

NO. 14-2001

In the United States Court of Appeals for the Fourth Circuit

NATIONAL FEDERATION OF THE BLIND, *et al.*,

Plaintiffs-Appellees,

v.

LINDA H. LAMONE, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Maryland

Brief of *Amici Curiae* Civil Rights Education and Enforcement Center, Maryland Disability Law Center, ADAPT Maryland, American Civil Liberties Union, Arc Maryland, Arc of the United States, Association of Assistive Technology Act Programs, disAbility Law Center for Virginia, Disability Rights Advocates, Disability Rights Bar Association, Disability Rights Education & Defense Fund, Disability Rights North Carolina, Freedom Center, IMAGE Center for People with Disabilities, Independence Now, Judge David L. Bazelon Center for Mental Health Law, League for People with Disabilities, Maryland Developmental Disabilities Council, Maryland Disabilities Forum, National Association of the Deaf, National Disability Rights Network, On Our Own of Maryland, Paralyzed Veterans of America, People on the Go, Protection and Advocacy for People with Disabilities, Southern Maryland Center for Independent Living, United Spinal Association, and West Virginia Advocates in Support of Appellees.

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Statement of Interest of *Amici Curiae*

Amici Curiae are disability rights and civil rights organizations who share a long-standing commitment to the full participation and independence of individuals with disabilities in society. Toward that end, *Amici* have developed expertise in the interpretation and application of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (“ADA”), and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”) and are uniquely situated to discuss the harm that Appellants’ arguments here would cause not only for the ability of people with disabilities to vote privately and independently, but more generally for their ability to fully and independently access the programs, activities, benefits, aids, and services of public entities and recipients of federal funding.

Accordingly, *Amici* submit this brief in support of Appellees’ argument in favor of affirming the District Court’s decision that Appellants’ refusal to use the accessible online ballot marking tool violated the ADA and Section 504.

Descriptions of *Amici Curiae* are set forth in the Appendix hereto.

All parties have consented to the filing of this *amicus* brief.

Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no

parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

Statement Pursuant to Fed. R. App. P. 29(c)(5)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person -- other than the *amici curiae*, their members, or their counsel -- contributed money that was intended to fund preparing or submitting the brief.

Introduction

Appellants' arguments, if accepted by this Court, threaten to undermine the purposes of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, in contexts far outside the realm of absentee voting in Maryland.

Appellants turn the phrase "meaningful access" on its head, defining it not as the equality of opportunity guaranteed by the statutes and their implementing regulations, but instead as essentially "some sort of access to some part of the program." This somehow-somewhere standard would significantly reduce the ability of people with disabilities to participate fully and independently in society.

To accomplish this definitional inversion, Appellants improperly import the concept of “program accessibility” from the regulations that govern architectural access to older buildings, and attempt to apply it to auxiliary aids and services required to ensure equal opportunity and effective communication. Appellants rely exclusively on this architectural regulation and ignore the applicable regulations requiring equality of opportunity, and effective, private, and independent communication.

Statement of the Issues; Statement of the Case; Statement of Facts

Amici incorporate by reference the Statement of the Issues, Statement of the Case, and Statement of Facts in the Brief of Appellees.

Briefly, the individual plaintiffs and many members of the National Federation of the Blind (“NFB”), are registered Maryland voters who have disabilities that prevent them from independently marking paper absentee ballots. Plaintiffs testified that they wish to vote by absentee ballot not only because they have encountered barriers to voting in person, but also to gain the same benefit that voters without disabilities gain by voting absentee: it is easier and more convenient.

The Maryland Board of Elections (“Board”) accepts only printed absentee ballots, so -- prior to the district court’s order in this case -- those who received

their ballots online were required to print, mark, and return the ballots to their local boards of elections. The Board had developed, but has not adopted, an online tool that allows voters to mark their electronically-delivered absentee ballots on their computers before printing the ballots. This tool permits voters with disabilities who are unable to mark a paper ballot to complete the ballot privately and independently using their computers and assistive technology.

The Board had made an accessible online ballot marking tool available in the 2012 primary election. The Maryland legislature later passed a law requiring that the Board certify the tool before making it available in future elections. After the filing of the present lawsuit, the Board met and voted three to one in favor of certification, thereby failing to obtain the required supermajority needed to certify the online ballot marking tool.

Following a three-day bench trial, the district court ruled in favor of plaintiffs and ordered the Board to make the online ballot marking tool available to plaintiffs in the November 2014 general election.

