No. 18-56236

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES ANTHONY GUERRA, CHRYSTAL, AND KARLTON BONTRAGER,
Plaintiffs-Appellants,

v.

WEST LOS ANGELES COLLEGE AND LOS ANGELES COMMUNITY COLLEGE DISTRICT,
Defendants-Appellees.

Appeal from a Final Judgment of the United States District Court
for the Central District of California
The Honorable Michael W. Fitzgerald, District Judge, Presiding
Civil Action No. 2:16-cv-06796-MWF-KS

BRIEF OF NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS BAR ASSOCIATION, NATIONAL FEDERATION OF THE BLIND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, ASSOCIATION OF LATE DEAFENED ADULTS, DISABLED VOICES UNITED, CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING CENTERS, LEGAL AID AT WORK, DISABILITY RIGHTS LEGAL CENTER AND WASHINGTON CIVIL AND DISABILITY ADVOCATE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS CHARLES ANTHONY GUERRA, CHRYSTAL, AND KARLTON BONTRAGER URGING REVERSAL AND REMAND

Michelle Uzeta
Law Office of Michelle Uzeta
710 S. Myrtle Ave., #306
Monrovia, CA 91016
Tel: 626.765.7625
Email: uzetalaw@gmail.com
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* National Disability Rights Network, Disability Rights Bar Association, National Federation of the Blind, Disability Rights Education and Defense Fund, Civil Rights Education and Enforcement Center, Association of Late Deafened Adults, Disabled Voices United, California Foundation for Independent Living Centers, Legal Aid at Work, Disability Rights Legal Center and Washington Civil and Disability Advocate certifies that no *Amici* has a parent corporation and that no publicly held corporation owns 10 percent or more of any *Amici's* respective stock.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

The undersigned certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel or any other person other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

STATEMENT REGARDING CONSENT

This motion is filed with the consent of Autumn Elliott, Counsel for Plaintiffs-Appellants Charles Anthony Guerra, Chrystal and Karlton Bontrager, and Cynthia Germano, Counsel for Defendants-Appellees West Los Angeles College and Los Angeles Community College District.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National Disability Rights Network ("NDRN") is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

The Disability Rights Bar Association ("DRBA") was started by a group of disability counsel, law professors, legal nonprofits and advocacy groups who share a commitment to effective legal representation of individuals with disabilities. Members of DRBA commonly believe that the fundamental civil rights of people with disabilities are inadequately represented in our society and that litigation and other legal advocacy strategies play a highly effective and necessary role in enforcing and advancing the rights of people with disabilities. It goes without

saying that members of DRBA believe strongly that students with disabilities must have full and meaningful access to institutions of education.

The National Federation of the Blind ("NFB") is a national nonprofit membership organization with over 50,000 members that is recognized by the public, Congress, executive agencies of government, and the courts as a collective and representative voice of blind Americans and their families. The NFB has over 700 local chapters in all 50 states, Washington, D.C., and Puerto Rico. The NFB promotes the general welfare of blind people by assisting them in their efforts to integrate themselves into society on terms of equality and independence, and by removing barriers and changing social attitudes, stereotypes and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB is keenly interested in this case because the organization believes the regulations promulgated by the Department of Justice under the Americans with Disabilities Act should be given deference to realize Congress's intent that individuals with disabilities be permitted to live the lives they want through the removal of artificial barriers.

The Disability Rights Education and Defense Fund ("DREDF"), based in Berkeley, California, is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy, and law reform efforts, and is

nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to educational and other civic spaces and that Title II of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. can be effectively enforced to ensure equal access and independence.

The Association of Late Deafened Adults (ALDA) is a nationwide organization whose mission includes advocacy for people with all levels of hearing loss. Two issues in this case involve that mission. If third-party accommodations relieve the entity obligated by the ADA to provide effective communication, our members may have to demonstrate that third-party voice-recognition technology, now in its infancy, fails to provide effective communication before the entity is obligated to provide auxiliary aids and services such as captioning. ALDA is also concerned that meaningful access may be measured by taking into account steps available to the person with a disability.

Disabled Voices United is a statewide organization directed by and for individuals with developmental disabilities of all ages and their families. We

advocate for self-determination and choice and control over our lives. We expect meaningful outcomes, like inclusion, appropriate education, and employment. We demand equity services and education that provide the same opportunities regardless of race, ethnicity, or where you live. We call for accountability over the regional center and special education systems to ensure they follow the law and treat us with dignity and respect. We will also fight efforts to restrict our Medicaid funding, health care, educational opportunities, or civil rights.

