Nos. 07-15661 & 07-15896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

SHARON GEORGE & SHARRICI FOURTE-DANCY,

Plaintiffs-Appellees

v.

BAY AREA RAPID TRANSIT DISTRICT,

Defendant-Appellant

UNITED STATES OF AMERICA,

Intervenor-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

_____

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

_____

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ARGUMENT

INTRODUCTION

Plaintiffs' brief raises numerous issues that were not addressed in the district court's final order. The district court found arbitrary and capricious the Department of Transportation (DOT) regulation interpreting the phrase "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs" in the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*. 42 U.S.C. 12147(b)(1). Plaintiffs now suggest (Appellees' Br. 4-5, 16-17)

a number of other grounds on which this Court could find a violation of not only the ADA, but of Section 504 of the Rehabilitation Act of 1973, California state law, "or any combination of these statutes and their implementing regulations." Although this Court may affirm a grant of summary judgment on any grounds reasonably supported by the record, it need not do so and usually does not. *United States* v. *Johnson Controls, Inc.*, 457 F.3d 1009, 1022 (9th Cir. 2006). Accordingly, there is no requirement that this Court consider the alternative bases for affirmance that plaintiffs set forth in their brief.

In this reply brief, we address those of plaintiffs' arguments that go to the validity of DOT's regulation, which was the basis of the district court's decision and the subject of our arguments to this Court. We show in the next Section that those arguments fail to establish the invalidity of the regulation at issue. We also briefly address plaintiffs' assertion that certain Department of Justice (DOJ) regulations apply in this case. The remainder of the arguments in plaintiffs' brief go to the separate issue of whether BART has complied with its obligation under state and federal law. In this litigation, we have not taken a position on whether BART has complied with the law, and we do not do so in this reply brief.

I

PLAINTIFFS FAIL TO SHOW THAT DOT'S REGULATION IS INVALID

A. Introduction And Standard Of Review

One difficulty in responding to plaintiffs' arguments on appeal is that it is unclear exactly to what relief plaintiffs claim they are entitled. In some places, plaintiffs argue without equivocation that they are seeking two specific modifications to BART's key stations: color-contrast stripes on stairs and accessible handrails. See, *e.g.*, Appellees' Br. 3. But plaintiffs also argue that BART would be in compliance with the ADA if, rather than installing those modifications, it installed different directional signage or audio cues. See Appellees' Br. 36. Because whatever relief plaintiffs might be seeking would be modifications to BART's key stations, the determinative issue is whether those modifications are required by 42 U.S.C. 12147(b)(1), which governs key stations such those at issue in this case.[1]

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[1] Plaintiffs erroneously argue (Appellees' Br. 54) that failing to make key stations readily accessible would not only be a violation of Section 12147(b)(1), but also would be a separate violation of 42 U.S.C. 12132. Plaintiffs are confused. Section 12132 states the general obligation of public entities not to discriminate against people with disabilities. The ADA provides remedies, including a private right of action, for violations of Section 12132. See 42 U.S.C. 12133. Under Section 12147(b)(1), a failure to make key stations readily accessible is defined as a specific instance of discrimination that violates Section 12132; it is not a separate violation.

Section 12147(b)(1) requires key stations to be made "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. 12147(b)(1); see U.S. Opening Br. 6 (discussing provision). Although the ADA does not define "readily accessible," DOT has done so in 49 C.F.R. 37.9(a).[2] That DOT regulation provides that a facility is "readily accessible" if it complies with all of the provisions in Part 37 of Title 49 in the Code of Federal Regulations, that is, with all of DOT's ADA regulations. None of those regulations specifically require accessible handrails or color-contrast stripes on stairs in key stations. As we explained in our opening brief, DOT's regulatory definition of "readily accessible" is not manifestly contrary to the statute or arbitrary and capricious, and this Court should reverse the district court's finding to the contrary.