Argument

I. Appellants' Definition of "Meaningful Access" Would Significantly Undermine Title II and Section 504.

The parties agree that the correct standard for compliance with Section 504 and title II of the ADA, 42 U.S.C. § 12132 ("Title II"), is "meaningful access." *See Alexander v. Choate*, 469 U.S. 287, 301 (1985) (holding that Section 504 requires that "an otherwise qualified [person with a disability] must be provided with meaningful access to the benefit that the grantee offers.").¹ Appellants, however, propose a definition for that concept so elastic that it would render the concept useless. They frame the question in this case as whether "Maryland's voting program" provides meaningful access. Br. of Appellants at 2. That is, they ask the Court to consider the voting program in its entirety, and assert that they comply with Title II and Section 504 because they provide access to some part of it. This excessively broad characterization of the program at issue would establish a standard that runs contrary to the language of the statute and the regulations, flies in the face of precedent, and excuses a wide range of discriminatory conduct.

¹ The analysis of Title II and Section 504 is "substantially the same." *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012) (Internal citations omitted).

A. Appellants' Definition of "Meaningful Access" Conflicts with the Language of Title II and Section 504.

The statutory language of Title II and Section 504 makes clear that those statutes require focus at a much more granular level than the entire voting program of the state of Maryland. Title II prohibits public entities -- and Section 504, recipients of federal funding -- from excluding people with disabilities from participation in, or denying them the benefits of, their services, programs, or activities, or otherwise subjecting them to discrimination. 42 U.S.C. § 12132; 29 U.S.C. § 794(a). If either statute were intended to focus only on programs at the broadest level, the words "services" (in Title II) and "activities" (in both) would have been unnecessary, as every service or activity conducted by a covered entity would fall within the entity's "program." *See Broughman v. Carver*, 624 F.3d 670, 677 (4th Cir. 2010) (holding that it is the Court's "duty to give effect, if possible, to every clause and word of a statute," quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)).

While the language of both statutes would, of course, prohibit exclusion of people with disabilities from an entire program, it also prohibits exclusion of such people from any particular service or activity of the program. Appellants' construction of the statutory obligation under both the ADA and Section 504 is

overly-broad and renders the specificity of the two statutes meaningless, contrary to congressional intent.

B. Appellants' Definition of "Meaningful Access" Conflicts with the Language of Title II's and Section 504's Implementing Regulations, Which Have the Force of Law.

Title II's and Section 504's implementing regulations underscore the granular focus of the statutes. Relevant to this case, these regulations prohibit covered entities, "in providing any *aid, benefit, or service* ..., [from] [a]ffording a qualified individual with a disability an opportunity to participate in or benefit from the *aid, benefit, or service* that is not equal to that afforded others; ... [or] provid[ing] a qualified individual with a disability with an *aid, benefit, or service* that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. § 35.130(b)(1)(ii) & (iii) (emphasis added); *see also* 45 C.F.R. § 84.4(b)(1)(ii) & (iii) (same; Health and Human Services ("HHS") regulations implementing section 504).² The regulations thus require a focus not only at the program level, but on any aid, benefit, or service of the covered entity.

² The words, "in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement," appear in the Title II regulations but not the HHS regulations.

These regulations make clear that it is not sufficient that voters with disabilities be able to vote somehow, somewhere in Maryland's overall voting program. Rather they specifically prohibit the state of Maryland from providing voters with disabilities aids, benefits, or services that are neither equal to, nor as effective as, the aids, benefits, and services provided to nondisabled voters. Thus, even if the "program" at issue here were Maryland's entire voting program, Defendants would not be permitted to provide the aid, benefit, or service of absentee voting in a fashion that is either unequal to or less effective than that provided nondisabled voters.

Furthermore, Title II regulations require that communications with people with disabilities, to be effective, "protect the privacy and independence" of such people, 28 C.F.R. § 35.160(b)(2), requiring, here, a private, independent ballot. Indeed, privacy and independence are "benefits" and "results" of the absentee voting system, which section 35.130(b)(1)(iii) guarantees people with disabilities an equal opportunity to obtain.

Appellants' brief is striking for the total absence of discussion of -- or even citation to -- the applicable regulations, including sections 35.130(b)(1)(ii) and (iii), 35.160(b)(2), and 84.4(b)(1)(ii) and (iii). Congress has made very clear that these regulations were intended to set forth the requirements of each statute and are, accordingly, entitled to deference; in the case of the DOJ's Title II regulations,

they have the force of law. *See, e.g., Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995).

