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11 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 **(OAKLAND DIVISION)**

13 SHERON GEORGE & SHARICCI
14 FOURTE-DANCY,

4:00-CV-02206-CW-WDB

15 Plaintiffs,

16 v.

17 BAY AREA RAPID TRANSIT DISTRICT,

18 Defendant,

19
20 UNITED STATES OF AMERICA,

21 Intervenor.

22 **BRIEF OF THE UNITED STATES**
23 **AS INTERVENOR**
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ISSUE PRESENTED

Pursuant to this Court's Order of June 30, 2006, the United States respectfully submits this brief as intervenor regarding the validity of certain regulations promulgated by the United States Department of Transportation (DOT) under the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*

STATEMENT

I

INTRODUCTION AND BACKGROUND

On January 10, 2003, this Court held that 49 C.F.R. 37.9(a), which gives content to the statutory term "readily accessible," was arbitrary and capricious because it did not fulfill the mandate of the ADA as the regulation "fail[ed] to consider the needs of those with visual impairments." 1/10/03 Order at 8. There are three issues that must be addressed in regard to the validity of DOT's regulation.

The first issue is the meaning of the requirement under DOT's regulations that there be "at least one accessible route" in key stations such as those at issue in this case. 49 C.F.R., pt. 37; App. A (ADA Accessibility Guidelines) Section 10.3.2(1). In its July 13, 2001, Order, the Court appears to have held that the Act requires *actual* accessibility to that route for every individual with a disability. The ADA, however, does not require this. The ADA plainly recognizes that some persons with disabilities will be unable to use facilities that are "readily accessible." For such persons, the statute requires public transportation entities to provide alternate transportation services — known as paratransit or special services — so that such persons still have comparable access to public transportation services. 42 U.S.C. 12143(a) & (c). Accordingly, to interpret the DOT regulations as imposing a requirement that key stations be usable by every individual with a disability would in fact be contrary to what the ADA itself requires.

Moreover, although the ADA requires that key stations be "readily accessible" to persons

1 with disabilities, 42 U.S.C. 12147(b), that term is not defined in the ADA. Rather, Congress
2 expressly delegated to DOT the responsibility of promulgating regulations that give meaning to
3 the statutory term "readily accessible." The regulations adopted by DOT after careful
4 consideration, including notice and comment, do not require that a public transportation entity
5 alter its stations every time an individual with a disability is unable to use them. Rather, the
6 regulations provide specific detailed requirements that key stations must have. As discussed
7 below, these regulations ensure that public transportation systems, when viewed in their entirety,
8 are "readily accessible to and usable by" persons with disabilities, including persons with visual
9 impairments. As such the regulations are completely consistent with the requirements of the
10 ADA.

11 The second issue is the signage required for accessible routes in key stations. In its
12 September 4, 2002, Order, this Court held that defendant Bay Area Rapid Transit District
13 (BART) violated one of DOJ's ADA regulations, 28 C.F.R. 35.163, which addresses information
14 that must be provided to persons with disabilities regarding accessible services and the signage
15 that must be placed at non-accessible entrances. In response to BART's motion for
16 reconsideration of that Order, this Court concluded that BART was subject only to DOT's
17 regulations and not DOJ's regulations. 1/10/03 Order at 7. As we discuss below, while public
18 transportation entities are generally subject to the requirements of the DOJ regulations, the
19 DOT's transportation-specific regulations govern the information that must be provided to
20 persons with disabilities and the signage required for accessible routes in key stations.

21 The third issue is the ultimate question decided in this Court's January 10, 2003, Order:
22 Whether the DOT regulations are arbitrary and capricious. Based in part on this Court's apparent
23 interpretation of the requirement to provide at least one accessible route, the Court held that the
24 DOT regulations did not satisfy the ADA and therefore were arbitrary and capricious. 1/10/03
25 Order at 8. As explained below, a full view of the regulations shows that DOT's regulations
26 fulfill the statutory requirements of the ADA, are well within the agency's delegated rulemaking

1 power, and are neither arbitrary nor capricious. The regulations ensure that public transportation
2 systems, when viewed in their entirety, including paratransit services, are “readily accessible to
3 and usable by” persons with disabilities, including persons with visual impairments. That is
4 precisely what the ADA requires. See 42 U.S.C. 12146, 12147, 12148(a)(1).^{1/}

5 II

6 STATUTORY AND REGULATORY SCHEME

7 A. *The Requirements Of Title II Of The ADA*

8 Congress adopted the ADA to address the problem of wide-spread discrimination against
9 persons with disabilities. The Act has three titles, each of which address different aspects of the
10 problem. Title I addresses employment, Title II addresses programs and services provided by
11 public entities, and Title III addresses public accommodations. The “public entities” covered by
12 Title II include state and local government entities such as BART. See 42 U.S.C. 12131(1).
13 Title II is divided into two parts. Part A generally prohibits disability-based discrimination by
14 any public entity. 42 U.S.C. 12131-12134.^{2/} Part B applies that prohibition in the context of
15 public transportation. 42 U.S.C. 12141-12165. Part B governs the purchase and lease of
16 accessible vehicles, 42 U.S.C. 12142, 12144, 12145, 12148(b), 12162(a)-(d); the accessibility of
17 public transportation facilities, 42 U.S.C. 12146, 12147, 12148(a), 12162(e), 12163; and
18 paratransit as a complement to regularly scheduled mass transit service, 42 U.S.C. 12143.

19 Congress gave the Attorney General the authority to promulgate regulations

20
21 ^{1/} In this brief, the United States limits its discussion to the validity of the regulations. The
22 United States takes no position on whether BART actually complies with the regulatory
23 requirements.

