No. 14-1729

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

M.R., a minor, through her mother and next friend, EDIE RUNNION,

Plaintiff-Appellant

v.

GIRL SCOUTS OF GREATER CHICAGO AND NORTHWEST INDIANA,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
THE HONORABLE HARRY D. LEINENWEBER, No. 1:12-cv-06066

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

MOLLY J. MORAN
Acting Assistant Attorney General

MARK L. GROSS
BONNIE I. ROBIN-VERGEER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 353-2464

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in this appeal, which presents an important question regarding the proper interpretation and application of Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (Section 504 or Rehabilitation Act). The Department of Justice (Department) issues regulations implementing Section 504, is authorized to bring civil actions to enforce the statute, and coordinates enforcement of Section 504 by all federal agencies. 29 U.S.C. 794, 794a; 28 C.F.R. Pt. 41 & App. A (Exec. Order No. 12,250). The United States thus has a strong interest in Section 504's proper interpretation.

In addition, this litigation involves construction of the definition of the term "program or activity" added by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which appears in the Rehabilitation Act, 29 U.S.C. 794(b); Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d-4a (Title VI); Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1687 (Title IX); and the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6107(4). Any interpretation of the term likely will affect the implementation of and the Department's enforcement obligations under all four statutes.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

QUESTION PRESENTED

The United States will address the following question:

Whether the district court erred in determining as a matter of law that the Girl Scouts of Greater Chicago and Northwest Indiana is not subject institution-wide to Section 504 of the Rehabilitation Act of 1973 because the organization is not "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation," 29 U.S.C. 794(b)(3)(A)(ii).

STATEMENT OF THE CASE

M.R., a minor, appeals the dismissal of her complaint with prejudice against the Girl Scouts of Greater Chicago and Northwest Indiana (GSGCNI) filed under Section 504 of the Rehabilitation Act, 29 U.S.C. 794. The district court ruled that M.R. failed to establish that all operations of GSGCNI are subject to Section 504

because she did not prove that federal financial assistance was extended to defendant "as a whole" or that the organization is "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." 29 U.S.C. 794(b)(3)(A)(i)-(ii).

As discussed below, the court erred in determining as a matter of law that GSGCNI is not principally engaged in the business of providing education or social services. Moreover, in the event the organization provides more than one service enumerated in the statute, the court should consider these services collectively in evaluating the "principally engaged" statutory requirement. Accordingly, this Court should remand the case for further proceedings.

1. The Statutory Scheme

"The Rehabilitation Act of 1973 establishes a comprehensive federal program aimed at improving the lot" of individuals with disabilities. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). Among its purposes is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. 701(b)(1). To that end, Congress enacted Section 504, which provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Section 504 is modeled after Title VI, which provides that "[n]o person in the United States shall, on the

ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d; see also 42 U.S.C. 2000d-4a; Title IX, 20 U.S.C. 1681, 1687; the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6201, 6107(4).

Congress initially did not define the term "program or activity" in these statutes. In *Grove City College* v. *Bell*, 465 U.S. 555 (1984), the Supreme Court considered its meaning for purposes of Title IX, 20 U.S.C. 1681(a). The Court confined the statute's anti-discrimination prohibitions to the specific program or activity that receives federal financial assistance. *Grove City Coll.*, 465 U.S. at 571-574; accord *Consolidated Rail Corp.*, 465 U.S. at 636.

Congress responded by enacting the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (Restoration Act), which amended the Rehabilitation Act and three other anti-discrimination statutes. As amended, Section 504 now defines "program or activity," in relevant part, to mean "all of the operations" of—

> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
>
> > (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> >
> > (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the

> case of any other corporation, partnership, private organization, or sole proprietorship * * *

any part of which is extended Federal financial assistance.

29 U.S.C. 794(b).

2. Statement Of Facts And Procedural History

a. When the complaint was filed in August 2012, M.R. was a twelve-year-old girl living in Cook County, Illinois, who had joined GSGCNI when she was in kindergarten. SA 1, 3-4 (¶¶ 1, 7, 22).[1] GSGCNI is a private corporation organized under the laws of Illinois. SA 328 ¶ 7. It is the largest Girl Scout council in the country, encompassing six Illinois and four Indiana counties. SA 329 ¶ 8. Girl Scout councils are issued their charters by the National Board of Directors of Girl Scouts of the United States of America (GSUSA), which is federally chartered. Girl Scouts, *Blue Book of Basic Documents 2012*, at 25, 32-33, http://www.girlscoutsgcnwi.org/resources_publications (*Blue Book*).

M.R. is deaf and uses American Sign Language. SA 327, 331 (¶¶ 1, 18-21). For six years, GSGCNI provided M.R. a sign-language interpreter for troop meetings and outings, enabling her to participate in scouting activities. SA 327, 332 (¶¶ 1, 32-33). Sign-language interpreters "gave [M.R.] equal access to the crucial educational, social, and leadership development offered to her peers, and allowed full communication among [M.R.], her peers, and her troop leaders." SA 332 ¶ 33.

