDA"), has become a vehicle for websites hosting illegal or offensive content to attempt to avoid liability.[22] Harvard invokes this statute to avoid liability for its inaccessible Online Content. The CDA, which covers content, not accessibility, does not apply here; even if it did, the law does not provide immunity for an entity that controls who can post.

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[20] Defendant offers no clarification, other than to simply italicize the word *Harvard.* Of note, Harvard's own webpage "About Harvard/Harvard at a Glance" includes faculty, as well as those with academic appointments; students, including undergraduate, graduate and professional students; and alumni. *See* https://www.harvard.edu/about-harvard/harvard-glance (last visited Aug. 28, 2018); *see also Santiago*, 741 F. Supp. 2d at 361 (court may consider facts susceptible to judicial notice in consideration of Rule 12(c) motion). *See also infra* note 29.

[21] Answer ¶¶ 28, 31.

[22] Such websites include Backpage.com, a website that featured ads for sex with minors who are victims of sex trafficking, *see Jane Doe No. 1 v. Backpage.com LLC*, 817 F.3d 12 (1st Cir. 2016), *M.A. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041 (E.D. Miss. 2011); TheDirty.com, a website that hid the identity of individuals who post illegal content, *see Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398 (6th Cir. 2014); and websites that host revenge porn, *see, e.g. Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

a. The CDA does not apply to entities like Harvard that place limitations on posting content to their websites and platforms.

No court has allowed the broad sweep of immunity that Harvard seeks from the CDA, Mot. at 17 (citing 47 U.S.C. § 230(c)(1)), because Harvard does not operate as an "Interactive Computer Service," the subject of that provision. An "Interactive Computer Service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[23] The CDA is meant to protect the public marketplace of online posting services such as Facebook, Twitter, eBay, and Craigslist that provide public access to *both* creators and users of content. *See, e.g. Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) ("Online services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services"). Harvard, on the other hand, does more than "merely provid[e] server space and a web platform for the posting of uncaptioned videos," Mot. at 17, because unlike traditional internet service providers, the university maintains control over *who* can post content -- including uncaptioned videos -- on Harvard websites and platforms.[24]

[23] 47 U.S.C. § 230(f)(2). Harvard's reliance on the term "educational institutions" is misleading. The statute refers to public computers which allow access to the internet, e.g. a library or school, which may be used to post offensive material. The original text of the amendment read "any information service that provides computer access to multiple users via modem to a remote computer server …." H.R. Rep. No. 104-223, at 30 (1995).

[24] *See, e.g.,* Harvard Graduate School of Education Publishing Policies and Disclaimers, https://www.gse.harvard.edu/policies (last visited Aug. 28, 2018) ("Any officially recognized HGSE office, project, program, area, or student organization, as well as any individual faculty member or student may publish on HGSE's web servers according to guidelines described here.").

Members of the general public cannot create and post content to a Harvard website, nor can they influence what content is hosted or embedded on Harvard websites and platforms.[25]

Harvard's request for immunity for hosting inaccessible content contradicts the underlying policy goals of the CDA, including, for example, "advance[s] in the availability of educational and informational resources to our citizens" and "promot[ing] the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. §§ 230(a)(1), 230(b)(1). Hosting or embedding content that a significant segment of the U.S. population cannot access is at odds with each of these purposes.

b. The CDA does not support ex ante absolute immunity which would have the effect of limiting the public's equal access to the internet.

Even the broadest interpretation of existing CDA case law does not support the sweeping result Harvard seeks to achieve -- namely, unlimited preemptive immunity from liability for making web-based content available to the public in a manner that excludes individuals who are deaf or hard of hearing. Cases applying CDA protection have generally involved a specific instance of defamatory or other offensive posting.[26] In contrast, Harvard demands immunity from liability for a vast array of content that would be impossible to clearly define even if the

[25] Harvard maintains control over the use of Harvard web servers and platforms, for good reason: to protect the Harvard brand. *See, e.g.,* Use of Name in Electronic Contexts, https://trademark.harvard.edu/use-of-name-in-electronic-contexts (last visited Aug. 28, 2018) ("As in the case of other uses of Harvard's name, advance permission of the appropriate official (the Provost in the case of the 'Harvard' name and the appropriate Dean in the case of an individual School's name) must be obtained before any of these names in any form … is used in an internet address, an e-mail address …, or a web site identification").

