IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

JEFFREY GORMAN, Plaintiff, and THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STEVEN BISHOP, et al, Defendants.	)	No. 95-0475-CV-W-8

REPLY BRIEF OF THE UNITED STATES AS AMICUS CURIAE

I. INTRODUCTION

The plaintiff, an individual with a disability who uses a wheelchair, claims that defendants, who include the Chief of Police of the Kansas City, Missouri Police Department ("KCMOPD"), several members of the KCMOPD's Board of Commissioners, and a KCMOPD police officer, violated title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12115 et seq., section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and state law, in connection with his arrest and transportation to police headquarters on May 31, 1992. Pursuant to this Court's order of October 10, 1995, plaintiffs and the United States as amicus curiae filed briefs arguing that title II of the ADA applies to

arrests of individuals with disabilities and to their transportation following arrest.

Defendants make two points in their responsive brief that merit a reply.[1] First, they argue that title II does not apply to arrests, because they are not "services," "programs," or "activities" in which persons with disabilities seek to participate or from which they seek some benefit. See Brief of Defendants at 7-8, 11, 14-15. Additionally, defendants seem to be suggesting that even if title II applies to arrests, it covers only the actions specifically mentioned in the legislative history and in the Department of Justice's interpretations of title II and section 504, which do not include transportation of arrestees. See id. at 4-5, 15.

II. ARGUMENT

A. Title II's Coverage is Not Limited to Programs and Activities in Which Individuals with Disabilities Seek to Participate or from Which They Seek to Gain Some Benefit.

As has been demonstrated in the United States' first brief as amicus curiae, title II covers everything a public entity

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[1] Defendants also argue that, at the time of his arrest, the plaintiff was a "direct threat" to his own health and safety and the health and safety of others, see Brief of Defendants at 10-12, 17, and also that providing a suitable vehicle in which to transport the plaintiff would have constituted an "undue burden." See id. at 15, 18. We believe that it was premature for the defendants to have raised these issues at this time, given the scope of this Court's October 10, 1995, order, and we therefore do not address them in this brief. We understand the October 10, 1995, order as having called for argument on the sole question of whether title II of the ADA applies to arrests and to the transportation of arrestees. The issues of "direct threat" and "undue burden" do not pertain to this question.

does, not just those services, programs, and activities in which persons with disabilities seek to participate or from which they seek a benefit, as defendants suggest.[2] See U.S. Brief II at 4-7. Defendants' response focuses only upon one part of section 202, which says that "[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or denied the benefits of services, programs, or activities of a public entity . . . ." 42 U.S.C. § 12132. In addition, however, section 202 says that no qualified individual with a disability "shall be subjected to discrimination by a public entity." Id. Thus, the conclusion that the acts and omissions complained of by the plaintiff are covered by title II is consistent with the statute's plain language, which prohibits any discrimination to which individuals with disabilities might be "subjected" by public entities. See U.S. Brief II at 6-7.

Even if he were required to identify a specific "program" or "activity" with respect to which he was discriminated, the plaintiff could certainly do so. It can be presumed that, when

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[2] Defendants make this same argument with respect to plaintiff's claims under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability by recipients of federal financial assistance. As the government has demonstrated in previous briefs, title II was intended to make section 504's rights, remedies, and procedures applicable to State and local government entities regardless of whether they receive federal financial assistance. See United States' Suggestions in Opposition to Defendants' Partial Motion to Dismiss (hereafter "U.S. Brief I") at 8-9 & note 6; U.S. Brief II at 6 & note 5. Though the Court's October 10, 1995, order requested argument only the issue of title II's applicability to the facts of this case, this brief may be treated as a reply to defendants' section 504 arguments as well.