24 ^{2/} Title II’s general non-discrimination requirement, 42 U.S.C. 12132, provides:

25 Subject to the provisions of this subchapter, no qualified individual with a
26 disability shall, by reason of such disability, be excluded from participation in or
27 be denied the benefits of the services, programs, or activities of a public entity, or
28 be subjected to discrimination by any such entity.

1 implementing Part A, see 42 U.S.C. 12134(a), and gave the Secretary of Transportation the
2 authority to promulgate regulations implementing the transportation-specific provisions of Part
3 B, see 42 U.S.C. 12143, 12149, 12164. Congress directed the Architectural and Transportation
4 Barriers Compliance Board (Access Board) to publish minimum accessibility guidelines for
5 public entities, including public transportation, 42 U.S.C. 12204. The Access Board, which has
6 representatives from several federal agencies, including DOT, has expertise in architecture,
7 design, and disabilities. See 29 U.S.C. 792. The Access Board promulgated the ADA
8 Accessibility Guidelines (ADAAG). DOT incorporated the ADAAG into its ADA regulations.
9 See 49 C.F.R., pt. 37, App. A. The Department of Justice (DOJ) similarly incorporated the
10 ADAAG into its ADA regulations. See 28 C.F.R. 35.151(c); 28 C.F.R. part 36, Appendix A.)^{3/}

11 Although Part B of Title II includes provisions regulating specific aspects of public
12 transportation, the provisions most relevant to this case are those dealing with transportation
13 facilities. Part B treats transportation facilities differently based on whether they are new or
14 existing construction. Newly constructed facilities must “be readily accessible to and usable by
15 individuals with disabilities, including individuals who use wheelchairs.” 42 U.S.C. 12146.
16 Existing facilities, other than “key stations,” are covered by Title II only when altered. When
17 altered, the alterations at those facilities must, “to the maximum extent feasible,” leave the
18 altered portion readily accessible. 42 U.S.C. 12147(a). For existing facilities, the ADA also
19 requires that “key stations (as determined under criteria established by the Secretary [of
20 Transportation] by regulation) in rapid rail and light rail systems * * * be made readily accessible
21
22

23 ^{3/} The Access Board subsequently revised the ADAAG. Both DOJ and DOT have given
24 regulatory notice of the proposal to adopt the new ADAAG, although this is still being reviewed
25 by the agencies and a final rulemaking has not been issued. Also, as part of its on-going review
26 and revision of its ADA regulations, DOT has drafted proposed revisions of its ADA regulations.
27 The public comment on those proposed revisions closed on July 28, 2006. See 71 Fed. Reg.
28 25544 (May 1, 2006); 71 Fed. Reg. 9,761 (Feb. 27, 2006), 49 C.F.R. pts. 27, 37 & 38.

1 to and usable by individuals with disabilities.” 42 U.S.C. 12147(b)(2)(A).^{4/} Furthermore, a
2 public transportation entity’s programs and activities, “when viewed in the entirety,” must be
3 “readily accessible to and usable by individuals with disabilities.” 42 U.S.C. 12148(a)(1).

4 The ADA also requires public transportation entities that use “fixed routes,” such as
5 BART, to provide “paratransit” services that are “comparable” to services provided to persons
6 without disabilities. 42 U.S.C. 12143(a).^{5/} Paratransit services are a *critical* part of public
7 transit services. Such services provide public transportation to those individuals who, because of
8 their disabilities, remain unable to use the services provided at stations, even when those stations
9 fulfill the ADA’s requirement of being “readily accessible.” Persons with disabilities who,
10 because of their disabilities, cannot access an entity’s “readily accessible” facilities are entitled
11 under the ADA to paratransit services. See 42 U.S.C. 12143(c)(1). “Paratransit” service goes
12 from “origin to destination” (door-to-door) rather than from station-to-station or stop-to-stop, 49
13 C.F.R. 37.129(a), and must be scheduled prior to the time the rider wishes to travel, see 49
14 C.F.R. 37.131(b).

15
16 ^{4/} The four BART stations that are the subject of this suit are “key stations.” See 9/4/02 Order at
17 10.

18 ^{5/} That section provides:

19 It shall be considered discrimination for purposes of [42 U.S.C. 12132] * * * for a
20 public entity which operates a fixed route system (other than a system which
21 provides solely commuter bus service) to fail to provide with respect to the
22 operations of its fixed route system, in accordance with this section, paratransit
23 and other special transportation services to individuals with disabilities, including
24 individuals who use wheelchairs, that are sufficient to provide to such individuals
25 a level of service (1) which is comparable to the level of designated public
26 transportation services provided to individuals without disabilities using such
27 system; or (2) in the case of response time, which is comparable, to the extent
28 practicable, to the level of designated public transportation services provided to
individuals without disabilities using such system.

1 *B. DOT Regulations Implementing Title II*

2 Congress did not set out in the ADA the specific requirements that would make a facility
3 or program “readily accessible to and usable by” persons with disabilities. Rather, Congress
4 delegated that responsibility to DOT. DOT’s regulations thus give content to the statutory terms.
5 Under the regulations, a transportation facility is considered “readily accessible to and usable by
6 individuals with disabilities if it meets the requirements” of DOT’s regulations, including the
7 incorporated requirements of the ADAAG. 49 C.F.R. 37.9(a).

8 Section 10 of the ADAAG applies to “Transportation Facilities.” Section 10.3 applies to
9 “Fixed Facilities and Stations.” Consistent with the ADA’s treatment of such stations, the
10 ADAAG treats newly constructed facilities (Section 10.3.1), existing key stations (Section
11 10.3.2), and alterations to existing facilities (Section 10.3.3) differently. Not surprisingly, new
12 construction are subject to requirements that are not imposed on key stations. Section 10.3.1
13 provides 19 sub-sections setting out specific accessibility requirements for newly constructed
14 stations.

