WRITTEN TESTIMONY OF
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SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET
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Good morning, Chairman Markey, Ranking Member Stearns and members of the Subcommittee. My name is Ken Nakata, and I am the Director of Disability Initiatives and Government Compliance for BayFirst Solutions LLC. I am testifying today, however, in my personal capacity. Thank you for the opportunity to present my independent views on the staff discussion draft of the *Twenty-first Century Communications and Video Accessibility Act of 2008.*

Since 2004, I have worked in the Seattle office of a Washington, DC based consulting firm. My focus is helping government and industry make its information technology accessible. I work with a young and highly motivated team of software developers and testers helping large Federal agencies and corporations meet the needs of their customers and employees with disabilities. This work involves developing innovative solutions as well as applying well-understood existing solutions to large or complex accessibility problems.

Before 2004, I was a trial attorney with the U.S. Department of Justice. For 12 years, I worked at the Department on enforcement of the Americans with Disabilities Act (ADA) and on helping the Federal government implement Section 508 of the Rehabilitation Act. In that role, I represented the United States numerous times in Federal court and vigorously enforced some of the Department of Justice's first cases under the ADA. I have worked on many controversial cases with broad social impact and many less controversial cases with smaller impact. I have also been asked by Federal courts to participate as *amicus curiae,* in order to present the position of the United States where the constitutionality of a Federal statute has been called into question.

My Department of Justice experience also includes a deep focus on information technology. I worked extensively with disability advocates, industry, and government when I helped the Federal government make its information technology accessible as a result of Section 508 of the Rehabilitation Act. In that role, I helped develop the Section 508 regulations for accessible electronic and information technology, helped create the Federal government's technical assistance for implementing Section 508, oversaw all three government-wide surveys conducted by the Attorney General, and co-authored all of the Attorney General's reports to the President and the Congress on Section 508 compliance. My work in information technology also extends beyond Section 508, as I have authored white papers and presented on the intersection between other disability rights laws and the internet.

Much of the staff discussion draft of the *Twenty-first Century Communications and Video Accessibility Act of 2008* is focused on improving access for people with disabilities to Voice over Internet Protocol (VoIP) telecommunications services and on providing captioning for internet-delivered media content. I support these goals and commend the Subcommittee for their efforts to further them. While I believe that additional regulation in this area is needed, I do not support a private right of action (as currently drafted) and I do not believe that the undue burden defense is appropriate.

I. Need for More Effective Legislation

Title I of the *Twenty-first Century Communications and Video Accessibility Act of 2008* bill is focused on improving access for people with disabilities to Voice over Internet Protocol (VoIP) telecommunications. I believe that this legislation is important because of the growing importance of VoIP communication and because the proposed bill corrects a communication gap present in Section 255 of the Communications Act.

In 1990, Congress passed the ADA, which is now widely seen as the most important civil rights law since the Civil Rights Act of 1964. Title IV of the ADA required telephone companies to provide relay services for deaf and hard of hearing customers. By the time of the ADA's passage, telecommunication devices for the deaf (TDD's) were a well-understood and proven technology. By creating relay services, millions of American businesses were suddenly "open for business" to deaf and hard of hearing customers who could not otherwise communicate by telephone. Much work remains before VoIP and real-time text can provide a complete alternative to TDD's. I commend the Subcommittee for furthering this work and helping ensure that people with disabilities can participate meaningfully in our digital age.

Title I of the proposed legislation also seeks to make the accessibility efforts by manufacturers and service providers more transparent to consumers. Specifically, the draft requires manufacturers and service providers to file a "written accessibility and compatibility impact analysis" for each product or service. While I cannot comment on the competitive impact or legal risk that providing an impact analysis may create for manufacturers and service providers, some additional steps beyond the current Section 255 framework would help address the perception of a market failure of Section 255. I trust members of industry when they identify their successes under Section 255 in developing more accessible products. But, I also appreciate the frustration I hear from members of the disability community when they describe how their needs are not being met. If the market has failed with Section 255, it isn't from a lack of innovation but a lack of communication. More needs to be done to ensure that industry can effectively communicate that it understands the needs of the disabled community—and that it is responding. Making the process more open and more transparent also fosters greater opportunities for partnership between industry and advocates in the disability community. Working together and helping each other understand both the opportunities and the limitations each faces will better enable us to provide greater accessibility. While providing "written accessibility and compatibility impact analysis" may prove to not be the ideal solution (particularly in combination with other

provisions as described below), some mechanism that improves communication between industry and consumers is a step in the right direction. For instance, the Subcommittee's proposal for a clearinghouse in Section 104 should be particularly useful and may advance accessibility for everyone.

Title II of the draft bill focuses on captioning and video descriptions for internet-based multimedia content and seeks to reinstate the Commission's video description regulation struck down in *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002). As more and more multimedia content is created, we face an increasing backlog of content that fails to meet the needs of people with disabilities. I commend the Subcommittee for recognizing that need and spurring this key work forward.

