IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RAMON BADILLO SANTIAGO, M.D. PRO SE Plaintiff vs. HON. JOSE ANDREU GARCIA, in his official capacity as Administrador del Sistema Judicial, LCDA. MERCEDES M. BAUERMEISTER, in her official capacity as Directora de la Administracion de Tribunales de Puerto Rico, WILFREDO GIRAU TOLEDO, in his official capacity as Director de la Autoridad de Edificios Públicos COMMONWEALTH OF PUERTO RICO, represented by the Secretary of Justice of Puerto Rico, JOSE FUENTES AGOSTINI, included in his official capacity, JUDGE JULIO Berríos JIMENEZ, in his official and personal capacity, Defendants	*	**CIVIL NO.** 98-1993 (SEC) Jury Trial Demanded

UNITED STATES' BRIEF AS
AMICUS CURIAE

TO THE HONORABLE COURT:

COMES NOW the United States of America through undersigned counsel, and very respectfully alleges and prays as follows:

I. INTRODUCTION

This action is brought by Mr. Ramón Badillo Santiago against Hon. Jose Andreu Garcia in his official capacity as Administrator of the Judicial System; Ms. Mercedes M. Bauermeister, in her official capacity as Director of the Courts Administration of Puerto Rico; Mr. Wilfredo Girau Toledo, in his official capacity as Director of the Public Buildings Authority; the Commonwealth of Puerto Rico represented by Jose Fuentes Agostini, included in his official capacity as Secretary of Justice of Puerto Rico; and Judge Julio Berríos Jimenez, in his official and personal capacity.

The plaintiff alleges a violation of title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131 et seq. Defendants have moved to dismiss on several grounds. The United States as amicus curiae urges the Court to deny the motions as to plaintiff's ADA claim, because contrary to the basis on which the Defendants seek such dismissal:

(1) Plaintiff has pleaded a prima facie case under title II of the ADA.[1]

[1] The United States takes no position on defendants' other claims.

(2) Congress has specifically abrogated the States' eleventh amendment immunity for suits brought pursuant to the ADA;

(3) Under title II of the ADA the defendants can be sued in their official capacities; and

(4) Judges do not enjoy absolute immunity for acts that are administrative rather than judicial in nature.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff Ramón Badillo Santiago has a hearing impairment. He was a defendant in a civil case at the Superior Court, First Instance Court, Bayamón Part on September 2, 3, and 8, 1997. At the trial, the plaintiff repeatedly requested an amplification device, in order to hear and participate in the proceedings. The plaintiff also submitted to the state court an audiometric evaluation by an audiologist, demonstrating his need for this auxiliary aid. Instead of granting the request, the judge ordered the Court Officer to instruct the plaintiff to use a wheeled secretary's chair and authorized him to move around the room during the proceedings to get closer to whoever was speaking at the time. After initially complying with the Court's order, the plaintiff discontinued the practice and declined to testify in his own trial.

Plaintiff filed the captioned case pro se. All the defendants have moved for dismissal under various grounds. The United States hereby opposes dismissal on several grounds.

III. ARGUMENT

A. Plaintiff Has Alleged a Prima Facie Case Under Title II of the ADA

Despite Defendants' contentions, there is no question that plaintiff has sufficiently pleaded a prima facie case of discrimination under title II of the ADA. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that there is no set of facts that plaintiff could prove which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 46, 78 S. Ct. 99, 102 (1957); Fed. R. Civ. P. 12(b)(6). Further, pro se complaints must be liberally construed and should not be held to the same high standard as formal complaints filed by attorneys. Estelle v. Gamble, 429 U.S. 97, 105, 97 S. Ct. 285, 291 (1976); Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595 (1972); Ferranti v. Moran, 618 F.2d 888, 889 (1st Cir. 1980) . It is under this more lenient standard that plaintiff's complaint should be read.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The statute defines the term "qualified individual with a disability" as "an individual with a disability who, with or without ...the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." See 42 U.S.C. § 12131(2). "Auxiliary aids and services" are defined as including a wide range of methods to provide effective communication with people who are deaf or hard of hearing. The ADA lists as examples of auxiliary aids and services, "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments," 42 U.S.C. § 12102(1)(A); these include "assistive listening devices," such as the device requested by plaintiff. See 28 C.F.R. § 35.104.