15 Section 10.3.2 of the ADAAG imposes some, but not all, of these accessibility
16 requirements on key stations of existing facilities. Section 10.3.2(1) requires that key stations
17 “shall provide at least one accessible route from an accessible entrance to those areas necessary
18 for use of the transportation system.” Section 10.3.2(2) specifies that the “accessible route”
19 required by Section 10.3.2(1) shall include some, but not all, of the features required by Section
20 10.3.1 for newly constructed stations. See Section 10.3.2(2). Subsections 10.3.2(3), (4), and (5)
21 impose further requirements for key stations.

22 Additionally, DOT’s regulations impose numerous requirements that specifically address
23 the needs of persons with visual impairments on public transportation entities such as BART.

24 For instance, Section 10.3.1(1) of the ADAAG requires that, where the circulation path
25 for persons with disabilities is not the same as the route used by the general public, stations must
26 include signs indicating the direction to the accessible entrance and the accessible route, and

1 must ensure that the signs use the international symbol of accessibility and have specific
2 minimum character proportions and heights. Key stations must comply with that requirement.
3 Section 10.3.2(2). In addition, identifying signs at entrances must include Braille and must
4 comply with the ADAAG's specific guideline for such signs. Section 10.3.1(4) (new
5 construction); Section 10.3.2(2) (key stations). Signs must also comply with specific provisions
6 intended to minimize glare. Section 10.3.1(11) (new constructions); Section 10.3.2(2) (key
7 stations). Similarly, clocks within stations must have features that make them more usable to
8 persons with visual impairments. Section 10.3.1(15) (new construction); Section 10.3.2(2) (key
9 stations).

10 Further, DOT's regulations require that there be "detectable warnings" on platform edges
11 bordering drop-offs — an important safety requirement specifically intended for persons with
12 visual impairments. ADAAG Section 10.3.1(8) (new construction); Section 10.3.2(2) (key
13 stations). Section 4.8.7 of the ADAAG governs drop-offs on ramps and landings — a
14 requirement which assists not only persons with mobility impairments, but also persons with
15 visual impairments. Similarly, Section 4.9.4 sets out requirements for handrails on stairs that
16 make them usable by persons with visual impairments. Section 4.4 of the ADAAG regulates
17 objects, such as telephones, that protrude into the accessible route. This regulation is specifically
18 intended to meet the needs of persons with visual impairments, especially those who use a cane
19 for guidance.

20 Further, the eligibility criteria for paratransit services state that eligibility can be based on
21 a visual impairment. 49 C.F.R. 37.123(e)(1). Also, transportation entities are required to make
22 available to individuals with disabilities adequate information concerning transportation services,
23 including adequate communications capacity, to enable users to obtain information and service
24 schedule, including paratransit services. 49 C.F.R. 37.167(f). The regulations also require
25 transportation entities to announce stops, 49 C.F.R. 37.167(b) & (c), and permit the use of
26 service animals, 49 C.F.R. 37.167(d).

1 C. *DOT Promulgated The Regulations After Careful Consideration Of The Needs Of*
2 *Persons With Disabilities, Including Persons With Visual Impairments*

3 DOT adopted its ADA regulations only after carefully considering the accessibility
4 requirements of public transportation systems. For instance, DOT published a notice of proposed
5 rulemaking six months prior to its final rule and received over 260 comments. Transportation for
6 Individuals with Disabilities, DOT, 56 Fed. Reg. 45,584 (Sept. 6, 1991), 49 C.F.R. pts. 27, 37 &
7 38. DOT also held six public hearings that took in an additional 120 comments. 56 Fed. Reg. at
8 45,584. DOT invited comments from the public, including individuals with visual impairments,
9 at both the proposed and final rulemaking stages. And, during the process of promulgating its
10 regulations, DOT considered all of the comments given to the Access Board during the
11 development of the ADAAG. See 56 Fed. Reg. at 45,587, 49 C.F.R. 37.9.

12 DOT responded to several comments on accessibility for persons with visual
13 impairments, some of which related to signage. See 56 Fed. Reg. at 45,741, 49 C.F.R. 37.61
14 (signage, continuous pathways and public address systems accessible to persons with visual
15 impairments). For example, DOT adopted the suggestion of a blind individual that persons with
16 disabilities not be compelled to sit in priority seating, 56 Fed. Reg. at 45,584, 49 C.F.R. pts. 27,
17 37 & 38. DOT also responded to comments on edge detection for persons with visual
18 impairments, adequate lighting for persons with low vision, providing schedules in alternate
19 formats such as large print, Braille, and readers, for persons with visual impairments, 56 Fed.
20 Reg. at 45,584, 45,623, 49 C.F.R. 37.3; use of service animals, 56 Fed. Reg. at 45,624, 49 C.F.R.
21 37.3; and eligibility for paratransit as for those with visual impairments, 56 Fed. Reg. at 45,601-
22 45,602, 49 C.F.R. 37.123.

