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

JEFFREY GORMAN,	)	
	)	
Plaintiff	)	No. 93-0487-CV-W-8
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Intervenor	)	
	)	
	)	
vs	)	
	)	
	)	
GUITARS & CADILLACS, L.P., et al,	)	
	)	
Defendants	)	
	)	

COMBINED SUGGESTIONS OF THE UNITED STATES AS INTERVENOR IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM AMICUS CURIAE

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I. BACKGROUND

The plaintiff, Jeffrey Gorman, filed this action against the owners and operators of Guitars & Cadillacs, a country western bar located in the Westport section of Kansas City, Missouri; the chief of police and several officers in the Kansas City, Missouri Police Department ("KCMOPD"); and members of the Board of Commissioners for the KCMOPD. Mr. Gorman has paraplegia secondary to a spinal cord injury. He alleges that the owners and operators of Guitars & Cadillacs violated his rights under title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-12189 (Supp. III 1992) and state laws by

refusing to allow him access to the dance floor level of the bar because he uses a wheelchair, and by subsequently having him arrested for trespass after he asserted his right to remain in that area of the facility.

Mr. Gorman's claims against the remaining defendants are based upon title II of the ADA, 42 U.S.C. §§ 12115-12164 (Supp. III 1992) ("title II"), section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988 & Supp. IV 1993) ("section 504"), 42 U.S.C. § 1983, and state law. He claims that the police officers who arrested him and the officer who transported him to police headquarters failed to ensure that he and his wheelchair were properly secured in the patrol vehicle, and that as a result he was injured and his chair was damaged during transport. Mr. Gorman further alleges that the KCMOPD's chief of police and members of the Board were responsible for implementing section 504 and the ADA, and as such should have ensured that policies, practices, and procedures for the detention and transportation of persons with disabilities were in place. The failure to have such policies, practices, and procedures and to make them known to all police officers, according to the plaintiff, resulted in discrimination on the basis of disability in connection with his arrest.

On May 13, 1994, defendants Becker, Bishop, Tate, Dillingham, Paul, Headley, and Cleaver[1] served upon plaintiff

[1] Defendant Neil Becker is the police officer who transported the plaintiff to police headquarters following his arrest on May 31, 1992. Defendant Steven Bishop is Chief of

their Suggestions in Support of Separate Motion for Summary Judgment (hereafter cited as "Def. Mem."). In their memorandum, the defendants claimed that their conduct is protected by sovereign and official immunity, Def. Mem. at 5-9; that title II of the ADA is unconstitutionally vague, Def. Mem. at 15, 16-17; and that neither section 504 nor title II applies to this case in any event. Def. Mem. at 9-15, 17-20. The United States has intervened in this action with respect to the constitutional challenge to the ADA, pursuant to 28 U.S.C. § 2403, and is participating as amicus curiae in support of plaintiff's position that (1) section 504 and title II of the ADA apply to policies, practices, and procedures incident to arrest that discriminate on the basis of disability; and (2) that if the facts as alleged by plaintiff are proven to be true, defendants' conduct would in fact constitute a violation of both section 504 and title II.

II. SECTION 504 APPLIES TO THE ACTS ALLEGEDLY ENGAGED IN BY THE DEFENDANTS.

The defendants argue that section 504 does not apply to them for three reasons. First, they suggest that section 504 was intended to cover only programs and activities which persons with disabilities seek to participate in or from which they seek to obtain some benefit. See Def. Mem. at 10-11. Defendants' other two arguments -- that the plaintiff was not "subjected to

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Police for the Kansas City, Missouri Police Department. The remaining defendants were, at the time the actions and omissions giving rise to plaintiff's complaint occurred, members of the Board of Commissioners for the Kansas City Police Department.

discrimination" and was not a "qualified individual with a disability" within the meaning of section 504 -- are similar to one another. The crux of each is that the methods employed to arrest and transport the plaintiff did not violate section 504 because they were a necessary response to an individual who may have posed a danger to himself and others. See Def. Mem. at 11-14. For the reasons that follow, all three of the defendants' arguments are unavailing.