it enacted section 202 of the ADA using language from section 504 of the Rehabilitation Act, Congress was aware of and intended to adopt agency interpretations of section 504, at least with respect to the words that appear in both statutes.[3] See e.g., Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc., 113 S.Ct. 2006, 2011 (1993); New York Council, Associated Civilian Technicians v. National Labor Relations Authority, 757 F.2d 502, 508 (2d Cir. 1985); Cleary v. United States Lines, 728 F.2d 607, 608 (3d Cir. 1984); Burns v. Equitable Life Assurance Company of the United States, 696 F.2d 21, 23 (2d Cir. 1982). In the Preamble to its 1980 regulation implementing section 504 with respect to its federally-funded

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[3] Indeed, Congress made absolutely clear, in section 204 of the ADA, its intention that title II should be interpreted in a manner consistent with section 504. Section 204 of the ADA requires the Department of Justice to promulgate regulations implementing title II that are

> consistent with this Act and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). With respect to "program accessibility, existing facilities" and "communications", such regulations shall be consistent with analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to Federal conducted activities under such section.

42 U.S.C. § 12134(b). See also 42 U.S.C. § 12201(a) ("Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied undder title V of the Rehabilitation Act of 1973 . . . or the regulations issued by federal agencies pursuant to such title."); U.S. Brief I at 8-9 note 6.

activities, the Department of Justice identified arrests as part of a "program" of law enforcement. See 45 Fed. Reg. 37,620 (1980). See also U.S. Brief II at 9. Defendants point to no evidence in their response that would overcome the presumption that this interpretation applies to title II as well. Indeed, as the government has already demonstrated title II's legislative history are unambiguous on the point that the statute was intended to apply to arrests. See U.S. Brief I at 5-7; U.S. Brief II at 7-10.

It is also well-established that words in a statute that are not defined are to be given their common, ordinary meaning. See, e.g., Smith v. United States, 113 S.Ct. 2050, 2053 (1993); Perrin v. United States, 444 U.S. 37, 42 (1979); United States v. Johnson, 57 F.3d 947, 956 (8th Cir. 1995); United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987). Arrests and the transportation of arrestees are certainly "activities" of public entities, within the ordinary meaning of that term.

Defendants' reliance upon Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), to support their reading of title II of the ADA and section 504 is also misplaced.[4] Torcasio addressed the

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[4] In addition to Torcasio, defendants cite Gates v. Rowland, 39 F.3d 1439 (9th Cir. 1994), and Williams v. Meese, 926 F.2d 994 (10th Cir. 1991), both of which dealt with the applicability of section 504 to prisons, not to arrests. The Gates court specifically acknowledged that an earlier Ninth Circuit decision, Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988) had held that section 504 of the Rehabilitation Act applied to prisons that receive federal financial assistance, and Gates did not disturb that holding. See Gates, 39 F.3d at 1446. Gates (continued...)

narrow question of whether prison officials could assert the defense of qualified immunity against the claims of the plaintiff, a morbidly obese prisoner, that their failures to make certain physical changes to the plaintiff's cell and modifications to prison policies, practices, and procedures violated both title II and section 504. Torcasio, 57 F.3d at 1342, 1343. In order to demonstrate that they were entitled to qualified immunity, defendants were required to show that the rights plaintiff was asserting were not "clearly established" at the time the alleged discrimination occurred. Id. at 1343. Torcasio never reached the issue of whether the ADA and section 504 actually apply to prisons, and even if it had, it would not necessarily follow that these statutes do not apply to arrests.[5]

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[4](...continued)
merely held that "the applicable standard for the review of the Act's statutory rights in a prison setting [is] equivalent to the review of constitutional rights in a prison setting . . . ." Id. at 1447.

In Williams, the court held that section 504 did not authorize an employment claim by a prisoner challenging certain prison work assignments because the plaintiff was not an "employee." The court also found, with no analysis, that the Bureau of Prisons is not a "program or activity" within the meaning of section 504. Id., at 997. The plaintiff in the instant case, however, has claimed that his arrest and transportation, as well as the policies, practices, and procedures which governed them, are the relevant programs and activities. He has not asserted that the KCMOPD or the Board of Commissioners are themselves programs or activities; hence Williams is inapposite.