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[1] "SA __" refers to pages of the separate appendix filed by appellant. "RA __" refers to pages of the appendix appended to appellant's brief. "Doc. __" refers to pages of documents filed in the district court, identified by docket number.

In August 2011, before M.R. entered sixth grade, GSGCNI stopped providing her sign-language interpreter services. SA 327, 332 (¶¶ 2, 32). On August 29, 2011, M.R.'s mother, as in previous years, submitted a request for interpreter services before the start of the scouting year. SA 332 ¶ 34. GSGCNI denied that request, stating: "Currently the Council does not pay for these services." SA 333 ¶ 35. On October 27, 2011, M.R.'s mother submitted a reasonable accommodation request for interpreter services for a rock climbing event scheduled for November 20, 2011. SA 333 ¶ 36. Although GSGCNI provided an interpreter for that event and for a December 2011 troop meeting, it denied it was subject to Section 504 and stated that it was in the process of developing a uniform policy as to future meetings and events. SA 333 ¶¶ 38-40.

GSGCNI has a "Financial Assistance Policy," which states in part: "In order to support the participation of girls and adults with special needs, the Council will provide resource lists for girls and adults requiring skilled assistants to participate in Council programs and activities. The contracting of these assistants (e.g., interpreters, occupational therapists, nurse's aides) is the responsibility of the girl's parent(s) or guardian(s) or the adult requiring assistance." SA 334 ¶ 48; Doc. 16, Exh. A, at 1. Around the time of these events, GSGCNI also adopted a "pilot policy" stating it would provide "support services for those with special needs (e.g., interpreters, occupational therapists, nurse's aides) up to an individual maximum of $50/month per requester. The requester is responsible for paying the balance of services in excess of $50. Regardless of the number and nature of the requests,

there is a council-wide maximum of $5,000." SA 334 ¶ 49; Doc. 16, Exh. A, at 2. According to M.R., $50 will not pay for an interpreter for even one occasion. SA 335 ¶ 50.

On January 8, 2012, M.R.'s troop leaders announced that the troop would be disbanded. SA 333 ¶ 41. They told her mother that the troop was disbanding because of GSGCNI's decision to stop funding interpreters and the resulting cost to the troop and its members. SA 333-334 ¶¶ 43, 45. M.R. would like to join another troop, but because defendant has not agreed to provide interpreter services in any troop, she cannot. SA 334 ¶ 47.

The Department of Housing and Urban Development (HUD) and the Department of Justice provided federal financial assistance to GSGCNI programs or activities during the relevant time period.[2] Regulations of both agencies require the provision of auxiliary aids (such as qualified interpreters) to individuals with disabilities to afford them an equal opportunity to participate in programs or activities receiving federal financial assistance, unless doing so would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. See 24 C.F.R. 8.6 (HUD); 28 C.F.R. 42.503(f) (Department of Justice); see also 28 C.F.R. 39.160; 28 C.F.R. Pt. 39, at 1059-1060 (2013).

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[2] GSGCNI received federal funding for GirlSpace and the Healthy Living Initiative through grants from HUD administered by a City of Chicago agency and the City of Evanston and expiring December 31, 2012. SA 26-27 ¶¶ 2-4. GSGCNI received federal funding for its Beyond Bars Program from the Department of Justice; that grant was administered by GSUSA and expired on July 31, 2012. SA 27 ¶ 5; see also SA 359-361 ¶¶ 4-5.

M.R. does not claim that she was denied the right to participate in the specific programs for which GSGCNI received federal financial assistance during these events.

b. M.R. sued GSGCNI on August 1, 2012, alleging discrimination and retaliation in violation of the Rehabilitation Act. SA 1-11. She sought declaratory and injunctive relief and compensatory damages (SA 9-10), and requested a preliminary injunction shortly thereafter. M.R. alleged that defendant was "a recipient of federal financial assistance within the meaning of 29 U.S.C. § 794." SA 3 ¶ 12. GSGCNI moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, submitting evidence in support of its motion.

On October 26, 2012, the district court granted GSGCNI's motion to dismiss. RA 1-16. The court recognized that defendant admitted receiving federal funding for the GirlSpace and Healthy Living Initiative programs it had operated during the relevant time. RA 7.[3] But the court rejected both grounds M.R. offered for applying Section 504's requirements organization-wide to other operations of GSGCNI. First, the court rejected M.R.'s claim that federal financial assistance for these programs constituted funding "as a whole" under 29 U.S.C. 794(b)(3)(A)(i). RA 7-9. Second, the court rejected M.R.'s argument that GSGCNI was subject to Section 504 because it was a private organization "principally engaged in the business of

[3] As discussed in note 2, *supra*, GSGCNI also received federal funding for its Beyond Bars Program during the relevant events. The court's omission of this program is not important for purposes of this analysis.

providing" "education" and "social services" under 29 U.S.C. 794(b)(3)(A)(ii). RA 9-14. Although M.R. did not allege in her complaint that GSGCNI was principally engaged in providing education or social services, the court nonetheless addressed her arguments on that point to assess whether an amendment to the complaint would be "futile." RA 10-11.