23 Before finally publishing the ADAAG, the Access Board also completed a careful and
24 thorough analysis. DOT is a member of the Access Board and participated in the Access Board's
25 development of the ADAAG. DOT also carefully considered the Access Board's guidelines and
26 reasoning during DOT's rulemaking. During its notice and comment period when it developed

1 the ADAAG, the Access Board specifically considered several comments involving accessibility
2 for those who are blind or have low vision. These comments included suggestions on design
3 criteria and layout to aid those with visual impairments, see ADA Accessibility Guidelines for
4 Buildings and Facilities; Transportation Facilities, 56 Fed. Reg. 45,500, 45,503 (Sept. 6, 1991),
5 36 C.F.R. pt. 1191 § 10.2.1(3); the use of large characters on signs, 56 Fed. Reg. at 45,502, 36
6 C.F.R. pt. 1191 § 10.2.2(2); methods to make schedules, timetables, and route identification
7 accessible to those with visual impairments, 56 Fed. Reg. at 45,503, 36 C.F.R. pt. 1191 §
8 10.2.1(3); and whether audible signs or other new technology might be substituted for tactile
9 signage and maps, 56 Fed. Reg. at 45,503, 36 C.F.R. pt. 1191 § 10.2.1(3).

10 The Access Board deliberately “reserved action in some areas pending further study or
11 research.” 56 Fed. Reg. at 45,500, 36 C.F.R. pt. 1191. As we discuss below, one such area was
12 signage for persons with severe vision impairments.

13 When promulgating its guidelines, the Access Board specifically requested comments on
14 signage location in transit stations. The members of the Access Board knew that, unlike a
15 building, which normally has defined spaces and entrances, transit stations are often large, open
16 areas without walls and doors; therefore, developing a standard convention for these spaces
17 might be difficult or impracticable.

18 After reviewing the comments it received, the Access Board found that signs usually were
19 not placed uniformly even within a single public authority’s system, much less in public
20 transportation generally. Further, in order for patrons in wheelchairs or with other mobility
21 impairments to see and use signage, the Access Board determined that it might be necessary to
22 place the signs above the heads of standing people. The Access Board did not believe that
23 requiring duplicate tactile signs was practical. See 56 Fed. Reg. at 45,504, 36 C.F.R. pt. 1191 §
24 10.2.2(2).

25 Therefore, the Access Board ultimately determined not to include a guideline requiring
26 tactile signs indicating the location of the accessible route. The Access Board explained that it

1 made this determination because:

2 [I]f sighted individuals including wheelchair users or those who use other mobility
3 aids are to make use of signage in crowded facilities, it must be usable and this
4 may require that it be placed above the heads of standing people. * * * In the final
5 guidelines the Board has required signage to comply with 4.30.1 (General), 4.30.2
6 (Character Proportion), 4.30.3 (Character Height), 4.30.5 (Finish and Contrast),
7 and 4.30.7(1) (Symbols of Accessibility). *The provision is intended to make such
8 signage more visible to persons with low vision and, by requiring the use of the
9 International Symbol of Accessibility, more readily identifiable for persons
10 traveling an accessible route. No provision has been added to address the needs of
11 persons with severe vision impairments who require directional information
12 regarding the accessible route because the Board has very little information to
13 adequately address the wayfinding needs of such persons at this time.*

14 56 Fed. Reg. 45,500, 45,505 (Sept. 6, 1991), 36 C.F.R. pt. 1191 § 10.3.1 (emphasis added).

15 D. *Relationship Of DOJ's And DOT's ADA Regulations*

16 DOT's regulations state that "[e]ntities to which this part applies also may be subject to
17 ADA regulations of the Department of Justice," and that "[t]he provisions of this part shall be
18 interpreted in a manner that will make them consistent with applicable Department of Justice
19 regulations." 49 C.F.R. 37.21(c). DOT's regulations further state that they apply over DOJ
20 regulations in "case[s] of apparent inconsistency." *Ibid.*

21 DOT included in its regulations Appendix D, which "explains the Department's
22 construction and interpretation of provisions of 49 CFR pt. 37. It is intended to be used as
23 definitive guidance concerning the meaning and implementation of these provisions." 49 C.F.R.
24 pt. 37, App. D, preamble. Appendix D's explanation of 49 C.F.R. 37.21 states:

25 Virtually all entities covered by this rule also are covered by DOJ rules * *
26 * Both sets of rules apply; one does not override the other. The DOT rules apply
27 only to the entity's transportation facilities, vehicles, or services; the DOJ rules
28 may cover the entity more broadly. * * *

29 DOT and DOJ have written their regulations to be consistent with one
30 another. Should, in the context of some future situation, there be an apparent
31 inconsistency between the two rules, the DOT rule would control within the
32 sphere of transportation services, facilities, and vehicles.

33 49 C.F.R. pt. 37, Appendix D, § 37.21. The DOJ regulations similarly explain the relationship of
34 the regulations. See 28 C.F.R. 35.102(b); 28 C.F.R. pt. 35, App. A, § 35.102.

ARGUMENT

DOT's Regulations Satisfy The ADA And Are Not Arbitrary And Capricious

Congress expressly delegated to DOT the responsibility of promulgating regulations to implement the statutory requirement that public transportation entities be readily accessible to persons with disabilities. "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984). As explained below, entities that satisfy DOT's regulations clearly will have made their programs, services, and facilities, when viewed in their entirety, readily accessible to and usable by individuals with disabilities. This is what the ADA requires, see 42 U.S.C. 12148(a)(1), and so rather than being arbitrary and capricious, the DOT regulations fully implement that statutory mandate.