B. Plaintiffs Have Not Shown That DOT's Regulatory Definition Of "Readily Accessible" Is Manifestly Contrary To The ADA

A legislative regulation such as 49 C.F.R. 37.9(a) would be invalid if a plaintiff could show that the regulation is manifestly contrary to the statute, arbitrary and capricious, or both. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983). The Supreme Court has recognized that

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[2] In this reply brief, as in our opening brief, we use the term "readily accessible" as a shorthand for the statutory phrase "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. 12147(b)(1).

when a private litigant defends its action based on a federal regulation, as BART has done here, the federal courts may address in such litigation the question of whether the regulation is invalid as a matter of law. Those legal arguments include whether the regulation contradicts the plain language of the governing statute or its promulgation was procedurally defective. See *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997).

1. Plaintiffs' Separate Legal Arguments Are Substantively Identical

Plaintiffs present three legal arguments challenging DOT's regulatory definition of "readily accessible." First, plaintiffs argue (Appellees' Br. 17-22) that DOT's regulation is inconsistent with the plain language of the ADA. Second, plaintiffs assert (Appellees' Br. 22-26) that Congress required DOT to issue regulations implementing the ADA, but DOT failed to do so by not issuing any regulations to address the needs of individuals with visual impairments. Third, plaintiffs argue (Appellees' Br. 26-32) that DOT's regulation is not entitled to deference because DOT has delayed for 17 years in issuing regulations to make key stations accessible to people with visual impairments.

None of these arguments have merit. As an initial matter, plaintiffs' second and third arguments are redundant. There is no meaningful difference between arguing that DOT failed to issue a required regulation in 1991 and arguing (because it is 2008) that DOT has not issued a required regulation in 17 years.

Moreover, those arguments are something of a red herring. Plaintiffs' real complaint is not that DOT failed to promulgate regulations; DOT issued an entire set of regulations, many of which address the needs of individuals with visual impairments. See U.S. Opening Br. 8-11. Rather, plaintiffs' complaint is that DOT's regulations do not require something that plaintiffs want. To achieve that end, plaintiffs repeatedly argue that the ADA, through the term "readily accessible," unambiguously guarantees that the two named plaintiffs will be able to use key stations. See, *e.g.*, Appellees' Br. 15, 19-21 & 33. This argument is incorrect.

2. The Statutory Term "Readily Accessible" Does Not Unambiguously Guarantee Universal Accessibility For Every Individual With A Visual Impairment

At the first step in the *Chevron* analysis, the question for this Court to decide is "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, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984)). Plaintiffs argue that the language of the ADA unambiguously guarantees access to key stations for individuals with visual impairments. The language of the ADA states that stations must be "readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. 12147(b)(1). Relying on the House Report, plaintiffs

argue: "Appellees and other persons with visual impairments should be able to 'enter into, exit from, and safely and effectively use' key stations at BART facilities for those facilities to be considered 'readily accessible.'" Appellees' Br. 20-21 (bolding omitted) (quoting H. Rep. No. 485, 101st Cong., 2d Sess. (1990)).

Plaintiffs are wrong to conclude that whether something is readily accessible is to be defined in terms of its accessibility to people with visual impairments. The language of Section 12147(b) — "individuals with disabilities, including individuals who use wheelchairs" — does not permit the conclusion that the level of access required by the phrase "readily accessible to and usable by" would apply to individuals with visual impairments differently from the way it applies to individuals with any other disabilities. Thus, plaintiffs' "plain-meaning" analysis — that suggests the statute mandates access to key stations for every individual with a visual impairment — would equally suggest mandatory access for *every* individual with *any* disability.

A second problem is that plaintiffs focus on whether "readily accessible" refers to using a station or being excluded from the station. See, *e.g.*, Appellees' Br. 21, 33. There is no dispute that the requirement that key stations be "readily accessible" deals with people using the station — indeed, it is unclear what else it might mean. But that does not solve the question of statutory interpretation here. There is a patent ambiguity in the congressional language. The term "individuals

with disabilities" leaves unexpressed whether this access must be for "*all* individuals with disabilities," "*nearly all* individuals with disabilities," "*most* individuals with disabilities," or something else. Moreover, while the meaning of "readily accessible" and "usable" would include entering and exiting the station, the terms clearly do not unambiguously address, as plaintiffs suggest, whether all people with visual impairments must be able to enter and exit the station.