Both sections of the draft *Twenty-first Century Communications and Video Accessibility Act of 2008* bill are excellent starting points for this important discussion. While this draft bill focuses on many of the needs in America that are not being met, I am concerned about two provisions that may harm both industry and the disability community.

II. Private Right of Action is Not the Answer

During my 12 years at the U.S. Department of Justice, much of my work involved enforcing Titles II and III of the ADA. This was the most rewarding job I have ever had. I was one of the first attorneys to join the new Office on the Americans with Disabilities Act in 1992, just as Title III of the ADA came into effect. I worked on some of the first architectural cases by the Department and represented the United States on many occasions in Federal court. I strongly believe that litigation plays an important role in upholding our laws in the right circumstances. Those circumstances, however, are not present in this bill.

First, I believe that a private right of action makes sense when there are clear rules of conduct that our society can expect people or companies to follow. Our society expects architects to follow accepted accessibility standards when designing a building. Our society expects an event planner to think about the communication needs of deaf visitors and request a sign language interpreter from a local deaf services center. Unfortunately, these clear rules of conduct do not exist in the information technology world where the means by which we provide access are still unclear or yet to be developed. Our society expects information technology to do *something* to meet the needs of people with disabilities—the problem is that none of us can definitively say what that *something* is.

Second, I believe that a private right of action is inappropriate because it thwarts innovation. All of us, including people with disabilities, benefit from the creativity of the information technology industry. Unlike many other industries, the IT industry regularly creates entirely new *categories* of products that create both barriers and opportunities for people with disabilities. For instance, instant messenger technologies, such as AOL Instant Messenger or Internet Relay Chat (IRC), were developed and intended as a means of easy real-time communication between computer users. Also, two-way alphanumeric pagers and RIM devices (predecessors of the current Blackberry) were intended as portable messaging devices for mobile professionals. Both of these technologies remained inaccessible to blind users for many years. At the same time, both of these technologies revolutionized communication for deaf and hard of hearing individuals and may now even supplant long-established technologies like TDD's. Unfortunately, a private right of action makes it far less likely that these kinds of technologies will come to market in the first place. Venturing into new product categories are risky business decisions for IT companies. When complicated by the risk of litigation, IT companies will be even less likely to innovate. In the end, however, it may be consumers with disabilities who pay the highest price.

My concerns about the risks of a private right of action are also heightened by the lack of safeguards against frivolous or vexatious litigation. For instance, potential plaintiffs do not have to first exhaust their administrative remedies before proceeding to Federal court. As a consequence, agencies with particular expertise (such as the FCC) do not have an opportunity to resolve a complaint before costly and damaging litigation. In addition, damages are not limited. In this regard, Title III of the Americans with Disabilities Act, which limits remedies to injunctive relief and attorney's fees, provides a useful model as it reduces the likelihood that companies will be singled out for litigation.

Without some limits in place, a private right of action can hurt the disability rights movement. For the last ten years, I have focused on IT accessibility, with a particular focus on improving access for persons with disabilities to the Internet. While I was still at the Department of Justice, advocates sued Southwest Airlines in 2002 to make their website accessible. When we learned about the lawsuit, we called the plaintiffs and warned them about the weaknesses in their case, but the plaintiffs pressed forward. The court's eventual ruling in *Access Now, Inc. v. Southwest Airlines,* 227 F. Supp.2d 1312 (S.D. Fla. 2002) was a disaster for the disability rights movement. The decision remains the single biggest obstacle to website accessibility to this day.

III.The Undue Burden Defense is Not Appropriate

Section 104 of the staff discussion draft requires manufacturers and service providers to ensure that equipment and services are accessible to and usable by individuals with disabilities unless doing so would result in an *undue burden*. This wording represents a change from the language of Section 255 of the Communications Act, which uses the *readily achievable* defense. I believe that the shift from readily achievable to undue burden is a significant change that should be avoided.

The undue burden defense originates with the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Since then, the undue burden defense has developed through the Department of Justice regulations for Section 504[1] and the Americans with Disabilities Act.[2] Federal courts defer to these regulations and the Department of Justice's interpretations of undue burden in litigation.[3] These interpretations make clear that *all* of the financial resources of a public accommodation need to be considered in determining whether an undue burden has been created.[4] Opting for an undue burden standard also shifts the burden of proof to the defendant.[5] As described below, I believe that using such a high threshold is counterproductive—it creates risks for innovation in industry, but creates even greater unintended risks for the disability rights movement.