Title II and Section 504 each contains basic anti-discrimination language, and each delegates to specific agencies the task of promulgating regulations to implement the statute. 42 U.S.C. §§ 12132 & 12134(a) (Title II; delegating to the Attorney General); 29 U.S.C. § 794(a) (Section 504; delegating to each agency head); *see also* H. Rep. 101-485, pt. 3 at 52, *reprinted in* 1990 U.S.C.C.A.N. 445, 475 (“Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of [section 12134] is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.”) Section 504 was passed in 1973 and its regulations promulgated in 1977, 42 Fed. Reg. 22676 (May 4, 1977). When Congress passed Title II in 1990, one of its purposes was “to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 ... to all programs, activities, and services provided or made available by state and local governments.” H. Rep. 101-485, pt. 2 at 84, *reprinted in* 1990 U.S.C.C.A.N. 303, 366.

To accomplish this, the provision instructing the Attorney General to promulgate implementing regulations requires that the Title II regulations be consistent with the regulations implementing Section 504. 42 U.S.C. § 12134(a) &

(b); *see also* H. Rep. 101-485, pt. 3 at 50, *reprinted in* 1990 U.S.C.C.A.N. 445, 473 (“The general prohibitions set forth in the Section 504 regulations, are applicable to all programs and activities in title II.”). “Because Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former regulations have the force of law.” *Helen L.*, 46 F.3d at 332; *Marcus v. Kansas Dep’t of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999) (same; quoting *Helen L.*); *see also Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003) (“Congress expressly authorized the Attorney General to make rules with the force of law interpreting and implementing” Title II. (Citing 42 U.S.C. § 12134(a)); *Kiman v. New Hampshire Dep’t of Corrections*, 451 F.3d 274 n.8 (1st Cir. 2006) (““Because Congress explicitly authorized the Attorney General to promulgate regulations under the ADA, the regulations ‘must [be given] legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.’” (Internal citations omitted)); *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002) (same); *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (same).

Furthermore, the Supreme Court has held that the Section 504 regulations at issue here “particularly merit deference.” The Supreme Court “generally ... defer[s] to contemporaneous regulations issued by the agency responsible for implementing a congressional enactment.” *Consol. Rail Corp. v. Darrone*, 465

U.S. 624, 634 (1984). The *Darrone* court held that the Department of Health, Education and Welfare (“HEW”) regulations implementing section 504 “particularly merit deference” because “the responsible congressional committees participated in their formulation, and both these committees and Congress itself endorsed the regulations in their final form.” *Id.* at 634; *see also Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 195 (2002) (same; citing *Darrone*). Sections 84.4(b)(1)(ii) and (iii) of the HEW regulations referred to in *Darrone* appear verbatim in the current HHS Section 504 regulations on which Appellees rely. *Compare* 42 Fed. Reg. 22676, 22678 (May 4, 1977) *with* 45 C.F.R. 84.4 (2014). These regulations thus “particularly merit deference.”³

Ultimately, as the Ninth Circuit has explained, “the ‘meaningful access’ standard incorporates rather than supersedes applicable interpretive regulations.” *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013). Thus to determine whether or not Appellants have provided meaningful access, the Court must evaluate whether they are in compliance with the applicable

³ While this Court has yet to address the question whether, in light of its history, the almost identical language of 28 C.F.R. § 35.130(b)(1) and 45 C.F.R. § 84.4(b)(1) -- requiring equal and equally effective aids, benefits, and services -- has the force of law, it has held as a general matter that the DOJ’s Title II regulations “warrant respect.” *A Helping Hand, LLC v. Baltimore County, Maryland*, 515 F.3d 356, 362 (4th Cir.2008) (quoting *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999)).

regulations. Since, in the absence of the online ballot marking tool, Appellants do not provide equal opportunity to obtain the same benefits as nondisabled voters, 35.130(b)(1)(ii) and (iii), and 84.4(b)(1)(ii) and (iii), or private, independent communication, 35.160(b)(2), they do not comply with the regulations or, therefore, provide meaningful access.

C. Appellants' Definition of "Meaningful Access" Conflicts with Well-Established Precedent.

It is clear that Maryland's absentee voting system discriminates against people with disabilities by requiring them to rely on the assistance of others to mark their ballots. In an attempt to avoid the Title II and Section 504 liability that this would entail, Appellants argue that the proper focus of the analysis should be its voting program as a whole -- including absentee voting and in-person voting at various locations around the state -- and that because people with disabilities can vote somehow somewhere, they have meaningful access. This somehow-somewhere standard runs contrary to years of case law interpreting Section 504, Title II, and the meaningful access standard in a variety of contexts.