It is clear from the statutory text as a whole, legislative history, and common sense that congressional intent would not be satisfied with a station that only two people could use. But as we argued in our opening brief (p. 22-24), it is equally clear from the plain language of the statute that the congressional intent would be satisfied even if some individuals with disabilities, and specifically some individuals with visual impairments, were unable to use key stations, and accessed public transportation through alternative services.

The language of a statute is not read in isolated pieces; one must look to the statute as a whole to understand Congress's intent. See *Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 490 (9th Cir. 2007) (en banc) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The meaning of the term "readily accessible" in Section 12147(b)(1) is significantly informed by the ADA provision that requires entities such as BART to provide alternate paratransit services, 42 U.S.C. 12143. That latter Section also

uses the term "readily accessible." Specifically, that ADA requires that paratransit be provided to

> any individual with a disability who is unable, as a result of a physical or mental impairment (*including a vision impairment*) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is *readily accessible* to and usable by individuals with disabilities.

42 U.S.C. 12143(c)(1)(A)(i) (emphasis added). Two things are clear from this text. First, Congress did *not* intend the term "readily accessible to and usable by individuals with disabilities" to mean that *all* individuals with disabilities must be guaranteed use of "readily accessible" vehicles and facilities. Rather, Congress intended that those who could not use these vehicles and facilities — despite the vehicles and facilities being "readily accessible" — would be eligible for paratransit services. Second, Congress expressly recognized that some individuals with visual impairments would be among those who would be eligible for paratransit services.[3]

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[3] Plaintiffs argue that paratransit is intended only for people with "severe" disabilities, which apparently can never mean individuals with visual impairments. Appellees' Br. 44. That, however, is not how the ADA works. Eligibility for paratransit turns on the nature of one's disability, not on its "severity." Eligibility turns *only* on whether the individual's disability prevents him or her from boarding, riding, or disembarking from a transportation vehicle, see 42 U.S.C. 12143(c)(1)(A)(i), (ii), or from traveling to a boarding location or from a disembarking location, 42 U.S.C. 12143(c)(1)(A)(iii). Indeed, it has been DOT's experience that whether a person with a visual impairment can use a key station or needs to rely on paratransit will often depend less on the specific extent of the individual's impairment than it does on other factors, such as whether the

Congress clearly understood that the definition of "readily accessible" that DOT would implement would not be a guarantee that every individual with a disability would be able to access public transportation through a key station. For those individuals who cannot use a key station, paratransit services are the statutorily mandated alternate means by which they can use public transportation. Indeed, it is difficult to imagine a set of regulations that could specify mandatory accessiblity features that would both anticipate *every* individual's particular needs and be feasible.

The decision of what accessible features should be required for readily accessible stations requires a balance of feasibility and effectiveness. Determining what modifications are reasonable is clearly a policy decision. Congress expressly left a gap for DOT to fill by leaving "readily accessible" undefined, and by doing so, Congress delegated to DOT the authority to make these necessary policy choices. See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2347 (2007) (Court inferred that Congress intended its delegation to an agency to promulgate a definition to include the authority to determine policy questions that might turn on the agency's expertise). Nothing in plaintiffs' arguments suggests that the precise balance of competing policy considerations that DOT struck when

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individual has received training on how to find a station and navigate through it and whether the individual uses a cane or service animal.

it promulgated its definition of "readily accessible" was manifestly contrary to the statute.

Indeed, beyond their faulty plain-language argument, plaintiffs do not challenge our argument (U.S. Opening Br. 20-24) that, under the appropriate *Chevron* deference, DOT's regulatory definition of "readily accessible," 49 C.F.R. 37.9(a), is a permissible construction of 42 U.S.C. 12147(b)(1). DOT has addressed the needs of people with all types of disabilities, including people with visual impairments. Because plaintiffs' arguments that DOT is not entitled to *Chevron* deference are incorrect, DOT's regulatory definition must be given "controlling weight" unless it is arbitrary and capricious. *Chevron*, 467 U.S. at 843-844. We discuss that issue in Section C below.[4]