A. Because Congress Left A Gap For DOT To Fill, DOT's Regulations Are Controlling Unless They Are Arbitrary And Capricious

In reviewing an agency's regulations, a court must be guided by Congress's expressed intent in the statute that the regulation implements. Where Congress expressly directs an agency to interpret a statute, as Congress did with the ADA, "[a court] first determine[s] whether Congress has expressed its intent unambiguously on the question before the court." *Environmental Def. Ctr. v. EPA*, 344 F.3d 832, 852 (9th Cir. 2003) (citing *Chevron*, 467 U.S. at 842-844). Both a court and an agency "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

When, however, a "court determines [that] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843 (footnote omitted). An agency's authority to administer a program created by Congress includes "the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). "If Congress has explicitly left a gap for

1 the agency to fill, there is an express delegation of authority to the agency to elucidate a specific
2 provision of the statute by regulation. Such legislative regulations are given controlling weight
3 unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at
4 843-844; *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999). Moreover,
5 “[t]he court may reverse under the ‘arbitrary and capricious’ standard only if the agency: ‘has
6 relied on factors which Congress has not intended it to consider, entirely failed to consider an
7 important aspect of the problem, offered an explanation for its decision that runs counter to the
8 evidence before the agency, or is so implausible that it could not be ascribed to a difference in
9 view or the product of agency expertise.’” *Environmental Def. Ctr.*, 344 F.3d at 858 (quoting
10 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

11 The first inquiry here is whether Congress unambiguously expressed its intent regarding
12 the issue of what “readily accessible to and usable by” persons with disabilities means. See
13 *Chevron*, 467 U.S. at 843. The ADA itself does not set out what features make a facility “readily
14 accessible to and usable by” persons with disabilities. See 42 U.S.C. 12146, 12147, 12148(a)(1).
15 Rather, Congress directed the Secretary to promulgate regulations that specify those features.
16 See 42 U.S.C. 12149(b). Congress thus explicitly left a gap for DOT to fill. Under *Chevron*,
17 DOT’s regulations are controlling unless they are arbitrary, capricious, or manifestly contrary to
18 statute. As shown below, DOT’s regulations are not arbitrary or capricious, nor are they contrary
19 to the ADA.

20 *B. DOT’s Regulations Are A Reasonable Interpretation Of The ADA And Are Not Arbitrary*
21 *And Capricious*

22 *1. Introduction*

23 The ADA requires that transportation facilities be “readily accessible,” but the statute
24 does not specify what features facilities such as key stations must have to satisfy that statutory
25 requirement. Rather, Congress expressly delegated to DOT the responsibility of promulgating
26 regulations that specify what features a public transportation entity must include for its facilities,
27

1 programs, and activities to “be readily accessible to and usable by” individuals with disabilities.
2 As noted above, under 49 C.F.R. 37.9(a), a public entity’s transportation program is “considered
3 readily accessible to and usable by individuals with disabilities if it meets the requirements of”
4 DOT’s ADA regulations, found in 49 C.F.R. pt. 37, including the incorporated requirements of
5 the ADAAG.

6 In its January 10, 2003, Order, this Court concluded that the DOT regulations were
7 arbitrary and capricious because they failed to fulfill the requirements of the ADA. In reaching
8 that conclusion, this Court appears to have relied in part upon an incomplete understanding of
9 what the ADA and the DOT regulations require.^{6/}

10 In subsection 2 below, we explain that the ADA does not require that *every* individual
11 with a disability be able to access key stations. Rather, the ADA requires that a key station be
12 “readily accessible,” and provides the “safety net” of comparable paratransit for those individuals
13 who, because of their disabilities, are unable to use the readily accessible facilities. The DOT
14 regulations fully implement those requirements.

15 In subsection 3 below, we address the relationship of DOT’s and DOJ’s regulations.
16 While, as a general matter, public transportation entities are subject to both DOJ and DOT
17 regulations, the signage requirements for accessible routes within key stations are controlled by
18 the DOT regulations.

19 In subsection 4 below, we address this Court’s ultimate conclusion that the DOT
20 regulations were arbitrary and capricious. The DOT regulations are valid because they
21 reasonably and fully implement the requirements of the ADA. The regulations impose
22 accessibility requirements on public transportation providers that make facilities, when they

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24 ^{6/} While this Court referred to the “DOT regulations” rather than a specific regulation, see
25 1/10/03 Order at 8, we understand that this Court found 49 C.F.R. 37.9(a) to be arbitrary and
26 capricious. This was also the understanding of the Court of Appeals. *George v. Bay Area Rapid
27 Transit Dist.*, 175 Fed. App. 809 (9th Cir. 2006) (court understood question before it to be
28 whether 49 C.F.R. 37.9 was invalid).

1 comply with the requirements, actually usable by the vast majority of persons with disabilities.
2 As required by the ADA, the regulations provide the “safety net” of paratransit for persons who,
3 because of their disabilities, are unable to use the readily accessible facilities. Although, as this
4 Court correctly understood, the DOT regulations do not require tactile signs within the key
5 stations, the decision not to require such signs was reached after careful consideration of the
6 needs of all persons with disabilities. As such, DOT’s decision was valid.

7 2. *The ADA Does Not Require A Key Station To Be Altered If There Is Any Person*
8 *With A Disability Who Cannot Access It*

9 It appears that the Court’s conclusion that 49 C.F.R. 37.9(a) was invalid may have been
10 based in part on an incomplete understanding of what the ADA requires. The Court, interpreting
11 42 U.S.C. 12132 and 12148, concluded that “the ADA requires that public transportation
12 programs be accessible to all patrons with disabilities” and that “[t]he ADA requires BART
13 provide at least one route that is accessible to the visually impaired.” 1/10/03 Order at 7-8.