[26] *See, e.g. Barnes*, 570 F.3d 1096 (nude photographs of plaintiff posted in a public profile on defendant's website); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (defamatory article appeared on website of defendant AOL pursuant to licensing agreement between the two defendants); *Doe v. Am. Online, Inc.*, 783 So.2d 1010 (Fla. 2001) (videos of child pornography sold through a chat room operated by defendant).

CDA applied.[27] While *Craigslist* held that the CDA barred liability for the specific content at issue, the court also recognized that "Subsection (c)(1) [of the CDA] does not mention 'immunity' or any synonym. Our opinion in *Doe* [*v. GTE Corp.,* 347 F.3d 655 (7th Cir. 2003)] explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts …." *Craigslist*, 519 F.3d at 669; *see also, Barnes*, 570 F.3d at 1100 ("it appears clear that neither [Section 230(c)] nor any other [subsection] declares a general immunity from liability deriving from third-party content"); *J.S. v. Village Voice Media Holdings, LLC,* 359 P.3d 714, 719 (Wash. 2015) (Wiggins, J., concurring) ("Backpage.com's argument that section 230 'provides broad immunity to online service providers' is wholly unsupported by the statute's plain language -- subsection 230(c) says nothing about 'broad immunity'"); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157, 1164 (9th Cir. 2008) ("The [CDA] was not meant to create a lawless no-man's-land on the Internet.").

c. CDA immunity relates to the substance of the online material provided by a third party, not accessibility of content.

Even assuming, *arguendo*, that Harvard is a provider of an interactive computer service under the CDA, Harvard is also an "information content provider"[28] -- a term Harvard does not address in its Motion. Under the CDA, "immunity applies only if the interactive computer service provider *is not also an 'information content provider*.'" *Roommates.com,* 521 F.3d at 1162 (emphasis added). Despite Harvard's attempts to repudiate any association with hosted or

[27] As discussed *infra,* the pleadings alone do not clearly delineate what content "Harvard itself" creates from other content related to which Harvard now seeks immunity. *See* Answer ¶ 28 ("Harvard … does not necessarily create, control, or administer that content.").

[28] Defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

embedded content originating from "individual faculty, students, and other scholars" or any employees not within the Public Affairs and Communications office,[29] Mot. at 1, the limitations placed on who can post content makes Harvard "responsible, in whole or in part, for the creation or development of information," 47 U.S.C. § 230(f)(3), in much the same way that a corporate entity is responsible for the accessibility of content on its website regardless of its point of origin. *See, e.g. Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1347 (S.D. Fl. 2017) ("many, if not most, of the third party vendors may already be accessible to the disabled and, if not, Winn-Dixie has a legal obligation to require them to be accessible if they choose to operate within the Winn-Dixie website."); *see also* Compl. ¶¶ 33-38. It is thus an "information content provider," not immune under the CDA.

The CDA's distinction between "publisher or speaker," on the one hand, and "information content provider," on the other,[30] underscores that the statute focuses on the actual content itself, not its accessibility. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (relating immunity under the CDA to "*information* originating with a third party user of the service") (emphasis added, citation omitted)); *Craigslist*, 519 F.3d at 668 (focusing on ads that state a preference with respect to a protected class). Accessibility, on the other hand, has no relationship to the substance of the underlying material. Closed captioning is an auxiliary aid or

[29] In contrast, Harvard's President espouses a broad definition of "Harvard itself." *See* Letter of Lawrence S. Bacow, July 2, 2018, *available at* https://www.harvard.edu/president/news/2018/looking-forward (last visited Aug. 28, 2018) ("Every one of us who works here plays a role in advancing our academic mission… thank you for all that each of you contributes to helping Harvard serve our world.").