C. Plaintiffs' Alternate Arguments Rely On Factual Assertions That Have Not Been Litigated Or Proven

As we have shown, this Court can readily resolve plaintiffs' alternate arguments that raise legal challenges to the DOT regulation by analyzing the language of the statute and the language of the regulations. But some of plaintiffs'

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[4] Plaintiffs rely extensively on legislative history to argue that the term "readily accessible" requires entry and exit from stations. This Court has recognized that an apparent ambiguity in statutory language can be "clarified by the usual interpretive aids." *Arizona Health Care Cost Containment Sys.* v. *McClellan*, 508 F.3d 1243, 1253 (9th Cir. 2007). But here, the statutory language, read as a whole, clearly shows that Congress anticipated that some individuals with visual impairments would be unable to use readily accessible vehicles and stations. There is nothing for the legislative history to clarify.

challenges to DOT's regulation do not simply rely on the language of the statute and regulation. Rather, those arguments are founded on significant factual assertions regarding how well DOT accomplished its goal of making stations readily accessible. That is, plaintiffs seem to argue that the regulation is invalid because the result of DOT's regulation is that stations are in fact not accessible to people with visual impairments.

In arguing that DOT's regulation is invalid, at some points, plaintiffs assert that DOT's regulation actually excludes individuals with visual impairments from key stations. See, *e.g.*, Appellees' Br. 21, 33. Less sweepingly, plaintiffs assert that DOT's regulation "do[es] not provide the protections mandated by Congress for a large portion of the [disabled] community." Appellees' Br. 4. Plaintiffs thus appear to be asserting that either *no* individuals with visual impairments can use key stations — that is, they are all excluded — or merely that some large number cannot use key stations. Neither of those assertions is a question of law to be discerned from the language of a statute or regulation. They are factual assertions for which plaintiffs have cited nothing in the record, and, as far as we can tell, plaintiffs have not put on any proof regarding them.

Plaintiffs also argue (Appellees' Br. 31) that DOT failed to offer evidence that it "ever considered the unique needs of visually disabled persons to locate and follow the public routes and to maintain orientation at public facilities." They also

argue (Appellees' Br. 31) that DOT "provide[d] no records from any hearings or rule-making comments that discuss the issue of *how* visually impaired persons orient themselves in public buildings."

Plaintiffs thus seem to be relying on the fact-bound assertion that DOT's regulation is substantively arbitrary and capricious either because DOT ignored an important aspect of the problem or because its regulation is contrary to the evidence before the agency. See *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (explaining the meaning of "arbitrary and capricious"). But, as we noted in our opening brief (p. 20), if plaintiffs wish to challenge DOT's regulation, they bear the burden of proof. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers Of Am.* v. *United States Dep't of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005). DOT's regulation is presumed to be valid, and plaintiffs must prove otherwise. *Ibid*.

These sort of fact-bound claims must be decided based on the administrative record before the agency at the time of the agency's decision. See *National Wildlife Fed'n* v. *Burford*, 871 F.2d 849, 855 (9th Cir. 1989). Moreover, a plaintiff is not free to raise any claims against an agency at any time. Where a plaintiff's complaint is, as here, that the agency has not amended its rule based on subsequent

circumstances, the plaintiff must first avail itself of the administrative procedures to petition the agency for a rulemaking. See *Auer*, 519 U.S. at 459.[5]

It is not surprising that plaintiffs cannot point to any evidence in this case to prove the factual assertions that underlie their arguments. Plaintiffs have not litigated these issues nor have they brought *any* claims or sought any relief against the United States. Obviously, BART is not responsible for the regulations being promulgated, cannot articulate the reasons for the agencies' decisions, and does not have the administrative record to illuminate the decisional process if that were necessary. Plaintiffs, of course, are free to pursue in an appropriate forum and through appropriate procedures whatever claims against the United States they believe are meritorious. They have not done so in this litigation. While plaintiffs argue (Appellees' Br. 4) that this case is not just about "a request to accommodate two plaintiffs," the record belies that assertion. Plaintiffs point out that there were more than six million persons with visual impairments in the United States as of