As Appellees' brief noted, a number of courts have addressed "meaningful access" in the context of voting and concluded that merely providing people with disabilities the ability to vote somehow somewhere in the jurisdiction does not constitute meaningful access. *See* Br. of Appellees at 27-29, 34 (discussing

Disabled in Action v. Bd. of Elections in City of New York, 752 F.3d 189, 198 (2d Cir. 2014) (holding that “Plaintiffs need not ... prove that they have been disenfranchised ... to establish discrimination under Section 504 or Title II”); *California Council of the Blind v. Cnty. of Alameda*, 985 F. Supp. 2d 1229, 1238 (N.D. Cal. 2013) (holding that Title II and Section 504 required “meaningful access to private and independent voting”); *Kerrigan v. Philadelphia Bd. of Election*, No. Civil Action No. 07-687, 2008 WL 3562521 at *18 (E.D. Pa. Aug. 14, 2008) (holding that “failing to ensure that mobility disabled voters are able to vote in their neighborhood polling places” violated the meaningful access requirement); *Westchester Disabled on the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004) (same)).

The inadequacy of the somehow-somewhere access standard, and the requirement of equal or equivalent access to each part of covered programs, has been upheld in a variety of other contexts. Appellants’ argument contradicts these well-established precedents and would result in significant limitations on the participation of people with disabilities in society.

For example, in *American Council of the Blind v. Paulson*, 525 F.3d 1256 (D.C. Cir. 2008), the D.C. Circuit held that people with visual impairments did not have meaningful access to paper currency. While such people can, of course, buy and sell things for cash, in order to use paper currency as currently configured,

they must rely on others to help them identify denominations. The court held that “[s]uch dependence . . . constitutes a denial of meaningful access to U.S. currency that is not remedied by use of existing coping mechanisms.” *Id.* at 1259; *see also id.* at 1269 (“Such dependence is anathema to the stated purpose” of Section 504). Noting that cases addressing meaningful access were fact specific, the court identified this general pattern:

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.

Id. at 1267. In the present case, Appellees have identified a barrier -- the requirement of a hand-marked absentee ballot -- that impedes their access to Maryland’s absentee voting program. Nothing in their request to use an online ballot marking tool to access that same program “expand[s] the substantive scope of [the] program.” Furthermore, as the *Paulson* court held, it is not necessary to “define precisely the severity of the deprivation that a plaintiff must experience in accessing a program, benefit, or service to demonstrate a denial of meaningful access, . . . [rather], [Section 504’s] emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons.” *Id.* at 1269.

In *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), the Ninth Circuit addressed Hawaii's rule that all carnivorous animals spend 120 days in quarantine, a rule that posed a significant barrier to individuals traveling to Hawaii with guide dogs. Several travelers with visual disabilities -- required to spend four months without these essential mobility aids -- challenged the rule under Title II. The dissent in *Crowder* articulated the position Appellants urge here: that there were no programs of the state of Hawaii from which the plaintiffs had been completely excluded and that the plaintiffs' argument -- that the quarantine discriminated against individuals with disabilities -- was "entirely undermined by [the plaintiffs'] admissions that they [had] traveled, albeit at times with difficulty, without guide dogs." *Id.* at 1488. The majority rejected this argument, holding that "Hawaii's quarantine effectively denies [people with visual impairments] meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others." *Id.* at 1484. The fact that there was access to some state services somehow -- "at times with difficulty" -- was not sufficient to establish meaningful access.

In *Robertson v. Las Animas County Sheriff's Department*, 500 F.3d 1185 (10th Cir. 2007), the defendants argued that they did not discriminate against a deaf arrestee when they failed to provide an interpreter for his probable cause hearing, both because his attorney was able to attend the hearing and speak on his

behalf, and because the charges were dismissed. The Tenth Circuit rejected this argument holding that, “[e]ven though [the plaintiff’s] presence was not required, because the facility makes the activity [of attendance at probable cause hearings] available to detainees in general, it must do so on nondiscriminatory terms.” *Id.* at 1199.

Similarly, in *Randolph v Rodgers*, 170 F.3d 850 (8th Cir. 1999), in which the defendant department of corrections failed to provide a sign language interpreter to a deaf inmate, the Eighth Circuit rejected the argument that the inmate was not excluded from any prison services, programs, or activities, holding that he did not “enjoy[] meaningful access to the prison’s internal disciplinary process, even if he was capable of limited participation.” *Id.* at 858; *see also Kiman*, 451 F.3d at 286-87 (holding that access to a prison’s medical program as a whole was not sufficient; access was also required to prescription medications, one of its “services, programs, or activities”); *Van Velzor v. City of Burlison*, 43 F. Supp. 3d 746, 759 (N.D. Tex. 2014) (holding that the fact that plaintiff enjoyed benefits from other aspects of city law enforcement did not excuse city’s failure to enforce accessible parking rules).