California Foundation for Independent Living Centers ("CFILC") is a statewide non-profit that works to increase access and equal opportunity for people with disabilities by building the capacity of Independent Living Centers. Since 1982 CFILC has been serving its members through advocacy, organizing and public policy that increase independent living and self-determination for all people with disabilities.

Legal Aid at Work is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. Legal Aid at Work has represented clients in cases covering a broad range of civil rights issues including discrimination on the basis of race, gender, age, disability, pregnancy, sexual orientation, and national origin. Legal Aid at Work has represented, and continues to represent, numerous clients faced with discrimination on the basis of their disabilities,

including those with claims brought under the Title II of the Americans with Disabilities Act. Legal Aid at Work has also filed amicus briefs in numerous cases of importance to persons with disabilities.

Disability Rights Legal Center ("DRLC") is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle with ignorance, prejudice, insensitivity, and lack of legal protections in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in obtaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Unruh Civil Rights Act, and other state and federal laws. DRLC's mission is to champion the rights of people with disabilities through education, advocacy and litigation. DRLC is generally acknowledged to be a leading disability public interest organization. DRLC also participates in various amici curie efforts in a number of cases affecting the rights of people with disabilities.

Washington Civil & Disability Advocate ("WACDA") is a Washington state non-profit public interest law firm whose primary goal is to advocate for the civil rights of traditionally marginalized populations, especially people with disabilities. WACDA primarily litigates cases under Titles I, II, and III of the Americans with Disabilities Act. WACDA engages in substantial public interest work such as providing disability education and awareness efforts, including

informing the disability community on disability rights by regularly conducting disability awareness and "know your rights" presentations as well as by providing information and referral services for people with disabilities and conducting legislative advocacy on behalf of the disability community.

Amici are all recognized authorities in the field of disability rights. *Amici* are also all organizations whose members regularly represent the disability community in the investigation and litigation of cases under federal anti-discrimination statutes, including Title II of the Americans with Disabilities Act ("ADA") and/or engage in other forms of advocacy under these laws, challenging stigmas, inequality and discrimination in all its forms. Collectively and individually, *Amici* have a strong interest in ensuring that the ADA is properly interpreted and enforced, consistent with Congress' s remedial intent to eliminate discrimination and address segregation and exclusion in areas such as postsecondary education.

Given *Amici's* strong interests, the August 20, 2018 Judgment of the Honorable Michael W. Fitzgerald is of significant concern, in that it: (1) suggests that mere compliance with ADA Guidelines is dispositive of a program access claim; (2) inappropriately considers the services of unobligated third parties in connection with the "meaningful access" inquiry; (3) inserts a mitigation requirement into the "meaningful access" inquiry; (4) diminishes the self-determination rights of people with disabilities.

ISSUES PRESENTED AND STATEMENT OF THE CASE

Amici incorporate by reference the Issues Presented and Statement of the Case in the Brief for Plaintiffs-Appellants ("Appellants").

SUMMARY OF ARGUMENT

The current appeal is part of an ongoing challenge by Appellants to Defendants-Appellees' ("Appellees") discontinuance of transportation assistance for individuals with disabilities on the campus of West Los Angeles College ("WLAC").

It is an undisputed fact that the layout of the WLAC campus and distance between various points on campus serve as a physical barrier to Appellants, who are individuals with mobility impairments. (ER:7-8). On August 20, 2018, the District Court nonetheless entered a Judgment after court trial in favor of Appellees finding that "notwithstanding the termination of the on-campus shuttle service, the WLAC campus remains meaningfully accessible to Plaintiffs," and that accordingly, Appellants' program access claim under Title II of the ADA had failed. (ER:25)[1] In support of its Judgment the District Court made the following conclusions of law, all of which are of immense concern to *Amici*:

[1] The District Court also found in favor of Appellees on Appellants' other federal and state law claims; claims that were all derivative of Appellants' ADA claim. (ER:25-28). These derivative claims are not addressed in this *Amicus Brief*.

1. Appellee's compliance with existing ADA Guidelines, which do not address distance of pedestrian walkways, undercuts Appellants' claim that they lack "meaningful access"[2] (ER 21:8-12);
2. City bus and Access paratransit[3] services were "other methods" that could be considered in connection with the meaningful access inquiry, and that in this case, the existence of such services did make the WLAC campus meaningfully accessible to Appellants (ER 21:19-22:22); and
3. The "possibility" of Appellants utilizing motorized scooters could be considered in connection with the "meaningful access" inquiry. (ER 22:23-24-12).