14 To the extent that the Court interpreted the ADA accessibility requirement to apply to
15 persons with all types of disabilities, that is correct. The ADA does not distinguish between
16 types of disabilities. On the other hand, the ADA does not require actual accessibility to key
17 stations for every person with a disability. Rather the ADA itself recognizes that some persons
18 with disabilities will be unable to use facilities that are “readily accessible.” For such persons,
19 the statute requires public transportation entities to provide alternate transportation services —
20 known as paratransit or special services — so that such persons still have comparable access to
21 public transportation services. 42 U.S.C. 12143(c); 49 C.F.R. 37.123(e)(1).²⁷ It is clear from the

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23 ²⁷ We add one proviso, however. Section 12132 refers to a “qualified individual with a
24 disability,” which term is defined in 42 U.S.C. 12131(2). The ADA recognizes that there will be
25 some persons with conditions that are so extreme that they will be unable to use public
26 transportation. The visual impairments of the plaintiffs in this case, however, are not such
27 extreme conditions. As discussed at length above, the ADAAG requires stations to provide
28 numerous features that are intended specifically to assist persons with visual impairments. And
DOT’s regulations regarding paratransit specifically require such services be available to persons

1 ADA itself, therefore, that the statute does not require that every individual who has a disability
2 be able to use a key station — a requirement that likely would be impossible to meet — but it
3 does require that the alternative of paratransit services be provided to those persons who cannot
4 access key stations.^{8/}

5 Moreover, although the ADA requires that key stations be “readily accessible to and
6 usable by persons with disabilities,” 42 U.S.C. 12147(b), including persons with visual
7 impairments, the statute itself does not define this phrase. Rather, Congress expressly delegated
8 to DOT the responsibility of promulgating regulations that give meaning to the statutory phrase
9 “readily accessible to and usable by.” The regulations adopted by DOT after careful
10 consideration, including notice and comment, do not require that a public transportation entity
11 alter its stations every time an individual with a disability is unable to use them. Rather, the
12 regulations provide specific detailed requirements that key stations must have. As discussed
13 supra ___, these regulations ensure that public transportation systems, when viewed in their
14 entirety, are “readily accessible to and usable by” persons with disabilities, including persons
15 with visual impairments. As such, these regulations are consistent with the requirements of the
16 ADA.

17 It appears that, to the extent the Court understood that BART must provide routes in its
18 _____
19 with “visual impairments.” 49 C.F.R. 37.123(e)(1).

20 ^{8/} DOT has found that nation-wide, paratransit trips — that is, trips taken by persons using
21 paratransit — generally represent only about one-half of one percent of the total number of trips
22 taken on public transportation. The actual number of paratransit trips varies considerably
23 between public transportation systems. There are many factors, such as size of the system and
24 availability of training for persons with disabilities, that can contribute to variations in the
25 number of paratransit trips. Information regarding numbers of paratransit trips and non-
26 paratransit trips can be found within DOT’s National Transit Database. See generally
27 www.ntdprogram.com/ntdprogram/. The specific data can be found in one of the reports
28 compiled from the available data. See [www.ntdprogram.com/ntdprogram/
pubs/dt/2004/Excel_files/2004_Table_26.xls](http://www.ntdprogram.com/ntdprogram/pubs/dt/2004/Excel_files/2004_Table_26.xls). (2004 Table has most recent data available.)

1 key station that every person with a disability could use, that was an incorrect interpretation of
2 the *regulatory* requirement that key stations have “at least one accessible route.”^{2/} The ADA itself
3 does not require an “accessible route.” Rather, that term appears in DOT’s regulations, and the
4 regulations themselves set forth in detail the specific features a key station must have to satisfy
5 this requirement. See ADAAG Section 3.5 (defining the terms “accessible” and “accessible
6 route”); Section 10.3.2(2) (specifying the requirements of an accessible route in key stations; see
7 also pp. 6-7, *supra* (discussing requirements of accessible route). As noted above, these
8 regulations were developed after careful consideration of the needs of all individuals with
9 disabilities, including those with visual impairments. These regulations do not require that
10 public transportation providers such as BART provide routes in their key stations that every
11 person with a disability could use. Indeed, as discussed above, to interpret the DOT regulations
12 as imposing such a requirement would in fact be contrary to what the ADA itself requires.

13 3. *The DOJ Regulations Apply To Transportation Entities Such As BART, But The*
14 *DOT Specific Signage Regulations Govern The Accessible Routes Of Key Stations*

15 This Court’s conclusion that DOT’s regulations were invalid followed from this Court’s
16 prior conclusion in its September 4, 2002, Order that BART’s key stations violated the signage
17 requirements found in the DOJ regulations. In response to BART’s motion for reconsideration of

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19 ^{2/} This Court appears to have first interpreted that term in this case in its July 13, 2001, Order. In
20 that Order, this Court applied a “plain meaning” interpretation to the term “at least one accessible
21 route” in ADAAG 10.3.2(1). 7/13/01 Order at 9. The Court held:

22 The plain meaning of these words is that all persons with disabilities must be able
23 to access one or more routes. If BART can create a route that is accessible to all
24 disabled patrons, including the visually disabled, the law does not require it to
25 provide additional routes. On the other hand, if, for example, the wheelchair
26 accessible route was not accessible to the visually disabled, BART would have to
27 provide a route that was. Multiple routes may therefore be necessary to comply
28 with the accessibility needs of all patrons with disabilities.

7/13/01 Order at 9.

1 this Court's September 4, 2002, Order, this Court concluded that BART was not subject to the
2 information and signage requirement of the DOJ regulations. It then concluded, however, that
3 because the DOT regulations did not contain similar provisions, key stations might not be
4 accessible to persons with visual impairments. Therefore, this Court held the regulations were
5 arbitrary and capricious.

6 Public transportation entities are generally subject to the requirements of DOJ's
7 regulations, but the signage requirements in accessible routes in key stations are controlled by
8 DOT's transportation-specific regulations rather than DOJ's generally applicable regulation.