A. The arrest and transportation of a person with a disability are programs and activities under section 504.

Section 504's language plainly covers programs and activities other than those sought out by individuals with disabilities for the purpose of receiving a benefit. Section 504 says 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1988 & Supp. IV 1993) (emphasis added). Excluding a qualified individual from participation in a program or activity and denying to such an individual a benefit of a program or activity are two ways in which a recipient of Federal financial assistance may violate section 504. However, Congress also prohibited a third category of conduct -- that which subjects individuals with disabilities to discrimination under

federally-funded programs and activities. This broad language covers all funded activities, including the detention and transportation of persons with disabilities by law enforcement officials, whether or not they are sought out for the purpose of obtaining a benefit.

In 1988, Congress amended the definition of "program or activity" which had been in effect since 1973, to emphasize its broad reach. Through the Civil Rights Restoration Act of 1988, Congress clarified the meaning of the phrase in light of an unduly narrow interpretation by the Supreme Court. 20 U.S.C. § 1687 (1988); S. Rep. No. 64, 100th Cong., 2d Sess. 1-2 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 3-4. See also Leake v. Long Island Jewish Medical Center, 695 F. Supp. 1414, 1416 (E.D.N.Y. 1988), aff'd 869 F.2d 130 (2d Cir. 1989) (stating that the expressed purpose of the clarified definition of "program or activity" in the 1988 Civil Rights Restoration Act was to "restore the broad scope of the coverage and to clarify the application of . . . Section 504 of the Rehabilitation Act of 1973") Bonner v. Arizona Department of Correction, 714 F. Supp. 420, 422-23 (D. Ariz. 1989) (adopting the rationale in Leake). See also Cohen v. Brown University, 809 F. Supp. 978, 982 (1992), aff'd 991 F.2d 888 (1st Cir. 1993) (discussing effect of Civil Rights Restoration Act upon the definition of "program or activity" in title IX of the Civil Rights Act). Congress' clarified definition, which applies to section 504, provides:

> [T]he 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;

20 U.S.C. § 1687 (1988); 29 U.S.C. § 794(b)(1)(A) (1988 & Supp. IV 1993) (emphasis added). By using the phrase "all of the operations of," the definition demonstrates that section 504 applies to every action taken by an entity receiving Federal financial assistance.[2]

The preamble to the Department of Justice's regulation implementing section 504 in its Federally assisted programs clearly indicates that the statute applies in arrest situations. It contains an illustration of the duties of law enforcement officials with respect to arrestees who are deaf:

> If a hearing-impaired person is arrested, the arresting officer's Miranda warning should be

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[2] The only authority that the defendants cite in an attempt to limit the definition of "program or activity" is Williams v. Meese, 926 F.2d 994 (10th Cir. 1991). In that case, a prison inmate claimed, inter alia, that prison officials had discriminated against him with respect to certain prison work assignment on the basis of his disability. The court held that section 504 did not authorize an employment claim in these circumstances 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.

> communicated to the arrestee on a printed form approved for such use by the law enforcement agency where thee [sic] is no qualified interpreter immediately available and communication is otherwise inadequate. The form should also advise the arrestee that the law enforcement agency has an obligation under Federal law to offer an interpreter to the arrestee without cost and that the agency will defer interrogation pending the appearance of an interpreter.

45 Fed. Reg. 37,620 (1980) (emphasis added; citations omitted). This discussion is set in the context of a broader statement about the duties of law enforcement officials under section 504 and appears under the heading "Physical and Other Accessibility to Programs." It not only supports the contention that an arrest is an "activity," but that it is part of a larger "program" of law enforcement as well. As a reasonable interpretation of a statute by an agency empowered to enforce it, the language of the preamble cited above must be given controlling weight. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); United States v. Board of Trustees for the University of Alabama, 908 F.2d 740, 746 (11th Cir. 1990) (applying Chevron to section 504 regulations issued by the Department of Education); Americans Disabled for Accessible Public Transportation v. Skinner, 881 F.2d 1184, 1991 (3d Cir. 1989) (principles of Chevron apply to section 504 regulations issued by Department of Transportation).