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[5] In our opening brief (pp. 25-38), we addressed the district court's conclusion that DOT's regulation was arbitrary and capricious. The district court relied on the Access Board's explanations, published in the Federal Register, of why it was adopting some requirements but not others, and concluded that the Board itself recognized the inadequacy of its guidelines but promulgated them nonetheless, and has not revised them since. See E.R. 11-13. Those issues can be resolved based on the administrative explanations already published in the Federal Register. But plaintiffs' fact-bound assertions regarding whether stations are sufficiently accessible to people with visual impairments, and particularly their claim that perhaps millions of people with visual impairments cannot use these stations, cannot be similarly resolved.

1981 (Appellees' Br. 2). Based on that number, which by itself has no significance in this litigation, plaintiffs suggest that there are millions of persons with visual impairments who are, at the very least, under-served by DOT's regulations. But plaintiffs point to nothing in the record to support that contention, referring only to the evidence before the district court that these two plaintiffs experienced difficulty using two BART stations on three days in 1999 and 2000. Thus, at bottom, this case truly is just about two people.

II

PLAINTIFFS' ALTERNATIVE ARGUMENTS MISINTERPRET THE ADA AND IMPLEMENTING REGULATIONS

A. The District Court Did Not Address BART's Obligation To Provide Readily Accessible Programs And Services In Its Existing Facilities, Which Is Separate From Its Obligation To Provide Readily Accessible Key Stations

Plaintiffs also argue (Appellees' Br. 45-46) that in addition to BART's obligation to provide key stations that are "readily accessible" under 42 U.S.C. 12147(b)(1), BART is obligated under 42 U.S.C. 12148(a) to ensure that its programs and activities conducted in its existing stations are "readily accessible," "when viewed in the entirety." That statement is correct legally, but the district court did not address whether BART has complied with its obligations regarding all of its programs and activities, which is separate from its obligation to provide "readily accessible" key stations.

Under 42 U.S.C. 12147(a), existing facilities need not be modified unless they are altered, in which case the alterations must be made readily accessible to the extent practicable. Thus, Section 12148(a)'s requirement that a provider's programs and activities conducted in existing facilities be made readily accessible "when viewed in the entirety" provides a level of benefit for individuals with disabilities who would be using existing transportation facilities. But Section 12147(b)(1) imposes a greater obligation on key stations, which are a special type of existing facility. Those stations must themselves be made readily accessible.

We take no position on whether plaintiffs have a viable claim under Section 12148(a) regarding BART's programs and activities conducted in its existing facilities. We merely point out that the district court did not address that issue in its opinion.

B. DOJ's Regulations Regarding Effective Communication, Signs At Entrances, And Information Do Not Govern BART's Obligation To Provide Accessible Key Stations

On appeal, plaintiffs argue (Appellees' Br. 48-51) that the modifications they seek are mandated by three DOJ regulations: 28 C.F.R. 35.160(a), which requires effective communication with people with disabilities; 28 C.F.R. 35.163, which requires in subsection (a) that public entities provide information regarding accessible facilities or services, and in subsection (b) that they provide directional signage at inaccessible entrances; and 28 C.F.R. 35.130, which requires in

subsection (d) that services be provided in the most integrated setting possible. Appellees' Br. 48-51. But none of these regulations governs the modifications to key stations that plaintiffs desire. Either the DOJ regulations do not apply because a DOT regulation already governs the specific issue, or plaintiffs have interpreted the DOJ regulations incorrectly, indeed, contrary to DOJ's own interpretation of those regulations.

First, DOJ's and DOT's regulations were drafted to be harmonious. See 49 C.F.R. 37.21(c). DOJ's regulations implement the general provisions of Title II of the ADA, which apply to all public entities, while DOT's regulations implement the transportation-specific provisions of subtitle B of Title II. See 28 C.F.R. 35.102(b); see also 28 C.F.R. Pt. 35, Appendix A (explaining 28 C.F.R. 35.102(b)); 49 C.F.R. Pt. 37, Appendix D (explaining 49 C.F.R. 37.21(c) and relations of the two sets of regulations). While public entities such as BART can be subject to requirements under both DOJ's and DOT's regulations, those regulations are not at cross-purposes and do not require contrary actions.