The court ruled first that GSGCNI was not principally engaged in providing social services. RA 12-13. The court explained that, even assuming "that Defendant engages in *some* social service programs, the fact that a few of Defendant's programs could fall within the definition of 'social services' does not mean that Defendant is an organization 'principally engaged' in such a venture." RA 12. The court added that it did not consider "Defendant's most widely known program, the sale of Girl Scout cookies, to be a 'social service' for the purposes of Section 504." RA 12. In addition, the court noted that one of the dictionary definitions of "social services" cited by the Sixth Circuit in *Doe* v. *Salvation Army in the United States*, 685 F.3d 564, 570 (2012), stated that "social services" are performed by "trained personnel." RA 12. The district court observed that "troop leaders generally are parent volunteers, not trained personnel or trained professionals." RA 12.

Second, the court rejected M.R.'s contention that GSGCNI was principally engaged in the business of providing education. Aside from the GirlSpace program, which provides an "interactive, educational experience," the court faulted M.R. for failing to offer other examples (RA 13), even though M.R. cited additional examples

in her surreply (SA 177). (She later cited many more examples in her proposed amended complaint (see SA 199-207 (¶¶ 58-80, 89-111)), which the court denied her leave to file. See *infra* p. 11.) Instead, the court was persuaded that defendant was not principally engaged in providing education because "it is a private membership organization" and because Congress intended Section 504 to apply only to private entities that "provide a public service" or "perform governmental functions." RA 13 (citing S. Rep. No. 64, 100th Cong., 1st Sess. 4, 20 (1987)). Citing cases holding that the Girl Scouts or Boy Scouts were "bona fide private membership clubs" or "private clubs" for purposes of exemptions in certain titles of the Civil Rights Act of 1964 or the Americans with Disabilities Act (ADA), and noting the similarities between the ADA and the Rehabilitation Act, the court concluded that GSGCNI was not an organization that could be principally engaged in the business of providing social services or education under Section 504. RA 13-14.

c. In November 2012, M.R. moved to alter the judgment and for leave to file an amended complaint. SA 183-300. She argued that GSGCNI readily qualifies as a private organization principally engaged in the business of providing education, health care, social services, and/or parks and recreation, and further, that defendant receives federal financial assistance "as a whole." SA 184. M.R. submitted a proposed amended complaint and evidence supporting her "principally engaged" argument. SA 190-300. She also maintained that the court should not dismiss her complaint before she could take discovery. SA 185-186.

On March 12, 2013, the court decided that new evidence by M.R. purporting to establish that defendant receives federal funding "as a whole," justified allowing her to conduct limited discovery on that issue. RA 23. The court emphasized, however, that it was granting M.R.'s motion based solely on her "as a whole" argument: "The Court does not find Plaintiff's arguments with respect to Defendant being an organization principally engaged in education or social services persuasive" but rather, "repetitive" of her contentions addressed in the court's October 2012 opinion. RA 24. Accordingly, the court permitted M.R. to file an amended complaint only on the "as a whole" basis for Section 504 coverage. RA 25. M.R. filed an amended complaint under those conditions. SA 327-340.

d. Following limited discovery and further briefing, the court issued an order on March 7, 2014, dismissing the case with prejudice. RA 29. The court held that the evidence established that federal money was used to support only the specific programs for which the money was designated, that defendant did not receive federal funds for general assistance, and that GSGCNI therefore "did not receive federal funds 'as a whole.'" RA 28-29.

According to a declaration filed by GSGCNI, as of April 2013 defendant was no longer receiving federal financial assistance. SA 358 ¶ 2; see also *supra* note 2.

SUMMARY OF ARGUMENT

The district court failed to apply the correct legal standards to the question of whether GSGCNI was "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation." 29 U.S.C. 794(b)(3)(A)(ii).

1. The district court erred in its analysis of whether GSGCNI was principally engaged in the business of providing "education." M.R.'s proposed amended complaint, which the court denied her leave to file, cited, with supporting exhibits, numerous examples of educational programs GSGCNI operated, as well as characterizations by GSUSA and GSGCNI of their organizations as "educational." These examples and characterizations plausibly suggest that defendant is engaged in a broad course of "education" within the ordinary meaning of the term.