B. At the time of his arrest, the plaintiff was a "Qualified Individual with a Disability" within the meaning of section 504.

The defendants also contend that the plaintiff was not a "qualified individual with a disability."[3] As defined in the Department of Justice's regulation implementing section 504 with respect to its federally-assisted programs, the term "qualified handicapped person," which is synonymous with the terms "qualified individual with a disability and "otherwise qualified individual with a disability," means "a handicapped person who meets the essential eligibility requirements for the receipt of . . . services." 28 C.F.R. § 42.540(l) (1993). In many circumstances, the qualifications for services, programs, and activities are minimal. The plaintiff certainly was "qualified" for arrest within the meaning of this definition since he exhibited conduct that, according to the police, warranted placing him under arrest. The KCMOPD "qualified" the plaintiff by arresting him. Having done so, the defendants were required to provide him with those services and benefits customarily afforded other arrestees (e.g., safe transport, freedom from the use of excessive force, freedom from self-incrimination, and the right to counsel), in a way that would not discriminate on the basis of disability.

The defendants' reliance upon School Board of Nassau County v. Arline, 480 U.S. 273 (1987), therefore, is misplaced, because

[3] Section 504 actually refers to an "otherwise qualified individual." See 29 U.S.C. § 794(a) (1988 & Supp. IV 1993).

whether the plaintiff is "qualified," in light of the risk he was perceived to present, is not at issue. As demonstrated in the following section, the defendants were obligated to ensure that reasonable modifications to their existing policies, practices, and procedures related to arrest and transport were made when necessary to avoid discrimination against an obviously qualified individual with a disability. In doing so, as explained below, the defendants could legitimately take into account the risk posed by the particular arrestee. The relevant issue, then, is whether the plaintiff was "subjected to discrimination" under the defendants' programs or activities, not whether he was "qualified" within the meaning of section 504.

C The plaintiff has alleged facts sufficient to demonstrate that he was "subjected to" discrimination under section 504.

Defendants claim that the plaintiff was not "subjected to" discrimination. They cite Southeastern Community College v. Davis, 442 U.S. 397 (1979), and Alexander v. Choate, 469 U.S. 287 (1985), and note that these cases "struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interest of federal grantees in preserving the integrity of their programs." See Def. Mem. 12. While a State has a legitimate interest in eliminating the danger arrestees could potentially cause to others and to themselves, the defendants' theory ignores that part of the balancing test, articulated in Davis and re-affirmed in Choate, that requires

that in some circumstances reasonable policy modifications be made in order to avoid discrimination on the basis of disability.

In Davis, for example, the Supreme Court affirmed the district court's decision to grant summary judgment in favor of Southeastern Community College, because the record did not demonstrate that the plaintiff would have been able to meet essential eligibility criteria for participation in the Federally-funded program at issue. Davis, 442 U.S. at 415. The plaintiff, who had a severe hearing impairment and understood spoken words primarily by lipreading, sought admission into the defendant's nursing program. Id., at 398. The plaintiff proposed that she be provided with an instructor to assist her with required clinical courses, which involved actual patient contact, or that these course requirements be waived in her case. See id., at 407. The Court accepted the defendant's assessment that being able to hear speech was essential for licensure as a registered nurse, and that no reasonable accommodation would have allowed the plaintiff to complete its program. Id., at 398 & n.1. Nevertheless, Davis as subsequently clarified in Choate, acknowledged that recipients of Federal funds are required to make reasonable accommodations that do not fundamentally alter the nature of their programs and activities (i.e., to eliminate eligibility criteria for participation that are essential) and do not impose undue financial or administrative burdens. See id., at 410, 412; Choate, 469 U.S. at 300 & n.20, 308. See also Simon v. St. Louis County, Missouri, 656 F.2d 316, 320 (8th Cir.),

cert. denied 455 U.S. 976 (1982) (also articulating this standard). Thus, section 504 required recipients of Federal funding to make determinations about what types of accommodations are necessary based upon the needs of each individual with a disability.