The ADA implementing regulation imposes on a public entity the duty to provide appropriate auxiliary aids. 28 C.F.R. § 35.160. This section establishes the following:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program or activity conducted by a public entity.

In the case at bar, plaintiff easily satisfies the prima facie elements for his cause of action under title II of the ADA. Plaintiff has averred that he has a hearing impairment, that he requested an auxiliary aid to participate in his trial, and that the secretary's chair provided by the court was an ineffective aid. Complaint ¶¶ 8, 9. Read liberally, as the complaint must be, plaintiff has sufficiently alleged that he is an "individual with a disability" under title II. See 42 U.S.C. § 12102(2). In addition, plaintiff has clearly alleged that he was "qualified," because he has stated that he was a defendant in a case before Judge Berríos from which it follows that plaintiff met "the essential eligibility requirements for the receipt of services or the participation in" his trial. 28 C.F.R. § 35.104. Finally, plaintiff has alleged that he was discriminated against by

defendants. He alleged that he requested and was denied an assistive listening device, and was rendered unable to effectively participate in his own trial. Complaint ¶¶ 8, 9. Plaintiff has therefore alleged that he was "excluded from participation in or denied the benefits of" defendants' program. 42 U.S.C. § 12132; 28 C.F.R. § 35.160. Thus, plaintiff has pleaded his prima facie case.

B. Congress has expressly abrogated the states' eleventh amendment immunity from private suits brought under the ADA

Defendants Jose Fuentes Agostini, the Commonwealth of Puerto Rico and Judge Julio Berríos Jimenez, all alleged that the captioned case is barred as against them under the eleventh amendment. Based on the language of the ADA, defendants' argument is without merit.

The eleventh amendment,[2] as interpreted by the Supreme Court, embodies a general constitutional principle of state sovereign immunity in federal court actions. The amendment, therefore, generally precludes a federal court from rendering judgment against an unconsenting state in favor of a citizen of the state. Hans v.

[2] The eleventh amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Louisiana, 134 U.S. 1, 15 (1890). The Commonwealth of Puerto Rico enjoys full benefits of the eleventh amendment. Fernandez v. Chardón, 681 F.2d 42, 59 (1st Cir. 1982); Ezratty v. Commonwealth of P.R., 648 F.2d 770, 776, n.7 (1st Cir. 1981).

However, the eleventh amendment does not bar suits for damages under title II of the ADA. The Supreme Court has held that Congress may abrogate the eleventh amendment without the states' consent when acting pursuant to its plenary powers, so long as it does so explicitly. Seminole Tribe of Florida v. Florida, 166 S. Ct. 1114, 1123 (1996). See e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Congress has the authority to override states' immunity when legislating pursuant to section 5 of the fourteenth amendment); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (Congress must make "its intention unmistakably clear in the language of the statute").

In the ADA, Congress expressly abrogated the States' eleventh amendment immunity. Title V, which contains provisions generally applicable to all other titles of the ADA, provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies

> (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Section 502 of the ADA, 42 U.S.C. § 12202 (parenthetical remark in the original). See also 28 C.F.R. § 35.178; S. Rep. No. 116, 101st Cong., 1st Sess., at 184 (1989); and House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Americans with Disabilities Act of 1990, at 138 (1990), reprinted in 1990 U.S.C.C.A.N. at 421; Niece v. Fitzner, 941 F.Supp 1497, 1501 (E.D. Michigan 1996); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998); cert. denied, 119 S. Ct. 58 (1998). Thus, the ADA explicitly abrogates eleventh amendment immunity, and defendants' motion on this point must be denied.

C. The Defendants Can Be Sued in Their Official Capacities

Defendants Garcia's and Bauermeister's motion to dismiss argues that they cannot be sued in their individual capacities under the ADA. Their argument is misplaced, because the plaintiff's complaint clearly names them only in their official, not individual, capacities. The plaintiff has named all of the defendants in their official capacities only except Judge Berríos,

whom is being sued both in his official and individual capacities.[3]

Not only have defendants Garcia and Bauermeister misread plaintiff's complaint, they also cite entirely inapplicable case law. All cases these defendants cite involve charges of discrimination in employment, which is governed by different definitions and standards than is discrimination by a public entity against its constituents. See 28 C.F.R. § 35.140.[4] Because all of those cases turn on the definition of "employer" under a different title of the ADA, they have no bearing on the captioned case.