A private organization must also be "principally engaged" in providing the services enumerated in Section 794(b)(3)(A)(ii) before all its operations will be subject to Section 504. An activity in which an organization is "principally engaged" represents the primary, or foremost, activity engaging that organization. *Doe* v. *Salvation Army in the United States*, 685 F.3d 564, 571 & n.10 (6th Cir. 2012). The allegations of M.R.'s proposed amended complaint and defendant's own website plausibly suggest that GSGCNI is "principally engaged" in the business of providing education.

The district court's conclusion that the "principally engaged" basis for Section 504 coverage does not apply to GSGCNI because it is a "private club" is incorrect.

The court read into the statutory text a limitation on institution-wide Section 504 coverage of private organizations that simply is not there. Case law construing the scope of liability for private clubs under express exceptions included in certain titles of the Civil Rights Act of 1964 or the ADA has nothing to do with this case brought solely under Section 504, which defines the circumstances in which private organizations *that receive federal financial assistance* are subject to its anti-discrimination requirements.

2. The district court also erred in its analysis of whether GSGCNI is principally engaged in the business of providing "social services." "Social services" need not be rendered by "trained personnel" to qualify under Section 504. Even if there were such a requirement, it is clear from the record and defendant's own website that at least some programs involve girl scouts interacting with trained professionals, and that any volunteers are selected on the basis of their job qualifications and receive the training necessary to perform their functions. There can be no doubt that programs GSGCNI runs constitute "social services" within the ordinary meaning of the phrase.

3. Finally, GSGCNI appears to be engaged in more than one of the services identified in 29 U.S.C. 794(b)(3)(A)(ii). Read sensibly, the statute requires that a private organization adhere institution-wide to Section 504's requirements if it is principally engaged in the business of providing *any* of the services enumerated in the statute, whether considered alone or in combination. It would be an absurd reading to conclude that an organization that is principally engaged in rendering

not one, but two or more, of what Congress considered to be important public services, could escape organization-wide statutory coverage.

ARGUMENT

The District Court Erred In Determining As A Matter Of Law That GSGCNI Is Not Principally Engaged In The Business Of Providing Education Or Social Services

It is undisputed that GSGCNI is a "private organization" and that part of the organization received "Federal financial assistance" during the relevant time frame. 29 U.S.C. 794(b) and (b)(3).[4] Because M.R. does not allege that she suffered discrimination or was excluded from participating in specific programs run by GSGCNI that received federal funding, her Section 504 claims depend upon the organization being subject institution-wide to the statute's requirements as specified in Section 794(b)(3).

A. The District Court Erred In Determining As A Matter Of Law That GSGCNI Is Not "Principally Engaged In The Business Of Providing Education"

"It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)); see also *Welsh* v. *Boy Scouts of Am.*, 993 F.2d 1267, 1269 (7th Cir. 1993) ("[T]he legislative purpose is expressed by the ordinary meaning of the words used.") (citation omitted). Section 504 defines the

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[4] Even if GSGCNI is no longer receiving federal financial assistance, this case is not moot. M.R. seeks compensatory damages and declaratory relief in addition to injunctive relief. SA 338-339; see, *e.g.*, *Greater L.A. Council on Deafness, Inc.* v. *Zolin*, 812 F.2d 1103, 1111-1113 (9th Cir. 1987).

term "program or activity" to mean "all of the operations" of "an entire corporation * * * or other private organization * * * which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b) and (b)(3)(A)(ii).

1. One question is whether GSGCNI is engaged in the business of providing "education." "Education" "[c]omprehends not merely the instruction received at school or college, but the whole course of training; moral, religious, vocational, intellectual, and physical." *Black's Law Dictionary* 514 (6th ed. 1990). The definition adds: "Acquisition of all knowledge tending to train and develop the individual." *Ibid.*; see also *Webster's Third New International Dictionary* 723 (1993) (defining "education" in part as "the act or process of providing with knowledge, skill, competence, or usu. desirable qualities of behavior or character or of being so provided esp. by a formal course of study, instruction, or training").

In her proposed amended complaint, M.R. cited numerous examples of educational programs operated by GSGCNI, as well as characterizations by GSUSA and GSGCNI of their organizations as educational. To receive and retain a charter, a Girl Scout council such as GSGCNI agrees "to subscribe to the purpose, adhere to the policies, and be guided by the standards of Girl Scouts of the USA." *Blue Book* at 25. The Constitution of GSUSA describes its program as follows: "Grounded in the Girl Scout Promise and Law, Girl Scouting is a non-formal, experiential, and cooperative education program that promotes girls' personal growth and leadership

development." SA 197 ¶ 48 (quoting SA 222 (*Blue Book* at 7)). In selecting "Service Categories" for the Combined Federal Campaign charity list, GSUSA describes its services as "Educational Institution and Related Activities" and "Youth Development." See SA 197-198 ¶ 49 (citing SA 224, 227). Likewise, a FY 2011 audited financial statement by GSGCNI describes "Girl Scouting" as "an out-of-school education program designed to help girls put into practice the fundamental principles of the Girl Scout movement." SA 199 ¶ 58 (citing SA 229).