The plaintiff has alleged, inter alia, that the defendants' failure to train the KCMOPD's officers in proper techniques for arresting and transporting persons with disabilities violated the section 504 obligation to make reasonable policy modifications. See Plaintiff's Second Amendment to Complaint ("Second Amend. to Comp.") at ¶¶ 228, 249, 261. At the very least, the plaintiff has alleged that he is a person with a disability and that some reasonable accommodation may have prevented him from having been subjected to discrimination under a program or activity receiving Federal financial assistance.

Additionally, however, the record as thus far developed raises factual disputes concerning the reasonableness of the plaintiff's proposed accommodation that precludes summary judgment. Some deposition testimony suggests that police officers in the KCMOPD are trained to treat all arrest situations differently, depending upon the circumstances they encounter. See, e.g., Deposition of Randall Simms at 36. Other testimony indicates that police officers annually receive in-service training on a variety of topics. See, e.g., Deposition of Donald D. Rey at 6-7. This testimony suggests that training officers in the proper procedures for arresting and transporting persons with

disabilities could be accomplished with little or no financial or administrative burden, and without altering the fundamental nature of the KCMOPD's law enforcement processes. This type of training, which would presumably emphasize the individualized treatment of arrestees with disabilities, would be consistent with the police department's already existing policies of treating arrest situations individually, and could be integrated easily into existing training sessions.

The Department of Justice does not take a position about whether proper training was actually conducted in this case, though some of the deposition testimony suggests that it was not. See Deposition of Dean Kelly at 8-9. Nor does the record as developed to date establish whether, even if such training was conducted, it would have averted the situation that occurred. The Department does believe, however, that training law enforcement officials in the proper techniques for detaining and transporting persons with disabilities is a reasonable accommodation which section 504 requires,[4] and that disputes that currently exist as to whether such training was provided, and whether appropriate policies were followed here, preclude summary judgment.

[4] See also Part III.C., infra.

III. THE AMERICANS WITH DISABILITIES ACT APPLIES TO THE ACTS ALLEGEDLY ENGAGED IN BY THE DEFENDANTS.

A. Title II is not unconstitutionally vague.

The defendants argue that title II is unconstitutionally vague because it does not provide standards sufficiently specific to have allowed them to "steer between lawful and unlawful conduct" and subjects them to the possibility of "arbitrary and discriminatory enforcement." Def. Mem. at 17; see also Def. Mem. at 16 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972). Their position suffers from at least two infirmities. First, the defendants have not pointed to any specific word, phrase, or concept in title II or the Department of Justice title II implementing regulation, see 28 C.F.R. Pt. 35 (1993) ("the title II regulation" or "the regulation"), that is unconstitutionally vague; thus it is difficult, if not impossible, to frame a complete response to their position.

Additionally, the defendants' reliance upon Grayned v. City of Rockford, supra, is misplaced. That case involved a challenge on vagueness grounds to a statute affecting the First Amendment right of free speech. It is firmly established that laws which may abridge constitutionally protected rights and those which carry criminal sanctions are subject to a more stringent vagueness test than are laws, like the ADA, which impose civil liability and regulate economic conduct. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 & n.7 (l982); United States v. Articles of Drug, 825 F.2d 1238, 1244 (8th Cir. 1987); D.C. & M.S. v. City of St. Louis, 795 F.2d

652, 654 (8th Cir. 1986). Grayned itself recognized this distinction. See Grayned, 408 U.S. at 109.

In order to violate due process, a statute must be "so vague and indefinite as really to be no rule or standard at all"). Boutillier v. Immigration and Naturalization Service, 387 U.S. 118, 121 (1967) (quoting A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925)). A non-criminal statute in particular is to be considered unconstitutionally vague only if "its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice." Horn v. Burns & Roe, 536 F.2d 251, 25 (8th Cir. 1976) (citing Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974). See also Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (a statute is vague if "[persons] of ordinary intelligence must necessarily guess at its meaning and differ as to its application . . . "); A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925) (vagueness will result only where "the exaction of obedience to a rule or standard . . . was so vague and indefinite as to be really no rule or standard at all . . . ").