This Court has reached a similar result under Title III of the ADA, which prohibits disability discrimination in places of public accommodation, 42 U.S.C. § 12181 *et seq.* In *Feldman v. Pro Football, Inc.*, 419 F. App’x 381 (4th Cir.

2011), this Court held that a professional football stadium was required to make accessible to patrons who were deaf or hard of hearing not only content spoken over the public address system, but also other content broadcast in the stadium, for example, lyrics to music playing on the concourse. The Court noted that the defendants provided more than a football game, and that “[f]ull and equal enjoyment of defendants’ goods, services, privileges, and facilities includes aural access to the lyrics to music broadcast over the stadium bowl’s public address system.” *Id.* at 391; *see also, e.g., Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (Equating Section 504’s meaningful access standard with Title III’s purpose of ensuring “that all people have ‘full and equal enjoyment’ of public accommodations regardless of disability”); *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (“Public accommodations must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience”); *Clavo v. Zarrabian*, No. SA-CV-03864-CJCRCX, 2004 WL 3709049, at *3 (C.D. Cal. May 17, 2004) (Title III; holding that defendant could not require plaintiff to ask employee to unlock gate in front of store or request that accessible check-out lane be opened. “Although Plaintiff was ultimately able to purchase merchandise at the [store], the manner in which he was able to make his purchases was neither ‘full’ nor ‘equal’ in comparison to non-disabled patrons.”); *Boemio v. Love’s Restaurant*,

954 F. Supp. 204, 208 (S.D. Cal. 1997) (Title III; holding that “[t]he standard cannot be ‘is access achievable in some manner.’ We must focus on the equality of access. If a finding that ultimate access could have been achieved provided a defense, the spirit of the law would be defeated.”).

Ultimately, the ADA isn’t about shoehorning people with disabilities into some part of public and federally-funded programs. It’s about providing people with disabilities an equal opportunity to participate in all of the aids, benefits, and services of those programs, and an opportunity that is as effective in obtaining the same result and gaining the same benefit, 28 C.F.R. § 35.130(b)(1)(ii) & (iii); 45 C.F.R. § 84.4(b)(1)(ii) & (iii), that is, meaningful access. Here, absentee voting is an aid, benefit, and service of the Maryland Board of Elections; Appellees are entitled to an equal opportunity to participate in absentee voting, and an opportunity that is as effective in obtaining the same results and benefits as others, including privacy and independence.

II. “Program Accessibility” and “Meaningful Access” Are Not The Same Thing.

Appellants attempt to graft the “program accessibility” standard from the regulations governing the physical accessibility of older buildings as a limitation on the “meaningful access” standard. Br. of Appellants at 40 (“the relevant analysis [for meaningful access] asks whether the program, when viewed in its

entirety, is readily accessible to voters with disabilities.” (citing 28 C.F.R. § 35.150(a)); *see also id.* at 54 (“This ‘program accessibility’ standard . . . affords public entities some flexibility in making their programs, overall, accessible to the disabled.”).

This is not a proper application of the program accessibility standard. As demonstrated above, “meaningful access” ensures that people with disabilities have more than just some access to some part of a program, but rather requires that access to be “meaningful.” The “program accessibility” standard of 28 C.F.R. § 35.150, in contrast, is a way of ensuring that programs *that occur in buildings built before the effective date of the regulations and not altered since* can be made as accessible as possible.

The structure of the regulations makes clear that the “Program Accessibility” provisions -- Subpart D -- are only applicable to physical accessibility of facilities. Subpart B of the Title II regulations is entitled “General Requirements” and includes section 35.130 -- “General prohibitions against discrimination” -- and thus sections 35.130(b)(1)(ii) and (iii), containing the equal opportunity language on which Appellees rely.⁴

⁴ Subpart A of the HHS section 504 regulations is similarly titled “General Provisions,” and sections 84.4(b)(1)(ii) and (iii) include requirements similar to 28

Subpart E of the Title II regulations is entitled “Communications” and contains the requirement of auxiliary aids and services, and the further requirement that they be “provided . . . in such a way as to protect the privacy and independence of the individual with a disability.” 28 C.F.R. § 35.160(b)(1) & (2).

Subpart D of the Title II regulations is entitled “Program Accessibility.” The first section of this Subpart prohibits discrimination “because a public entity’s facilities are inaccessible to or unusable by individuals with disabilities.” 28 C.F.R. § 35.149. Section 35.151, “New construction and alterations,” requires that facilities designed and constructed after January 26, 1992 and portions of facilities altered after that date must be “readily accessible to and useable by individuals with disabilities.” 28 C.F.R. § 35.151(a) & (b).⁵

The new construction and alterations regulations left open the question of what to do about buildings built before 1992 and not altered in the meantime. Section 35.150(a)(1) makes clear that a public entity is not necessarily required “to make each of its existing facilities accessible to and usable by individuals with

C.F.R. §§ 35.130(b)(1)(ii) and (iii).