As alleged in M.R.'s proposed amended complaint, with supporting exhibits, numerous programs offered by GSGCNI reinforce these characterizations of its services as "educational." Examples include:

- GirlSpace "provides a safe space and structured, age-appropriate activities for low-income girls during the critical after-school hours, offered at 40 Chicago Public Schools." SA 199 ¶ 60 (citing SA 232). Defendant described GirlSpace in its 2011 Annual Report as "holding educational programs throughout the year." SA 199 ¶ 61 (citing SA 237).

- "STEM (science, technology, engineering, and math)" "engages girls in innovative hands-on activities and discussions that encourage them to pursue STEM interests in both schools and careers, and improve their academic performance." SA 200 ¶¶ 67-68 (citing SA 231).

- Journey World facility is "[a] state-of-the art facility that offers 3rd-12th graders unique, immersive learning experiences that encourage them to explore careers in science, technology, engineering, math, environmental sciences, commerce, entrepreneurism and finance." SA 200-201 ¶ 72 (alteration in original) (citing SA 232). According to defendant, "no other program more directly connects the business community and business leaders to the crucial educational issues of the 21st century and shows them how they can act to address those issues and improve the educational outcomes." SA 201 ¶ 74 (quoting SA 243).

- Project Law Track is a series of interactive sessions relating to the field of law. "[W]ell-prepared Girl Scouts entered a courtroom at the United States Northern District of Illinois Court in Chicago ready to give their opening

remarks, question the witnesses, analyze the facts, and reach a verdict within a reasonable doubt during a mock trial." SA 202 ¶¶ 78-79 (citing SA 248, 251-252).

- Healthy Living Initiative "helps girls lead healthier lives by building their skills and knowledge relating to fitness, nutrition, self-esteem and relationships." SA 203 ¶ 90 (citing SA 231).

- M.R.'s proposed amended complaint alleges that she "participated in and benefitted from many educational Girl Scout activities, which included learning how to administer first aid, how to cook outdoors, and how to use maps, compasses, and other navigational tools. She also learned about water safety rules and the traditions of people who live in other countries." SA 194 ¶ 25.

In short, M.R.'s proposed amended complaint plausibly alleges that GSGCNI engages in a broad course of "education" that is "vocational, intellectual, and physical," *Black's Law Dictionary* 514 (6th ed. 1990), and that provides girls "with knowledge, skill, competence, or * * * desirable qualities of behavior or character." *Webster's Third New International Dictionary* 723 (1993).

2. The next question is whether GSGCNI is "principally engaged" in the business of providing education. An activity in which an organization is "principally engaged" connotes the primary, or foremost, activity engaging the organization. As the Sixth Circuit recognized, *Black's Law Dictionary* 1312 (9th ed. 2009) defines "principal" as "[c]hief; primary; most important." *Doe* v. *Salvation Army in the United States*, 685 F.3d 564, 571 n.10 (2012) (*Salvation Army*); see also, *e.g.*, *Webster's Third New International Dictionary* 1803 (1993) (defining "principally" as "primarily, chiefly, mainly"). This construction of the term would require a plaintiff to demonstrate that GSGCNI was engaged in mostly educational activities; in other words, educational programming would comprise at least a plurality of the

organization's efforts. The district court denied M.R. an opportunity, however, to amend her complaint or conduct discovery regarding whether defendant was principally engaged in providing education or any other services enumerated in the statute, leaving her to rely only on publicly available information about the comparative quantity of educational programs defendant operates. M.R.'s proposed amended complaint and defendant's own website plausibly suggest that GSGCNI is principally engaged in the business of providing education. This Court should remand to the district court to give M.R. the opportunity to establish this point.

3. Rather than allow the development of the record on this basis for subjecting defendant to Section 504, the district court decided that defendant was not the type of organization that can, under any circumstances, be "principally engaged in the business of providing education" within the meaning of 29 U.S.C. 794(b)(3)(A)(ii). First, the court cited defendant's argument that Congress intended Section 504 to apply only to those private entities that "provide a public service" or "perform governmental functions." RA 13. Second, the court stated that, instead of providing a "public service," GSGCNI is a private club exempt from Section 504, just as some courts have held that the Girl Scouts and Boy Scouts are private membership organizations or private clubs exempt from liability under certain titles of the Civil Rights Act of 1964 or the ADA. RA 13-14.