D. Judge Berríos is not Immune from Suit

Given the abrogation of state immunity by the ADA, claims can be brought against a state judge in his/her individual or official capacity under the ADA but for the doctrine of judicial immunity.

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[3] These defendants do not dispute the well-settled premise that they may be named in their official capacities, as an alternative method of suing the entity for which they are representative. See Hafer v. Melo, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed.2d 301 (1991); Gorman v. Bartch, 152 F.3d 907, 916 (8th Cir. 1998).

[4] Disability-based discrimination in employment is governed by the definitions and regulatory standards of title I of the ADA. 28 C.F.R. § 35.140; 42 U.S.C. § 12101 et seq.; 29 C.F.R. pt. 1630. Requirements governing the activities of public entities other than employment are detailed in the Department of Justice's regulation under title II, 28 C.F.R. pt. 35.

It has been established that this doctrine generally affords judges immunity from damage suits. See Stump v. Sparkman, 435 U.S. 349, 356 (1978). However, the Supreme Court has held that judges can be held liable for damages[5] in suits where actions which are administrative in nature are challenged. See Forrester v. White, 484 U.S. 219, 224-225 (1988). The Court in Forrester refused to attach judicial immunity to a judge's decision to fire a court employee, because the act was not judicial in nature. The Court held that truly judicial acts must be distinguished from the administrative, legislative or executive functions that judges may occasionally be assigned to perform. According to the Court, it is the nature of the function performed -- adjudication -- rather than the identity of the actor who performed it -- a judge -- that determines whether absolute immunity attaches to the act.[6] Any time an action taken by a judge is not an adjudication between

[5] It is undisputed that judicial immunity does not extend to injunctive suits. Pulliam v. Allen, 466 U.S. 522 (1984); Livingston v. Guice, 1995 U.S. App. Lexis 39238 (copy attached.)

[6] Defendant Judge Berríos admits in his motion that "[a] judge loses protection of absolute immunity if his or her acts occur when there is clear absence of jurisdiction or when said act does not constitute a judicial act". (See docket 8- Judge Berríos Motion to Dismiss at page 8)(emphasis added).

parties, it is less likely that the act [will be found to be] a judicial one. Cameron v. Seitz, 38 F.3d 264, 271 (6th Cir. 1994).

In Morrison v. Lipscomb, 877 F.2d 463 (6th Cir. 1989), a Chief Judge's moratorium on writs of restitution during two holiday weeks was challenged by a landlord unable to redeem his property from a tenant for those two weeks. The Court of Appeals for the Sixth Circuit held that the moratorium, though performed by a judge, was not a judicial act entitled to absolute immunity. Id. at 466. The court noted that the act was not judicial in nature, because the legislature could have easily issued the moratorium as well. Id.

The Morrison Court's reasoning has a direct bearing on the captioned case. The processing of auxiliary aid requests can easily be, and often is, a function performed by court administrators rather than judges. The ADA requires that necessary auxiliary aids and services be provided by courts to all participants in the judicial system, including parties, witnesses, jurors, and spectators. 28 C.F.R. § 35.160; [TA manual cite]. In its enforcement of the ADA, the United States has seen that courts establish system-wide administrative policies and leave the task of processing individual requests to system-wide administrators rather than individual judges. This court should not dismiss Judge

Berríos from the case before plaintiff has an opportunity to prove that the Judge acted administratively, not judicially, when refusing plaintiff's auxiliary aids.

Judge Berríos does respond in his official capacity for any injunctive relief the plaintiff is requesting and also responds in his individual capacity to the extent the acts in controversy are administrative in nature and not protected by the absolute immunity doctrine.[7]

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this court deny defendants' motions to dismiss on the issues discussed in this memorandum.

I HEREBY CERTIFY that on this date a true copy of the foregoing has been mailed to **Alfredo Fernandez Martinez, Esq.**, Union Plaza Building, Suite 316, 416 Ponce De León Avenue, San Juan, Puerto Rico 00918; **Marie L. Cortés Cortés, Esq.**, Federal Litigation Division, Department of Justice, P.O. Box 9020192, San Juan, Puerto Rico 00902-0192; **Harry R. Segarra Arroyo, Esq.**,

[7] Of course, Judge Jimenez may still be entitled to raise a "qualified immunity" defense. See Gorman v. Bartch, supra, at page 914-915 (8th Cir. 1998).

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RESPECTFULLY SUBMITTED, in San Juan, Puerto Rico, this 10th day of March, 1999.

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