[5] It must be noted that there is no evidence in the Torcasio opinion that the court was presented with the kinds of clear statements from the ADA's legislative history or from Department of Justice interpretations of title II and section 504 that the Court has been offered with respect to arrests in this
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B. Title II Covers Arrests and All Related Actions.

Quoting selectively from title II's legislative history, defendants suggest that, if title II covers arrests at all, it applies only to detentions that occur "because of" an arrestee's disability and to "brutal treatment" of arrestees with disabilities, not transportation of arrestees. See Brief of Defendants at 4.[6] They conclude that since the plaintiff was not arrested "because he was in a wheelchair" and did not "suffer[ ] any abuse merely because he was disabled," he has no cause of action under title II. Id.[7] Defendants gloss over language that unmistakably expresses Congress' intent that title II should apply to "all actions of state and local governments," H.R. Rep.

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[5](...continued)
case. In the face of such evidence, the court's decision might have been different. See Torcasio, 57 F.3d at 1347 ("Torcasio might be able to overcome the facial ambiguity of the ADA and Rehabilitation Act, and demonstrate that the applicability of the acts to state prisons was clearly established, if he were able to show that the courts have uniformly interpreted the acts as applying to state prisons, or if he were able to point to regulations that make that applicability clear.")

[6] At some points in their response, defendants suggest that a distinction should be made between the act of detaining a person with a disability, which might be covered by title II, and all actions following detention, which are not. See Brief of Defendants at 4, 17.

[7] Defendants support this conclusion with portions of two quotations found in the United States first brief as amicus curiae. One quotation is from Representative Mel Levine. It was made during House debates on the ADA, and refers to "mistreatment" of individuals with disabilities by police. The other quotation, that Representative Steny Hoyer, refers to situations in which individuals with epilepsy are arrested because of a mistaken belief that their actions indicate unlawful activity. See U.S. Brief II at 7.

No. 485(II), 101st Cong., 2d Sess. 84 (1990); see also U.S. Brief II at 4, stating simply that "the Act itself was not passed with this broad language." Brief of Defendants at 4.

Defendants' theory -- that title II covers some actions related to arrests, but not others -- contradicts the language of the statute, the legislative history, and interpretations of title II by the Department of Justice, as set forth in both the United States' previous brief as amicus curiae and in Part II.A, supra. This theory is also impossible for police departments and courts to apply, a fact which defendants' own response demonstrates. Confronted with the language in the Preamble to the Department of Justice regulation implementing section 504, that refers to the proper means of administering Miranda warnings to individuals with hearing impairments,[8] defendants merely assert, without analysis, that "[g]iving Miranda warnings to a deaf suspect and the transportation of an uncooperative arrest [sic] are not analogous situations." Brief of Defendants at 15. Defendants articulate no principled basis upon which actions connected with arrests that are subject to title II and section 504 can be distinguished from actions that are not, and their position is plainly at odds with the words of both statutes, the legislative history, and official interpretations of both laws by the Department of Justice.

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[8] See Brief of Defendants at 15 (citing 45 Fed. Reg. 37,620 (1980); See also U.S. Brief II at 9; Part II.A, supra.

III. CONCLUSION

For all of the foregoing reasons, as well as for those reasons set forth in the United States' brief as amicus curiae filed on November 13, 1995, the United States asks this Court to find that title II of the ADA and section 504 of the Rehabilitation Act apply to plaintiff's arrest and subsequent transportation.

Respectfully submitted,

STEPHEN L. HILL, JR.
United States Attorney
For the Western District
of Missouri

DEVAL L. PATRICK
Assistant Attorney General
Civil Rights Division

ALLEEN S. VANBEBBER
Deputy United States
Attorney for the Western
District of Missouri
Missouri Bar #41460
Suite 2300
1201 Walnut Street
Kansas City, MO 64106
Tel: (816) 426-3130

By: _____
JOHN L. WODATCH
L. IRENE BOWEN
CHRISTOPHER J. KUCZYNSKI,
Attorneys
Disability Rights Section
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202) 307-1060