Both strands of the court's analysis are wrong. First, the court read into Section 504 a limitation on coverage of private organizations that simply is not there. If a private organization receives federal financial assistance and is

principally engaged in the business of providing services enumerated in Section 794(b)(3)(A)(ii), that is the end of the matter; all its operations are subject to Section 504. The statute is not ambiguous in this respect; thus, there is no need to resort to legislative history. *EEOC* v. *Chicago Club*, 86 F.3d 1423, 1434 (7th Cir. 1996).

Even if consulted, the legislative history buttresses the text's plain language that a private entity that receives federal funding and is principally engaged in providing the identified services is covered in all its operations. The court cited the Senate Committee Report's use of the phrases "provide a public service" and "perform governmental functions" as a reason not to apply Section 504 to GSGCNI. RA 13 (citing S. Rep. No. 64, 100th Cong., 1st Sess. 4, 20 (1987) (Senate Report)). But it is clear that the Senate Report used these phrases as shorthand for the types of services identified in the statute—i.e., education, health care, housing, social services, or parks and recreation. See, *e.g.*, Senate Report 4 ("For private corporations, * * * if the corporation provides a public service, such as social services, education, or housing, the entire corporation is covered."); *id.* at 18 (institution-wide coverage is required for corporations and other private entities "that provide services that are traditionally regarded as within the public sector, i.e., those enumerated in part (3)(A)(ii) of the definition of 'program or activity'"). If GSGCNI is principally engaged in providing education for girls, it is rendering a "public service" in the sense Congress meant.

Furthermore, the court wrongly concluded that GSGCNI is exempt from Section 504 because it is a private club. RA 13-14. The court relied on cases, some

involving the Girl Scouts or Boy Scouts, that construed the "bona fide private membership club" exception to Title VII of the Civil Rights Act of 1964 and the ADA, 42 U.S.C. 2000e(b), 12111(5)(B)(ii), and the "private club" exception to the public accommodations provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a(e). See RA 13-14 (citing *Chicago Club*, 86 F.3d at 1437, *Welsh*, 993 F.2d at 1276-1277, and *Roman* v. *Concharty Council of Girl Scouts, Inc.*, 195 F. Supp. 2d 1377, 1382 (M.D. Ga. 2002)).[5] The court reasoned that because the ADA was "built on" the Rehabilitation Act, any exemption for private clubs set out in the ADA must reflect a similar exemption in Section 504. RA 14 (citation omitted).

That line of cases involving liability directly under the ADA or the Civil Rights Act of 1964 is irrelevant to the question in this case, brought only under Section 504. The terms of Section 504 specify the circumstances in which private organizations *that receive federal financial assistance* are subject to the statute's non-discrimination requirements. The court's reasoning that, because GSGCNI is a private club, it cannot be subject to institution-wide coverage under Section 504, is particularly difficult to understand when *the very purpose* of Section 794(b)(3) is to set the precise conditions under which Section 504's requirements will be imposed institution-wide on *private* organizations. 29 U.S.C. 794(b)(3). If Congress had wanted to exempt private clubs from Section 504, it would have said so explicitly, as it did in other statutes.

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[5] The district court referred to Title II "of the ADA" (RA 14), but the cited decision, *Welsh*, 993 F.2d 1267, discussed the applicability of the private club exception of Title II of the Civil Rights Act of 1964.

*B. The District Court Erred In Determining As A Matter Of Law That GSGCNI Is Not "Principally Engaged In The Business Of Providing * * * Social Services"*

The district court also erred in concluding that defendant is not principally engaged in providing social services. The court rejected that basis for subjecting defendant to Section 504 because the organization's troop leaders "generally are parent volunteers, not trained personnel or trained professionals" and because the court did not believe selling Girl Scout cookies was a "social service." RA 12. Not only are these reasons based on assumed facts outside the record, but the court's assumptions do not support the conclusion that GSGCNI is not principally engaged in providing social services.

First, the court cited one of two dictionary definitions for "social services" quoted by the Sixth Circuit in *Salvation Army*, 685 F.3d at 570, for the proposition that social services must be rendered by "trained personnel." RA 12. Although one definition the Sixth Circuit cited defined "social service" as "organized welfare efforts carried on under professional auspices by trained personnel," *Salvation Army*, 685 F.3d at 570 (quoting *Random House Unabridged Dictionary* 1811 (2d ed. 1993)), more typical is the first definition the court cited—"an activity designed to promote social well-being; [specifically]: organized philanthropic assistance of the sick, destitute, or unfortunate." *Ibid.* (alteration in original) (quoting *Merriam Webster's Collegiate Dictionary* 1115 (10th ed. 1995)); see also *The American Heritage Dictionary of the English Language* 1226 (1976) (defining "social service" as "[o]rganized efforts to advance human welfare; social work"). Certainly the well-

known fact that many Salvation Army services are provided by volunteers, see http://www.salvationarmyusa.org/usn/who-we-are (last visited Sept. 18, 2014), did not deter the Sixth Circuit from remanding to determine whether the Salvation Army is principally engaged in providing social services. *Salvation Army*, 685 F.3d at 574. The impermissible requirement the district court imposed here—that "social services" be performed by "trained personnel"—does not comport with the ordinary understanding of the term.