9 In its September 4, 2002, Order, this Court held that two DOJ regulations applied to
10 transportation entities such as BART. First, the Court found that 28 C.F.R. 35.130(d) applied.
11 That regulation requires that persons with disabilities be integrated into a public entity's
12 programs "to the greatest extent appropriate." Second, the Court found that 28 C.F.R. 35.163
13 applied. That regulation requires public entities to provide information to persons with
14 disabilities and also requires specific signage at non-accessible entrances.^{10/}

15 The integration requirement of 28 C.F.R. 35.130(d) does apply to public transportation
16 entities such as BART. As expressly stated in 49 C.F.R. 37.21(c), DOJ regulations apply
17 generally to transportation entities, but specific DOT regulations control, among other things,
18 physical alterations to facilities. Both agencies agree, however, with the Court's conclusion that
19 this regulation should not be applied as the plaintiffs argued. Although the plaintiffs argued that
20 this regulation governs the extent to which the accessible route must coincide with the regular
21 route used by the public, that issue is in fact specifically addressed by the ADAAG, see Sections
22 10.3.1(1), 10.3.2(2). That issue, therefore, is not controlled by the generally applicable
23

24 ^{10/} The Court concluded that BART did not violate 28 C.F.R. 35.130(d), 9/4/02 Order at 19, 22,
25 but concluded that it did violate 28 C.F.R. 35.163, 9/4/02 Order at 15. After BART filed its
26 motion for reconsideration, this Court held, interpreting 28 C.F.R. 35.102(b), that BART was *not*
27 required to comply with the DOJ regulations. 1/10/03 Order at 6-7.

1 integration requirement of 28 C.F.R. 35.130(d).

2 The specific requirements of 28 C.F.R. 35.163 do not govern the signage requirements of
3 the accessible route of a key station. Subpart (a) of that regulation requires that information be
4 provided to persons with disabilities.^{11/} DOT has a regulation specifically requiring such
5 information regarding public transportation facilities. DOT's regulation, 49 C.F.R. 37.167(f),
6 provides:

7 The entity shall make available to individuals with disabilities adequate
8 information concerning transportation services. This obligation includes making
adequate communications capacity available, through accessible formats and
technology, to enable users to obtain information and schedule service.

9 Under both the DOT and DOJ regulations, see 49 C.F.R. 37.21(c); 28 C.F.R. 35.102(b), the
10 transportation-specific DOT regulation applies to transportation entities. DOT does not interpret
11 its regulation as requiring alterations to an entity's facilities, such as placing striping on stairs.
12 Rather, by its terms, this regulation concerns the provision of *information* in a way that is usable
13 by persons with disabilities through such things as Braille, TDD systems, and the like. See 49
14 C.F.R. pt. 37, App. D, § 37.167 (discussing this requirement). The requirement of disseminating
15 information about the entity's activities in a usable form is an important component of making
16 transportation facilities accessible to persons with disabilities, including persons with low vision.

17 Subpart (b) of the DOJ regulation, 28 C.F.R. 35.163(b), requires that certain signage be
18 placed at non-accessible entrances directing persons to the accessible entrance.^{12/} DOT's
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20
21 ^{11/} That regulation provides:

22 A public entity shall ensure that interested persons, including persons with
23 impaired vision or hearing, can obtain information as to the existence and location
of accessible services, activities, and facilities.

24 ^{12/} That regulation provides:

25
26 A public entity shall provide signage at all inaccessible entrances to each of its
facilities, directing users to an accessible entrance or to a location at which they

1 regulations contain a parallel provision. As noted above, ADAAG Section 10.3.1(1) requires for
2 new construction signage directing patrons to the accessible route if that route is not the same as
3 the route used by the general public. That requirement also applies to key stations, see Section
4 10.3.2(2). The required signage must comply with Sections 4.30.1, 4.30.2, 4.30.3, 4.30.5, and
5 4.30.7(1). These provisions require specific features, such as size, contrast, and anti-glare
6 requirements, that make such signage useful to persons with visual impairments. Braille must be
7 used on signs at entrances, Sections 10.3.1(4); 10.3.2(2), although Braille is not required on signs
8 within the station, Section 10.3.1(1). As this Court correctly recognized, DOT's transportation-
9 specific signage regulations, rather than DOJ's regulation, apply to the accessible routes in key
10 stations. As discussed in the next section, those regulations validly implement the requirements
11 of the ADA because, among other things, they reasonably provide for the needs of persons with
12 visual impairments.

13 4. *Properly Interpreted, DOT's Regulations Fully Implement The Requirements Of*
14 *The ADA And Are Not Arbitrary And Capricious*

15 This Court concluded that DOT's regulations were invalid because the "regulations
16 arbitrarily and capriciously fail to consider the needs of those with visual impairments." 1/10/03
17 Order at 8. A view of the entire set of DOT regulations shows this conclusion was incorrect,
18 however, because it failed to account for all of DOT's extensive regulations. There appear to be
19 two relevant issues here. First, whether DOT considered or ignored the needs of persons with
20 visual impairments when it drafted its regulations. Second, whether the requirements that DOT
21 has chosen to impose are arbitrary and capricious because they fail to implement the ADA
22 requirement that facilities be "readily accessible." We address each point in turn.

23 First, as discussed at pp. 7-9, *supra*, DOT's regulations were promulgated after careful

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25 can obtain information about accessible facilities. The international symbol for
26 accessibility shall be used at each accessible entrance of a facility.