⁵ The regulations enforcing section 504 of the Rehabilitation Act have almost identical language requiring accessibility in facilities constructed or altered after the effective date of those regulations, June 3, 1977. 45 C.F.R. § 84.23(a) & (b), *published in* 42 Fed. Reg. 22676, 22681 (May 4, 1977); *see also* 45 C.F.R. 84.23(a) & (b) (2015).

disabilities.” Instead, it is required to “operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150(a) (emphasis added). This is the only section of the Title II regulations in which the phrase “in its entirety” appears; it applies only to physical access to existing facilities.

The remainder of section 35.150 makes clear that it addresses architectural accessibility, and does not establish a general standard permitting any program to be “viewed in its entirety” when considering compliance with Subpart B’s requirements of an equal opportunity to participate or Subpart E’s requirements of effective, private, and independent communication. Section 35.150(b)(2)(i), for example, provides a “safe harbor” for elements in existing facilities that comply with the building-code-like Standards for Accessible Design. Section 35.150(b)(3) addresses access in historic buildings. Section 35.150(d) addresses transition plans for “structural changes to facilities.”

Section 35.150(a) is the only textual hook for Appellants’ argument that this Court must consider the voting program in its entirety; it simply does not apply here.

III. Appellants' Misguided Definition of "Meaningful Access" and Misapplication of the "Program Accessibility" Standard Are In Service of a Goal Anathema to the ADA and Section 504.

The ability of people with disabilities to live in the world as independently as possible is a central purpose of both the ADA and Section 504. When it passed the ADA, Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent living*, and economic self-sufficiency." 42 U.S.C. § 12101(a)(7) (emphasis added). The legislative history describes the ADA as "[l]egislation opening doors to opportunity and independence for millions of Americans." H. Rep. 101-485, pt. 1 at 58, *reprinted in* 1990 U.S.C.C.A.N. 267, 296. This is in harmony with Congress's findings in the Rehabilitation Act: that "disability is a natural part of the human experience and in no way diminishes the right of individuals to ... live independently." 29 U.S.C. § 701(a)(3)(A).

"There was a time when disabled people had no choice but to ask for help -- to rely on the 'kindness of strangers.' It was thought to be their lot. Blind people had to ask strangers to push elevator buttons for them. People in wheelchairs needed Boy Scouts to help them over curbs and up stairs. We have evolved, however, and Congress has made our evolution official, by enacting the Rehabilitation Act, whose stated purpose is 'to empower individuals with

disabilities to maximize employment, economic self-sufficiency, *independence*, and inclusion and integration into society.’” *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 59 (D.D.C. 2006) (quoting 29 U.S.C. § 701(b) (emphasis in *Paulson*)). The D.C. Circuit quoted from this passage in affirming the case, explaining “the Rehabilitation Act’s emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons.” *Paulson*, 525 F.3d at 1269.

Appellants’ arguments for ignoring the statutory language, the applicable regulations, regulatory and legislative history, and Supreme Court and circuit precedent, and their attempt to repurpose a regulation intended to address physical access to older buildings, are all in the service of a goal that undermines this central purpose of the ADA and Section 504. Were this Court to accept Appellants’ arguments here, it would endorse the principle that people with disabilities may be forced to rely on the assistance of others to access public benefits and services.

Conclusion

For the reasons set forth above, *Amici Curiae* respectfully request that this Court affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that

1. according to the word count feature of MS Word 2013, which was used to prepare this brief, this brief complies with the type-volume limitation of Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because this brief contains at most 5,199 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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

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Dated: April 15, 2015

Certificate of Service

I, Sophie P. Breene, certify that on April 15, 2015, a true and correct copy of the foregoing Brief of *Amici Curiae* was served on the following counsel by email and by FedEx overnight delivery:

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APPENDIX: Statements of Interest of Amici Curiae

Civil Rights Education and Enforcement Center (“CREEC”) is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC’s efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have access to all programs, services, and benefits of public entities, especially to a program as central to our system of government as voting, and ensuring that section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (“Section 504”) and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (“ADA”) can be effectively enforced to ensure equal access and independence.