Even if "social services" must be conducted by "trained personnel," there is no basis for the court's conclusion that the work of GSGCNI does not qualify. The court assumed with no record basis that troop leaders "generally are parent volunteers, not trained personnel or trained professionals." RA 12. Whether or not some portion of GSGCNI's programs are conducted by parent volunteers—a point not developed in the record—it is clear, as M.R. alleged in her proposed amended complaint, that at least some programs involve girl scouts interacting with trained professionals. For example, Project Law Track enabled girl scouts to interact with attorneys to learn about their careers and conduct a mock trial. SA 202, 248, 251-252. The court's supposition that any parent volunteers are untrained likewise is unsupported. Volunteers are selected on the basis of their qualifications for the assignment and receive training necessary to perform their functions. The Policies of GSUSA, to which GSGCNI is required to adhere, provides that "[e]very adult volunteer and executive staff member in Girl Scouting must be selected on the basis of qualifications for membership, ability to perform the job, and willingness and

availability to participate in training for it." SA 221 (*Blue Book* at 22). GSGCNI also provides extensive training information on its website for volunteers. See, *e.g.*, *Training Calendar, Fall/Winter 2014-15*, http://www.girlscoutsgcnwi.org/resources_publications. Thus, the court's assumption that services provided by GSGCNI do not involve trained personnel is unfounded.

Finally, there is no doubt that M.R.'s proposed amended complaint plausibly alleges that GSGCNI is engaged in the business of providing "social services" within the phrase's ordinary meaning. Among such programs provided by defendant are the Healthy Living Initiative, cited by the court, which aims "to help 75 girls with low to moderate income levels develop a healthy holistic lifestyle." RA 12 (citation omitted). Other social services programs described in the proposed amended complaint, elsewhere in the record, or on GSGCNI's website include:

- Humanitarian Service Project, which "suppl[ied] gifts for 1,200 needy children and 120 seniors [and] provide[d] food to the 250 families enrolled in their Children's Birthday Project and monthly delivery of 90 pounds of groceries to seniors." SA 204 ¶ 97 (alterations in original) (citing SA 267).

- Share Your Soles program, which "[c]ollect[s] gently worn shoes for children and adults in some of the most impoverished places in the world." SA 205 ¶ 99 (alteration in original) (citing SA 268).

- Stand Up! Step Out! Program, which "brings the Girl Scout Leadership Experience to girls incarcerated in the River Valley Detention Center in Joliet, Illinois" and aims to "giv[e] girls the tools and knowledge they need to succeed in the world, and to avoid re-incarceration." SA 204 ¶ 95 (citing SA 232).

- Beyond Bars Program, which served girls who were in jail or detention centers, or who otherwise were involved in the juvenile justice system. SA 27 ¶ 5.

- Various activities denominated "Service Projects" in *2014 Program Essentials* at 4, http://www.girlscoutsgcnwi.org/activities-events.

Contrary to the district court's assessment (RA 12) (citation omitted), defendant's mission to "build girls of courage, confidence, and character" is perfectly compatible with its engagement in "[o]rganized efforts to advance human welfare" and "to promote social well-being." *Merriam Webster's Collegiate Dictionary* 1115 (10th ed. 1995); *The American Heritage Dictionary of the English Language* 1226 (1976).

The court downplayed the significance of GSGCNI's social services with its observation that it "does not consider Defendant's most widely known program, the sale of Girl Scout cookies, to be a 'social service' for the purposes of Section 504." RA 12. This observation is besides the point. Cookie sales are both a fundraising mechanism and an educational program. GSGCNI stated in its IRS Form 990 that its product sales program, including selling cookies, "is an integral part of our business and economic literacy initiative, which helps girls learn life skills such as money management, ethical decision-making, and goal setting." SA 199 ¶ 63 (citing SA 218).

C. All Operations Of GSGCNI Are Subject To Section 504 If The Organization Is Principally Engaged In The Business Of Providing Services Enumerated In Section 794(b)(3)(A)(ii), Considered Alone Or Collectively

GSGCNI appears to be engaged not only in the provision of education and social services, but other enumerated services, such as "health care" and "parks and recreation." See SA 203-207 (¶¶ 89-91, 103-111). Some of its programs fit different individual categories listed in Section 504; other programs serve hybrid purposes. For example, the Stand Up! Step Out! Program is likely an educational and social

services program. The Healthy Living Initiative likely provides education, social services, and health care. That defendant is engaged in the business of providing more than one of the identified services raises the question whether it is "principally engaged in the business of providing education, health care, housing, social services, *or* parks and recreation," 29 U.S.C. 794(b)(3)(A)(ii) (emphasis added), if it is principally engaged in *more than one* of these services.