When interpreting the meaning of words in a statute challenged as unconstitutionally vague, courts must consider the limiting construction given to the words by the statute's legislative history, see, e.g., U.S. v. Articles of Drug, 825 F.2d at 1244, by the agencies charged with enforcing the statute, see, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 795 (1989);

Hoffman Estates, 455 U.S. at n.5, and by case law interpreting the particular words at issue. See, e.g., Ginsburg v. New York, 390 U.S. 629, 643 (1968); Moore v. Clarke, 904 F.2d 1226, 1233 (8th Cir. 1989). Particularly relevant in this case is the fact that administrative regulations and interpretations may provide sufficient clarification for statutes that might otherwise be deemed vague. See United States v. Schneiderman, 968 F.2d 1564, 1568 (2d Cir. 1992).

Application of these principles demonstrates that title II is not unconstitutionally vague. The Supreme Court has upheld statutes similar to and less specific than the ADA, even when the imposed criminal liability, like the one at issue in Boyce Motor Lines v. United States, 342 U.S. 337 (1952), which required truck drivers who carry explosives or flammable liquids to avoid driving into congested thoroughfares "so far as practicable, and where feasible." Id., at 339. Moreover, one district court has specifically rejected the argument that title III of the ADA and the title III regulation, 28 C.F.R. Pt. 36 (1993), are unconstitutionally vague. See Pinnock v. International House of Pancakes, 844 F. Supp. 574 (S.D. Cal. 1993), appeal pending, No. 94-55030 (9th Cir. Nov. 23, 1993). In Pinnock, the court observed that the title III regulation and its preamble sufficiently clarified the meaning of "reasonable modifications" so as to avoid a claim that this term was vague. Id., at 582. The court also drew upon the Supreme Court's use and interpretation of the term "fundamental alteration" in the

context of section 504,[5] to clarify the meaning of the same term under title III. Id. As is discussed below, title II and the title II regulation borrow explicitly from section 504 and extend that act's coverage to those public entities which do not receive federal funding.[6] Since terms such as "reasonable modifications" and "fundamental alteration" are consistent with the meanings of the same terms in title III and with similar or the same terms in section 504 and its regulations, they cannot be found unconstitutionally vague.[7]

The defendants suggest that in order to withstand their constitutional challenge, title II would virtually need to

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[5] See Southeastern Community College v. Davis, supra.

[6] See, e.g., Part II.B, infra. With respect to the term "reasonable modifications" specifically, the preamble to the title II regulation links the meaning of that term both with the title III definition of the same term upheld by the Pinnock court as not unconstitutionally vague, and with the definition of similar language under section 504. With respect to section 35.130(b)(7) of the title II regulation, the preamble says:

> [This paragraph] is a specific application of the requirement under the general prohibitions of discrimination that public entities make reasonable modifications in policies, practices, or procedures where necessary to avoid discrimination on the basis of disability. Section 302(b)(2)(A)(ii) of the ADA sets out this requirement specifically for public accommodations covered by title III of the Act, and the House Judiciary Committee Report directs the Attorney General to include those specific requirements in the title II regulation to the extent that they do not conflict with the regulations implementing section 504.

28 C.F.R. Pt. 35, App. A (1993).

[7] It is noteworthy that the defendants have neither raised the same arguments with respect to section 504, nor sought to justify why the two statutes should be treated differently with regard to their constitutional claims.

contain a list of the specific actions it prohibits, if not a detailed description of how police officers and police departments can avoid liability toward arrestees with disabilities.[8] Statutes which provide only for civil liability, however, need not meet such an exacting standard. See Horn, 536 F.2d at 254.[9] Title II, as clarified by the regulation and its preamble, see 28 C.F.R. Pt. 35, App. A (1993), far exceeds the level of specificity necessary under Horn. The regulation contains a detailed list of those acts and omissions which constitute "discrimination." See 28 C.F.R. § 35.130 (1993). Several items in this list are in turn elaborated upon in the preamble. Clearly, title II is not unconstitutionally vague.