Unlike the undue burden defense, the readily achievable defense is easier to understand and is a much lower threshold. The term "readily achievable" was introduced in the Title III of the ADA and defined as, "easily accomplishable and able to be carried out without much difficulty or expense."[6] Although it uses the same factors as the undue burden defense, the readily achievable defense was intended to be less difficult for businesses.[7] It also places the burden of proof on the plaintiff.[8]

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[1] 49 Fed. Reg. 35,724 (1984).
[2] 28 C.F.R. pt 36 (2008).
[3] *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Chevron Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).
[4] United States Memorandum of Law as Amicus Curiae in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion at 27, n. 31, *Kovacs v. Kawakami* (D.D.C. Feb. 24, 1995)(No. 93-2576). *See also,* Letter from Acting Assistant Attorney General Isabelle Pinzler to Senator Joseph Lieberman (Aug. 28, 1997); Letter from Section Chief John Wodatch to Dr. Kenneth Hrechka (Feb. 16, 1995); Letter from Assistant Attorney General Deval Patrick to Senator Phil Gramm (Dec. 29, 1994); Letter from Section Chief John Wodatch to Dr. W. Yates Trotter (Jan. 15, 1993); Letter from Acting Assistant Attorney General James Turner to Congressman Thomas Bliley (Aug. 28, 1992); Letter from Acting Assistant Attorney General James Turner to Senator Larry Pressler (Aug. 28, 1992); Letter from Deputy Director Joan Magagna to Dr. Richard Sagall (June 11, 1992).
[5] Letter from Assistant Attorney General Deval Patrick to Senator Phil Gramm (Dec. 29, 1994). *See also*, *Colorado Cross-Disability Coalition v. Hermanson Family Ltd, P'ship.,* 264 F.3d 999, 1003 (10th Cir. 2001); 49 Fed. Reg. 35,724 (1984).
[6] 42 U.S.C. §12181(9).
[7] 56 Fed. Reg. 35544 (July 26, 1991).
[8] *Colorado Cross-Disability Coalition v. Hermanson Family Ltd. P'ship*, 264 F.3d 999, 1003 (10th Cir. 2001). Compliance Now v. Newbury Comics, Inc., No. 02-11929-GAO, 2003 U.S. Dist. LEXIS 11883 (July 10, 2003 D. Mass.);

There is an enormous difference between the readily achievable standard and the undue burden defense. Ultimately, the Subcommittee may decide that that both defenses are inappropriate in this setting. As noted above, I believe that the shortcoming of Section 255 is its failure to create an open dialog between industry and consumers—a dialog that the current draft bill will hopefully foster. I believe that applying an undue burden standard, however, will undermine this effort for several reasons.

First, an undue burden standard threatens the dialog between consumers and industry. VoIP and internet-based multimedia are very new technologies that were not commonly available five years ago. The solutions to these problems will likely come from the innovative minds and creative developers within industry in partnership with their colleagues from the disabled community. The threat of pending and difficult litigation is inconsistent with developing the collaborative spirit that we need to get this important work done.

Second, an undue burden defense is particularly problematic when combined with other provisions of the staff discussion draft. For instance, section 104 requires manufacturers and service providers to file a written accessibility impact analysis for each product or service released to the public. Advocates can search for even the smallest area of noncompliance and then sue the manufacturers or service providers through the proposed private right of action. And, because the undue burden defense shifts the burden of proof squarely to the defendant, manufacturers and service providers will be defenseless in litigation. The end result may likely be that companies will be very reluctant to create new products and will be even more reluctant to create new categories of products (like instant messenger or two-way alphanumeric pagers) that may redefine how accessibility is provided to people with disabilities.

Speciner v. NationsBank, 215 F. Supp. 2d 622, 632-33 (D. Md. 2002); *Association for Disabled Americans v. Claypool Holdings LLC,* No. IP00-0344-C-T/G, 2001 U.S. Dist. LEXIS 23729 (Aug. 6, 2001 D. Md.) at *89.

Third and most importantly, I am concerned about the unintended effects to the disability rights movement by applying such a high standard to multi-billion dollar companies central to our nation's economy. The undue burden defense has worked very well when the costs of compliance are high but still manageable. Extending the undue burden defense to multi-billion dollar IT corporations means that large IT companies would have to devote *all* of their profits to solving difficult accessibility problems. The problem I foresee is that Federal courts will be unwilling to go that far. To avoid that result, courts will simply weaken the definition of undue burden. Then, with a lower threshold for undue burden, other rights central to the disability rights movement that hinge on the undue burden defense will also be threatened and the overall level of accessibility in our country will go down. It will be unfortunate if the gains our society has won for people with disabilities over the last 20 years are endangered by misapplying the undue burden defense. A deaf patient can get a sign language interpreter before a risky operation because of the undue burden defense. State and local governments make their basic programs and services accessible to people with disabilities because of the undue burden defense. The undue burden defense has worked because we have used it sparingly and only where it makes sense. It has worked in other contexts because it preserves the delicate balance of disability rights laws. Using the undue burden standard here upsets that balance.

IV. Conclusion

In conclusion, I would like to express my gratitude to the Subcommittee for the opportunity to express my views. For almost my entire professional career, I have focused on improving accessibility for persons with disabilities. The *Twenty-first Century Communications and Video Accessibility Act of 2008* is one of the most exciting opportunities for people with disabilities to be included in the promise of our digital era. We will fail, however, if our zeal to create more accessibility ultimately creates less. Finding the right course requires carefully balancing different approaches in light of a complex

background of other civil rights laws. I commend Chairman Markey and the other members of the Subcommittee for their diligent effort at finding the right balance. I look forward to working with the Subcommittee in their efforts.