Suppose a private organization devotes 40% of its time and resources to education, 25% to social services, and 15% divided among housing and health care. Or take a private organization that spends more than half its time engaged in activities that constitute a hybrid of services listed in the statute (*e.g.*, activities simultaneously providing education and social services). Read sensibly, the statute requires that Section 504's anti-discrimination requirements apply institution-wide if, in the aggregate, the organization is principally engaged in the business of providing any of the services enumerated in the statute. These two hypothetical organizations would be covered by Section 504 in all their operations.

Such a reading of the statute is not precluded by its use of the conjunction "or" in the list of services. In many instances, courts have construed "or" in statutory or contractual lists as meaning not only that *one* of the items may satisfy legal requirements, but that the items taken in combination may do so, or that the items separated by "or" can create multiple legal obligations. In other words, Section 794(b)(3)(A)(ii) does not require that the organization be principally engaged in the business of providing education *or* social services *or* health care, etc.,

but covers all its operations if it is principally engaged in providing these services alone or in combination. See, *e.g.*, *Baxter* v. *Baxter*, 423 F.3d 363, 370 (3d Cir. 2005) (citation omitted) ("The words 'removal or retention' [in international convention] * * * create a multiple, not alternative, obligation. In other words, the use of the word 'or' in article 13(a) of the Convention is not disjunctive in the sense of indicating an alternative between mutually exclusive things."); *Federation of Fly Fishers* v. *Daley*, 131 F. Supp. 2d 1158, 1164 (N.D. Cal. 2000) (statutory factors determining whether species is endangered or threatened are "listed in the disjunctive; any one or a combination can be sufficient for a finding that a particular species is endangered or threatened"); *Van Zanten* v. *National Cas. Co.*, 52 N.W.2d 581, 585-586 (Mich. 1952) (insurance policy covering "loss of life, limb, sight or time" does not mean insured may recover only for loss of leg or loss of time, but not both).

Statutory context is key, of course, in determining whether the "or" separating "education, health care, housing, social services, or parks and recreation" is meant to separate mutually exclusive alternatives or to permit the services to be considered in combination. As discussed above, Congress viewed private organizations providing these enumerated services to be furnishing a "public service" and concluded that, if such organizations received federal financial assistance, it was of paramount importance that they be subject institution-wide to the anti-discrimination mandate of Section 504 and other civil rights statutes incorporating the same "program or activity" definition. Senate Report 4, 20. As Senator Kennedy, the floor manager and chief sponsor of the Restoration Act

explained: "In the present bill, we have limited corporatewide coverage to areas of public service, where it is most important." 134 Cong. Rec. 4225, 4266 (1988). It would be a perverse reading of the statute to conclude that an organization principally engaged in the business of rendering not one, but two or more, of these "most important" public services, or in the business of providing services that could qualify under more than one of these categories, would escape organization-wide statutory coverage. See U.S. Department of Justice, Civil Rights Division, *Title VI Legal Manual* 39 (2001) (citing example of nursing home as "principally engaged in the business of providing social services and housing for elderly persons" as subjecting the entire corporation to the requirements of Title VI).

* * * * *

Because the district court did not consider, based on correct legal standards, whether GSGCNI is subject to Section 504 in all its operations, and therefore denied M.R. leave to amend her complaint and to conduct discovery regarding the services GSGCNI provides, this Court should reverse and remand for further proceedings.

CONCLUSION

As set forth above, this Court should reverse the district court's judgment and remand for further proceedings.

Respectfully submitted,

MOLLY J. MORAN
Acting Assistant Attorney General

s/ Bonnie I. Robin-Vergeer
MARK L. GROSS
BONNIE I. ROBIN-VERGEER
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 353-2464

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 6,980 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007, in 12-point Century Schoolbook font.

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney

Date: September 19, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

I further certify that, with the exception of counsel listed below, all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on September 19, 2014, the foregoing brief was mailed to the following counsel by certified U.S. mail, postage prepaid:

Marc Charmatz
National Association of the Deaf Law and Advocacy Center
8630 Fenton Street, Suite 820
Silver Spring, MD 20910

Barry C. Taylor
Equip For Equality
20 North Michigan Avenue, Suite 300
Chicago, IL 60602

s/ Bonnie I. Robin-Vergeer
BONNIE I. ROBIN-VERGEER
Attorney

ADDENDUM

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794:

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service * * *

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;[*]

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

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[*] Pub. L. No. 113-128, 128 Stat. 1425, 1675 (2014), amended Section 794(b)(2)(B) by striking "vocational education" and inserting "career and technical education."

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.