1. DOJ's Effective Communication Regulation

The first DOJ regulation upon which plaintiffs rely, 28 C.F.R. 35.160(a), requires, among other things, that a public entity's communication with individuals with disabilities be as effective as its communication with other people. The D.C. Circuit has applied that regulation to transportation providers, although in doing so

the court left open whether it *should* be so applied. See *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1210 & n.1 (D.C. Cir. 1997) (declining to address transportation provider's argument that regulation did not apply because the issue had not been raised below); see also *id*. at 1211 (discussing 28 C.F.R. 35.160 and DOT's similar 49 C.F.R. 37.173, which requires transportation providers to properly train their employees to assist people with disabilities).

As the United States informed the district court, however, this Court need not decide the extent to which this regulation is applicable to transportation providers in order for the Court to determine that, whatever its scope, the regulation does not govern modifications in key stations. Rather, the effective communication regulation, 28 C.F.R. 35.160(a), governs precisely what its language indicates — communication between the public entity and individuals with disabilities. See E.R. 98-99; cf. *Burkhart*, 112 F.3d at 1209 (suit arose out of attempted communication between transit police officer and deaf passenger following altercation between passenger and bus driver). It does not regulate modifications like color-contrast striping as a form of "communication."

2. DOJ's And DOT's Information And Signage Regulations

The second DOJ regulation on which plaintiffs rely, 28 C.F.R. 35.163(a), requires that public entities provide information regarding its accessible programs and facilities. It is not relevant to plaintiffs' requested modifications to key

stations for two reasons: First, DOT has a parallel regulation, 49 C.F.R. 37.167(f), that specifically applies to transportation providers. Second, both 28 C.F.R. 35.163(a) and 49 C.F.R. 37.167(f) apply to *information* that must be provided to individuals regarding, among other things, accessible service; they do not govern modifications to facilities.

On the other hand, DOJ's 28 C.F.R. 35.163(b) does govern signage at inaccessible entrances, but DOT has a specific regulation, which is part of the incorporated ADAAG, that governs the transportation-specific issue of signage at entrances to key stations. See ADAAG § 10.3.2(2) (incorporating ADAAG § 10.3.1(1)(8)). DOT's transportation-specific regulations govern this issue, not DOJ's generally applicable parallel regulations.

3. DOJ's Integration Regulation

Finally, plaintiffs challenge BART's key stations under 28 C.F.R. 35.130(d), the DOJ integration regulation. DOT and DOJ agree that as a general matter the integration requirement applies to all public entities. But to the extent plaintiffs are arguing about modifications to key stations pursuant to 42 U.S.C. 12147(b)(1), that is governed by 49 C.F.R. 37.9(a). To the extent they are arguing how closely the accessible route must correspond to the circulation path for the general public, that is governed by the standard set out in ADAAG § 10.3.1(1) (new construction) and 10.3.2(2) (key stations). The "integration" concept does not require that everyone

must be able to use the route that people who do not have disabilities use. Clearly, a transit provider likely could not unnecessarily segregate people with disabilities into specific transit cars, but the issue of how the accessible route is defined by the regulations hardly implicates the "integration" concept. [6]

CONCLUSION

This Court should reverse the district court's finding that 49 C.F.R. 37.9(a) is arbitrary and capricious.

Respectfully submitted,

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[6] Plaintiffs rely (Appellees' Br. 52-53) on this Court's decision in *Barden* v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), which addressed whether a city's sidewalks were "programs" or "activities" covered by Title II of the ADA. DOJ argued as *amicus* that sidewalks were covered, and this Court relied on the government's interpretation of its own regulations. 292 F.3d at 1077. Because plaintiffs here assert interpretations of DOJ's regulations that DOJ itself rejects, *Barden* is no help to them.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 12.0 and contains no more than 4,594 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

KARL N. GELLERT

Dated: February 19, 2008

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2008, two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLANT were served by Federal Express next business day delivery on the following counsel of record:

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