[30] *See* 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.")

service, separate and apart from the information being disseminated.[31] Harvard's argument is based on the false premise that captioning is equivalent to changing the underlying content. *See* Mot. at 18. To the contrary, accessibility doesn't change content, it merely makes it available to everyone. The terms "publisher or speaker" in the CDA relate to the substance of the content, not the accessibility. *See, e.g., Daniel v. Armslist, LLC*, 913 N.W.2d 211, 247 (Wis. Ct. App. 2018) (denying CDA immunity where plaintiff's theory was not based on treating defendant as the publisher or speaker of information content created by third parties, but rather on designing and operating its website in a way that encouraged prohibited sales of firearms). Similarly, *Craigslist* is not analogous to a claim of failing to provide accessibility under the ADA and Section 504, because it arose under the Fair Housing Act, where the violation inheres in the content: expressing a prohibited preference. *See* 42 U.S.C. § 3604(c) (unlawful to publish a statement that "indicates any preference" based on protected class). In *Craigslist,* unlike here, it was appropriate to treat the website as the publisher or speaker of the challenged content.

2. Hosting or Embedding Inaccessible Content is Discriminatory Even if The Creator Did Not Include Captions.

Harvard's reliance on the movie-theater captioning cases only supports Plaintiffs' claims in this matter, including claims that Harvard uses "methods of administration that have the effect of discriminating on the basis of disability," and fails "to provide auxiliary aids or services where necessary to ensure that deaf and hard of hearing people are not excluded or denied effective communication." Compl. ¶¶ 92, 94, 99, 101. Those cases reinforce the undisputed premise that "[c]aptioning and audio descriptions are 'effective methods of making [aurally and visually] delivered materials available to individuals with [hearing and visual] impairments." *Arizona ex*

[31] *See* 28 C.F.R. § 36.303(b) (examples of auxiliary aids and services, including captioning).

rel. Goddard v. Harkins Amusement Enters., Inc., 603 F.3d 666, 670 (9th Cir. 2010) (*citing* 42 U.S.C. § 12103(1); 28 C.F.R. § 36.303(b)); *Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 23 (D.D.C. 2003). As both cases recognized, an auxiliary aid or service may take many different forms, so long as the method used is effective. Providing access to the equipment necessary for patrons to access closed captioning happens to be one of the most effective ways for a movie theater to meet this requirement, in part because movie theaters do not have control over the producers of films and cannot require that films be delivered to them with captions. However, like the defendant in *Goddard,* Harvard attempts to "put the cart before the horse," 603 F.3d at 671, in arguing that a movie theater's more limited menu of options somehow absolves the university of providing other available auxiliary aids and services. Harvard controls who can post content and can, in addition to affirmatively captioning its web content, require that all aural content that appears on its websites and platforms be captioned as a precondition for the use of the www.Harvard.edu domain or other Harvard platform.

Similarly, content that is hosted elsewhere is not "altered" if captions are provided because captions merely make the substance of the content available to those with typical hearing as well as deaf or hard of hearing individuals. Even if Harvard is not responsible for the creation of such content, the university chooses to display the content as a part of the "service" (Title III) and "program or activity" (Section 504) of streaming online content that it provides to the public, and thus must do so in a manner which avoids discrimination against individuals who are deaf or hard of hearing.

IV. CONCLUSION

For the foregoing reasons, Harvard's Motion for Judgment on the Pleadings should be denied.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 7.1(d), Plaintiffs join Defendants in respectfully requesting oral argument on this Motion.

Respectfully submitted,

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* Application for admission *pro hac vice* granted

Dated: August 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2018, the foregoing document and supporting Declaration of Amy F. Robertson were served upon all counsel of record through this Court's electronic filing system as identified in the Notice of Electronic Filing.

/s/ Amy Farr Robertson
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Pro Hac Vice