1 consideration of the needs of all persons with disabilities, including persons with visual
2 impairments. As discussed at pp. 5-7, *supra*, the DOT regulations impose numerous
3 requirements on public transportation entities such as BART that specifically address the needs
4 of persons with visual impairments. While the regulations regarding accessible features of
5 transportation facilities make them actually usable to most persons with disabilities, the
6 regulations require more than just readily accessible facilities. For those persons who are still
7 unable to use the readily accessible facilities, DOT's regulations provide that such persons,
8 including persons with "vision impairments," are entitled to comparable paratransit service. 49
9 C.F.R. 37.123(e)(1); 42 U.S.C. 12143(c)(1). Paratransit is thus a critical "safety net" for those
10 individuals with disabilities for whom the accessibility requirements are insufficient to provide a
11 facility that they can use. See 49 C.F.R. pt. 37, App. D, § 37.123 (discussing role of paratransit
12 in context of accessible public transportation).

13 As to the second point, in finding that BART's accessible routes were not usable by
14 persons with visual impairments, it appears that this Court focused *only* on the needs of persons
15 with visual impairments sufficiently severe that they could not benefit from the signs that the
16 DOT regulations do require. See 9/4/02 Order at 13 ("BART does not dispute that there are no
17 Braille, raised letter, or auditory cues directing persons to the 'universal' accessible route."). But,
18 as discussed above, the Access Board carefully considered whether its guidelines would require
19 tactile signs within stations and concluded, after notice, comment, and thorough analysis, that
20 they would not. DOT adopted the Access Board's guidelines in its rulemaking after carefully
21 considering the Board's reasoning and conclusions. This Court is required to give that decision
22 considerable deference. See *Environmental Def. Ctr.*, 344 F.3d at 860 (agency decision not to
23 regulate entitled to deference where agency "articulated a rational connection between record
24 facts indicating insufficient data to categorically regulate facilities * * * and its corresponding
25 decision not to do so").

26 Nothing in the ADA mandates the placement of particular signs in any particular form at

1 any particular place. DOT's regulations require public transportation programs such as BART to
2 make adequate information available to persons with disabilities and to provide directional
3 signage that is intended to assist persons with visual impairments. As noted above, compliance
4 with those regulations makes stations usable by the vast majority of persons with disabilities,
5 including persons with visual impairments, and accordingly satisfies the ADA. The Access
6 Board expressly stated that its signage requirements were intended to make the signs usable to
7 persons with mobility impairments and persons whose visual impairments were not "severe."
8 The Board thus had to balance competing needs and chose to adopt a guideline that would meet
9 the needs of most people. Moreover, the Board concluded that it lacked sufficient information in
10 this area and, as a result, reserved action in this area pending further study or research. DOT
11 considered that analysis and adopted that guideline in its rulemaking. That was a legitimate
12 exercise of agency rulemaking, particularly in the context of visual impairments, which impose
13 varying degrees of disability.

14 As detailed above, the Access Board specifically considered how to ensure that signs in
15 public transportation facilities were accessible to the visually impaired and adequately indicated
16 the accessible route, and concluded that it did not have sufficient information to promulgate a
17 *specific* guideline for signs indicating the accessible route to patrons with *severe* visual
18 impairments. DOT's decision to adopt that conclusion is reasonable and, therefore, entitled to
19 deference. See *Environmental Def. Ctr.*, 344 F.3d at 860. DOT's decision to accept the Access
20 Board's careful recommendation was also rational and, therefore, entitled to deference. *Ibid.*

21 Also, DOT has found that the ability of persons with visual impairments to access public
22 transportation varies greatly depending on the skills and abilities of the individuals. Persons with
23 identical visual abilities may have completely different abilities to access a "readily accessible"
24 facility because of different levels of training regarding the particular route, use of a service
25 animal, use of a cane, or other factors. If an individual, with whatever skills and abilities he or
26 she has, cannot use the "readily accessible" facilities, he or she would be entitled to comparable

1 paratransit services, even if training or some other aid might make paratransit unnecessary. See
2 49 C.F.R. 37.123(e)(1). Furthermore, persons with visual impairments might be able to access
3 facilities for some routes they frequently travel, such as home to work, but be unable to access
4 them for unfamiliar routes, such as home to a medical appointment. For that reason, DOT's
5 paratransit regulations provide for paratransit service for a route that the individual cannot
6 access, even if he or she can access other routes. 49 C.F.R. 37.123(e)(3).^{13/}

7 DOT considered the accessibility requirements for public transportation programs and
8 facilities in a "detailed and reasoned fashion," *Chevron*, 467 U.S. at 865, including the Access
9 Board's detailed analysis and conclusions. As described above, most people with disabilities
10 will be able to use the key stations, assuming the public transit entity has satisfied the DOT's
11 regulatory requirement regarding accessibility standards. For those few people who cannot use
12 the stations despite those accommodations, DOT requires the public transit entity to provide
13 paratransit services to those individuals. Viewed overall, the DOT regulations provide
14 transportation programs, activities, and facilities, when considered in their entirety, that are
15 readily accessible to and usable by persons with disabilities, exactly as the ADA requires. As
16 such, the regulations are not arbitrary and capricious. *Ibid.*

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23 ^{13/} There is no requirement that transportation entities provide training to persons with visual
24 impairments. DOT has found, however, that providing training is a common practice among
25 large public transportation entities. Paratransit is an additional cost and can be expensive.
26 Therefore, transportation entities have a financial incentive to provide training to persons with
27 visual impairments, if they choose to use such training, so that they can use the readily accessible
28 facilities rather than paratransit.

CONCLUSION

1
2 The United States respectfully requests this Court hold that DOT's ADA regulations,
3 including 49 C.F.R. 37.9(a), are valid.

4 Respectfully submitted,

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1 I certify that on August 24, 2006, a copy of the foregoing Brief Of The United States As
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