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[8] See Def. Mem. at 17. There it is stated that

> [f]rom a legal standpoint, there is absolutely no case law or regulatory law that tells these Defendants how they are to arrest or transport a person in the condition that the Plaintiff was in on May 31, 1992. These Defendants are not able to steer between lawful and unlawful conduct and are subjected to arbitrary and discriminatory enforcement of the law because of the failure of the law and regulations to apply explicit standards.

[9] In Horn, the plaintiff challenged as unconstitutionally vague a Nebraska statute which provided for a two-year statute of limitations of claims based upon "professional negligence." The Eighth Circuit dismissed the plaintiff's claim, noting that he had not suggested more specific language that would have withstood the vagueness challenge short of a list of those professions that were covered. "Even if more specific language could be devised," the court observed, "it is apparent that the absence of criminal sanctions requires less literal exactitude in order to comport with due process." Horn, 536 F.2d at 254-55.

B. The arrest and transportation of persons with disabilities are "services, programs, or activities" within the meaning of title II.

Like section 504, title II, on its face, does not prohibit discrimination specifically with respect to the arrest and transport of persons with disabilities. Instead, it uses extremely broad language to prohibit discrimination with respect to everything that a public entity does, including the types of actions with respect to which the plaintiff claims the defendants discriminated against him. Section 202 says 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 (Supp. III 1992). These words prohibit the same three types of acts or omissions by a public entities that section 504 does. Under section 202, a qualified individual with a disability who is subjected to discrimination is protected, even though the discrimination may not have involved exclusion from participation in or the denial of the benefits of some service, program, or activity.[10]

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[10] Indeed, section 202's coverage is arguably even broader than section 504's. Section 504 plaintiffs, while not always required to show that they were excluded from participation in or denied the benefits of a program or activity, must still identify a specific program or activity "under" which they were subjected to discrimination. Section 202 has eliminated this requirement. It is sufficient that plaintiffs alleging a violation of title II show that they were subjected to discrimination by a public entity. 42 U.S.C. § 12132. Hence, the plaintiff in this case is not required to show that his arrest was a "program" in order to sustain his ADA claim, to the extent that the basis of this claim is that he was subjected to discrimination by a public entity.

The legislative history further demonstrates that title II was intended to cover everything that a public entity does. Emphasizing title II's link to section 504, the House Report explains that

> [t]he Committee has chosen not to list all the types of actions that are included within the term 'discrimination' . . . because this title essentially simply extends the antidiscrimination prohibition embodied in section 504 to all actions of state and local governments.

H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. at 367 (emphasis added). Elsewhere the report states that

> Title II . . . makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination).

Id. at 151, reprinted in 1990 U.S.C.C.A.N. at 434 (emphasis added).

In the House of Representatives' discussions about title II, there are at least two references to discriminatory treatment, including discriminatory arrests, of persons with disabilities by law enforcement officials. The remarks make clear that title II covers the acts and omissions of the defendants as the plaintiff has described them. Representative Mel Levine emphasized the importance of addressing in the regulation implementing title II the problem of mistreatment of persons with disabilities by law enforcement officials. "Regretfully," he said, "it is not rare for persons with disabilities to be mistreated by police. Sometimes this is due to persistent myths and stereotypes about

disabled people. Sometimes it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior." Representative Levine then cited examples of mistreatment of persons with disabilities by law enforcement officials and concluded that, even when conducted in good faith, "[t]hey constitute discrimination, as surely as forbidding entrance to a store or restaurant is discrimination." 136 Cong. Rec. H2599-01, H2633-01 (May 22, 1990).

Representative Steny Hoyer, one of the ADA's principal sponsors and its floor manager in the House of Representatives, added that title II covers training of public employees to ensure that discrimination does not occur. The example he cites to underscore this need involves a discriminatory arrest:

> [P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In my [sic] situations, appropriate training of officials will avert discrimination.