Maryland Disability Law Center (“MDLC”) is Maryland’s designated Protection & Advocacy (“P&A”) agency, dedicated to advancing the civil rights of people with all types of disabilities. It provides legal representation and/or other advocacy services in a number of substantive areas, including voting rights. It has worked in close collaboration with its client community to vindicate their right to vote privately and independently, and has conducted voter outreach, registration, and education with and for such individuals. MDLC believes that people with all disabilities have a legal right of access to technology that enables them to vote privately and independently, without creating a segregated ballot or process.

ADAPT Maryland is a chapter of the national grass-roots disability rights activist organization that believes in using non-violent civil disobedience, among other strategies, to work towards social change for disabled citizens. ADAPT Maryland advocates to ensure that the rights of people with disabilities are not diminished in any way, including the right to vote privately and independently.

The American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan organization of approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The Disability Rights Program of the ACLU works to fight segregation of and discrimination toward people with disabilities, and believes people with disabilities deserve full access to voting options.

The Arc Maryland is the state’s largest nonprofit membership organization dedicated to the rights and quality of life of persons with intellectual and developmental disabilities. Its mission is to create a world where children and adults with intellectual and developmental have and enjoy equal rights and opportunities. The Arc believes individuals with disabilities have the right to vote privately and independently.

The Arc of the United States, founded in 1950, is the nation’s largest community-based organization of and for people with intellectual and developmental disabilities. The Arc promotes and protects the human and civil

rights of people with such disabilities and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with intellectual and developmental disabilities receive the protections and supports provided by law.

Association of Assistive Technology Act Programs (“ATAP”) is a national, member-based organization, comprised of state Assistive Technology Act Programs funded under the Assistive Technology Act. ATAP was established in 1997 and works to maintain and enhance a strong, effective, and efficient national network of Statewide Assistive Technology Programs which enables individuals with disabilities, service providers, and others to learn about, access, and acquire assistive technology needed for education, employment, and community living. ATAP believes that people with disabilities should have access to a private, independent ballot.

The disAbility Law Center for Virginia (dLCV) is the nonprofit agency designated as the P&A System in the Commonwealth of Virginia. dLCV is mandated to protect and advocate for the rights of persons with mental, cognitive, sensory, physical, or other disabilities and to receive federal funds to implement a number of P&A programs. Among the federal laws dLCV is charged with enforcing is the Help America Vote Act. dLCV’s thus has an interest in protecting the voting rights of individuals with disabilities under the law.

Disability Rights Advocates (“DRA”) is a nonprofit public interest legal center that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology, and housing. DRA’s clients, staff, and board of directors include people with various types of disabilities. DRA strives to protect the civil rights of people with all types of disabilities.

The Disability Rights Bar Association (“DRBA”) is an association of attorneys who specialize in disability civil rights law. DRBA’s goals include advancing and enforcing the rights of people with disabilities in all spheres of life through the use of litigation and other legal advocacy strategies. DRBA’s members are experienced in studying, interpreting, and applying disability rights laws, including the ADA and Section 504. Based on those goals and experiences, the DRBA supports the Appellees in their efforts to ensure people with disabilities can vote privately and independently.

Disability Rights Education & Defense Fund (“DREDF”), is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy, and law reform efforts. DREDF is nationally

recognized for its expertise in the interpretation of federal disability civil rights laws, including Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. DREDF serves as party counsel in both individual and class action litigation to enforce the critical disability access entitlements mandated by those laws, and participates as *amicus* in federal appellate cases.

Disability Rights North Carolina is a nonprofit organization and North Carolina's P&A agency. Since 2008, its team has worked to provide advocacy and legal services at no charge for North Carolinians with disabilities to protect their civil rights in a broad range of matters related to their disabilities, including employment, education, housing, abuse, health care matters, and voting.

The Freedom Center, founded in 2001, is a Center for Independent Living that offers services and supports to empower people with disabilities to lead self-directed, independent, and productive lives in a barrier-free community. Its services are designed to promote community integration among people with disabilities so they can fully participate in their own communities within their own homes, having the same equal opportunities to achieve independence as those without disabilities. It advocates to protect the rights of people with disabilities to vote in an equitable manner that is independent and private.

The IMAGE Center for People with Disabilities, founded in 2011, provides skills, training, and advocacy services to people with disabilities in order for them

to live independently in the community and be full contributors in their families, in the community, and on the job. Voting privately and independently is a cornerstone of democracy and this cornerstone should be available to all people with disabilities.

Independence Now, a 20-year-old Center for Independent Living, is a resource and advocacy center that promotes independent living and equal access for people of all ages with all types of disabilities residing in Montgomery and Prince George's Counties, Maryland. Independence Now is designed, governed, and staffed by people with disabilities. It also advocates for the rights of people with disabilities to gain and maintain independence, including the right to vote privately and independently.