136 Cong. Rec. E1913-01, E1916-01 (June 13, 1990). Failures to provide proper training and to act appropriately in an arrest situation and with respect to events directly following arrests are, indeed, central to the plaintiff's allegations.

The title II regulation and its preamble, issued pursuant to 42 U.S.C. § 12134(a) (Supp. III 1992), further support the plaintiff's position. The regulation repeats section 202's nondiscrimination mandate that "no qualified individual with a 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 public entity." 28 C.F.R. § 35.130(a) (1993). Section 35.102(a) further clarifies the meaning of these words. It says that Subtitle A of title II, which contains this nondiscrimination mandate, applies to "all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a) (1993). The only exception to this broad coverage are those transportation services, programs, and activities of public entities which are covered by Subtitle B of title II. See 28 C.F.R. § 35.102(a) and (b) (1993). This interpretation is consistent with the language of title II and with its legislative history, and is thus to be given controlling weight. Chevron, 467 U.S. at 844; Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ind. 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of Title II of the ADA); see, e.g., Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (relying on Justice Department interpretations of Title II); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same).

The preamble both re-affirms the broad coverage of title II and specifically mentions the obligations of law enforcement officials under title II to refrain from discriminatory arrests of persons with disabilities. Commenting upon section 35.102(a), the Department of Justice said that

> [t]he scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and

> activities "conducted by" Federal Executive agencies, in that title II applies to anything a public entity does.

28 C.F.R. Pt. 35, App. A (1993). In connection with section 35.130 of the regulation, the Department responded to comments it received from persons with disabilities who believed that the regulation should contain provisions requiring law enforcement officials to receive training on how to distinguish behavior associated with various disabilities from criminal activity. While it declined to include such a provision, the Department hastened to add that

> [d]iscriminatory arrests and brutal treatment are already unlawful police activities. The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.

28 C.F.R. Pt. 35, App. A (1993). Clearly, title II covers the types of activities as to which the plaintiff has alleged discrimination.

C. At the time of his arrest, the plaintiff was a "Qualified individual with a Disability" within the meaning of title II.

The defendants have challenged the plaintiff's status as a qualified individual with a disability under section 504, but have not specifically raised this issue under title II. However, given the defendants' assertion that the only relevant difference between section 504 and title II is that Federal funding is necessary to impose liability under the former, see Def. Mem. at 14-15, and the conceptual relationship between the section 504 term "otherwise qualified individual with a disability" and the

title II phrase "qualified individual with a disability," we will briefly consider the issue.

Section 201 of the ADA defines the term "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or 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.

42 U.S.C. § 12115(2) (Supp. III 1992). Section 35.104 of the regulation repeats this language verbatim. See 28 C.F.R. § 35.104 (1993) (definition of "qualified individual with a disability"). Patterned on the language of regulations promulgated by the Department of Health and Human Services to implement section 504, see 28 C.F.R. Pt. 35, App. A (1993),[11] the title II definition also makes it clear that the

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[11] The preamble establishes the following link between the title II definition of "qualified individual with a disability" and the section 504:

> The definition of "qualified individual with a disability" is taken from section 201(2) of the Act, which is derived from the definition of "qualified handicapped person" in the Department of Health and Human Services' regulation implementing section 504 (45 CFR § 84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment ("a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question") with the definition for other services at 84.3(k)(4) ("a handicapped person who meets the essential eligibility requirements for the receipt of such services").

28 C.F.R. Pt. 35, App. A (1993). The definition found in the Department of Justice's section 504 implementing regulation is exactly the same. See, Part II.B, supra.

qualifications standards which a person with a disability is required to meet in order to be protected by the ADA are minimal. As earlier noted,[12] the plaintiff not only met any eligibility requirements that might have existed, but the KCMOPD accepted his qualifications. The only remaining issue, then, is whether he was subjected to discrimination in the form of a failure by the defendants to assure that reasonable modifications were made to existing policies, practices, and procedures to ensure his safety.

D. The plaintiff has alleged facts sufficient to demonstrate that he was "subjected to discrimination" within the meaning of title II.

Section 35.130 of the title II regulation lists several types of acts and omissions that may constitute discrimination by a public entity. The plaintiff has alleged facts which, if proven to be true, would constitute discrimination within the meaning of that section of the regulation. Most notably, a public entity must

> make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7) (1993). As earlier noted in the discussion concerning reasonable modifications under section 504,[13] the Department of Justice has not concluded that the

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[12] See Part II.B, supra.

[13] See Part II, supra.

defendants failed to make reasonable modifications in this case, or that such modifications would have averted the plaintiff's injuries. We do argue, however, that the defendants were required to make such modifications, and that factual disputes sufficient to preclude summary judgment exist at least as to whether such modifications were made in this case and whether such modifications would have prevented the plaintiff's injuries.[14]

E. The defendants have not demonstrated that making modifications to equipment would constitute an undue financial or administrative burden.

The defendants' argument concerning plaintiff's title II claim is that it would have been an undue burden for the KCMOPD to have provided some form of transportation other than a standard pre-existing patrol wagon four months after title II's effective date. Def. Mem. at 20.[15] However, the defendants had

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[14] Other parts of section 35.130 may also apply to this case. Section 35.130(b)(3)(i), for example, says that a public entity may not "utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(3)(i) (1993). The preamble says that "methods of administration" refers to "the official written policies of the public entity and to the actual practices of the public entity." 28 C.F.R. Pt. 35, App. A. Certainly the manner in which police officers conduct arrests would constitute the "actual practices" of a public entity. Section 35.130(b)(1)(vii) prohibits a public entity from doing anything that would "limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving the aid, benefit, or service." 28 C.F.R. § 35.130(b)(1)(vii) (1993).

[15] In fact, the events here occurred twenty-two months after the ADA's enactment. The defendants' memorandum creates some confusion about the period of time that elapsed between

an obligation to make reasonable modifications that would have avoided discriminating against the plaintiff. They have not demonstrated that no reasonable modification, such as the installation of securement devices in existing patrol wagons for arrestees with disabilities, was available to them. Nor have they adequately supported their claim of undue burden. Section 35.150(a)(3) of the title II regulation provides:

> In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the services, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.

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passage of title II and the events of May 31, 1992 on which the plaintiff's complaint is based. The date of title II's passage was July 26, 1990, not January 26, 1992, as the defendants claim. The eighteen-month period from the date of passage and the effective date (January 26, 1992) was certainly adequate to allow public entities to come into compliance. The defendants' claim that they had only four months to come into compliance with the ADA prior to May 31, 1992 is, therefore, unpersuasive. Moreover, by the time title II became effective, the defendant were required to have to have formulated a "transition plan" if the public entity involved "employ[ed] 50 or more persons" and if "structural changes to facilities [are to] be undertaken to achieve program accessibility." 28 C.F.R. § 35.150(d) (1993). The defendants have offered no evidence that such a plan existed on May 31, 1992, or that such a plan even now exists. Finally, because section 504 applied to the defendants, they should have been on notice as to their obligations toward individuals with disabilities even before passage of the ADA.

28 C.F.R. § 35.150(a)(3) (1993). The defendants have not pointed to data showing the financial resources of the KCMOPD, that any modifications to transport vehicles could not be made, or the cost of making such modifications. Not having demonstrated undue burden, the defendants are not entitled to summary judgment.

IV. CONCLUSION

For all of the foregoing reasons, the United States respectfully requests this Court to find that:

1. Title II of the ADA is not unconstitutionally vague;

2. Section 504 applies to policies, practices, and procedures related to the detention and transportation of persons with disabilities by law enforcement officials;

3. Title II of the ADA applies to policies, practices, and procedures related to the detention and transportation of persons with disabilities by law enforcement officials;

4. The plaintiff has sufficiently alleged a violation of section 504; and

5. The plaintiff has sufficiently alleged a violation of title II of the ADA.

Respectfully submitted,

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