The Judge David L. Bazelon Center for Mental Health Law, founded in 1972, is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, training and education, the Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life, including employment. The Center played an important role in securing the passage of the ADA and Section 504, and has extensive experience with advocacy under those statutes in a variety of contexts, including the provision of equal opportunity in voting systems.

The League for People with Disabilities has been a passionate advocate and provider of services to Maryland citizens with disabilities since 1927. As its headquarters in Baltimore City is a voting site for Early Voting as well as Election Day voting, the League sees the wide variety of abilities and challenges people have when voting. Based on this, it supports Appellees in their effort to vote privately and independently.

Maryland Developmental Disabilities Council (“the Council”) is a self-governing public policy and advocacy organization that was established in 1971 through the federal Developmental Disabilities Assistance and Bill of Rights Act. The Council envisions a state where all people with developmental disabilities exercise control over their lives, reach their full potential, and lead healthy, fulfilling lives with enriching relationships. The Council strongly supports the rights of people with disabilities to vote privately and independently.

Maryland Disabilities Forum (“MDF”) is a nonprofit led by people with disabilities that produces statewide system changes in order to achieve community inclusion, civil rights, and equal opportunity. The MDF achieves this through education, leadership development, and facilitating consensus within the disability community, while respecting its diversity. It follows basic principles for fostering equal opportunities for all individuals with disabilities in all aspects of life,

including education, employment, housing, healthcare, community living, voting, choice, and access to places of public accommodation.

The National Association of the Deaf (“NAD”), founded in 1880, is the oldest civil rights organization in the United States and is the nation’s premier organization of, by, and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents in all aspects of society including but not limited to education, employment, and ensuring full access to programs and services. The NAD believes everyone, including persons with disabilities, have the right to a private and independent ballot.

National Disability Rights Network (“NDRN”) is the nonprofit membership association of P&A agencies in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories, as well as P&A agencies serving Native Americans. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation’s largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and

works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

On Our Own of Maryland, Inc. is a statewide mental health consumer education and advocacy group that promotes equality in all aspects of society for people who receive mental health services and develops alternative, recovery-based mental health initiatives. Its interest in equal rights extends to the fundamental right to vote.

Paralyzed Veterans of America (“PVA”) is a national, Congressionally-chartered veteran’s service organization. PVA seeks to improve the quality of life for veterans and all people with spinal cord injury and dysfunction through its medical services, benefits, legal, sports and recreation, architecture, and other programs. PVA advocates for quality health care, for research and education addressing spinal cord injury and dysfunction, for benefits based on its members’ military service, and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and non-veterans with disabilities.

People on the Go is a statewide advocacy group made up of individuals with intellectual and developmental challenges. The organization uses its members’ voices to be heard and recognized. It believes all people should be active participants in their communities and it strives to eliminate discrimination. People

on the Go began in 1994, as the Maryland statewide self-advocacy group, helping people stand up for what is important to them and bring people together to advocate for common issues. It is a driving force behind legislative changes in the state, including the right to vote privately and independently.

Protection and Advocacy for People with Disabilities, Inc. (“P&A”) is a private nonprofit organization in South Carolina providing legal advocacy to individuals with disabilities. Since 1977 it has been the designated protection and advocacy system in South Carolina, providing advocacy for numerous programs including the federally-mandated Protection and Advocacy for Voting Access program. Under this program, P&A seeks to ensure full participation in all aspects of the voting process for voters with disabilities. P&A’s work under its many programs involves federal and state laws related to disability rights, including the ADA.

The Southern Maryland Center for Independent Living is a 15-year old Center for Independent Living that supports all disabilities including mental, physical, cognitive, and intellectual for people of all ages to enable them to acquire or maintain their independence. Its mission is to provide services and advocacy to help empower people with disabilities to lead self-directed, independent, and productive lives in their communities. The Southern Maryland Center for

Independent Living vehemently opposes any efforts to narrow the legal rights of people with disabilities.

United Spinal Association is a membership organization with 40,000 members residing in the United States who have spinal cord injuries or diseases, or are interested in issues affecting people with spinal cord injuries or diseases. United Spinal Association believes the right to cast votes privately, without interference, intrusion, and unnecessary assistance is fundamental to our democracy and should be available to all eligible voters including people with disabilities.

West Virginia Advocates is the designated P&A agency for the State of West Virginia. Created by the federal government in 1977, it advocates for the rights of individuals with physical or mental disabilities, both individually and systemically. West Virginia Advocates is pleased to join as an *amicus* in this case and in all efforts to enforce the ADA and assure that individuals with both mental and physical disabilities have equal access to voting rights.