In reaching these conclusions, the District Court interpreted a public entity's obligations under the ADA in a manner that conflicts with established Ninth Circuit precedent, runs afoul of Congressional intent and frustrates the ADA's remedial purpose, and disregards the importance of personal autonomy and self-determination in the lives of people with disabilities.

---

[2] The "prohibition against discrimination [under Title II of the ADA] is universally understood as a requirement to provide 'meaningful access.' " *Lonberg v. City of Riverside*, 571 F.3d 846, 851 (9th Cir. 2014). The terms "program access" and "meaningful access" are used interchangeably herein.

[3] Access, a local public entity, is the Los Angeles County Consolidated Transportation Services Agency ("CTSA") and administers the Los Angeles County Coordinated Paratransit Plan ("Plan") on behalf of the County's 45 public fixed route operators (*i.e.*, bus and rail).

Amici have a strong interest in ensuring that the program access requirement of Title II of the ADA is properly interpreted in cases such as this and believe Appellants' appeal is highly merited and of utmost importance. *Amici* therefore join Appellants in urging reversal and remand.

ARGUMENT

I. The District Court's Judgment Runs Afoul of Congressional Intent and Frustrates the ADA's Remedial Purposes.

The ADA was passed by Congress in 1990, ushering in a new era of civil rights, by acknowledging and seeking to end the discrimination encountered by individuals with disabilities. The far-reaching purpose of the ADA was pronounced boldly and unequivocally by Congress: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) and (2). *See also, PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001) ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals.")

"In studying the need for such legislation, Congress found that 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.'" *Id*. at 674–75

(quoting 42 U.S.C. § 12101(a)(2)). Congress also found that "discrimination against individuals with disabilities persists in such critical areas as employment … education …, and access to public services" and that the various forms of discrimination encountered includes "the discriminatory effects of architectural . . . barriers, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(3) and (5).

As a "remedial statute, designed to eliminate discrimination against the disabled in all facets of society," the ADA "must be broadly construed to effectuate its purposes." *Kinney v. Yerusalim*, 812 F.Supp. 547 (E.D. Pa 1993), affirmed 9 F.3d 1067, certiorari denied 114 S.Ct. 1545, 511 U.S. 1033 (1996). *See also Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 68 (2d Cir. 2012) ("As a remedial statute, the ADA must be broadly construed to effectuate its purpose" of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014)(Courts "construe the language of the ADA broadly to advance its remedial purpose.").

As discussed throughout this brief, the Judgment of District Court frustrates the ADA's remedial purposes in ways that are of significant concern to the disability rights community. First, contrary to Ninth Circuit precedent, the District Court suggests that the scope of a public entity's program access obligations do not exceed specific scoping and technical requirements enacted by regulation. Second, the

District Court finds that a public entity can rely on the services of third parties as meeting its program access obligations, even where those third parties are in no way obligated to, under the control of, or coordinated with Appellee's program at issue. Third, the District Court inserts a mitigating measures requirement into the meaningful access analysis, ignoring long-standing principles of self-determination. Finally, the District Court utilizes a very narrowed view of what meaningful access requires under the ADA; a view that will result in unequal and segregated services.

II. The Ninth Circuit Has Unequivocally and Repeatedly Held That the Absence of Specific Scoping and Technical Requirements Does Not Eliminate an Entity's Statutory Duty Under the ADA.

Recognizing the broad, remedial reach of the ADA, the Ninth Circuit has unequivocally and repeatedly held that "the lack of specific regulations cannot eliminate a statutory obligation." *Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 909 (9th Cir. 2019) (citing *Fortyune v. City of Lomita*, 766 F.3d 1098, 1102 (9th Cir. 2014) and *Gorecki v. Hobby Lobby Stores, Inc*., 2017 WL 2957736, at *4 (C.D. Cal. June 15, 2017)("The lack of specific regulations [regarding website accessibility] does not eliminate [defendant's] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA.")).

In *Fortyune v. City of Lomita*, for example, this Court held that the ADA required local governments to maintain accessible on-street public parking, despite the fact that regulatory design specifications for on-street parking facilities did not exist. In *Fortyune*, an individual with paraplegia filed suit against the City of Lomita

alleging that he experienced great difficulty, discomfort, and fear for his safety when visiting locations in the city because the city did not have public on-street parking which was accessible to people with disabilities. The city argued that ADA regulations did not specifically require such parking.

The district court denied the city's motion to dismiss and held that the broad language of the ADA required the city to ensure all of its services, including on-street parking, were reasonably accessible to persons with disabilities. On appeal, the defendant-city argued that although existing Title II regulations broadly prohibited it from discriminating in its services, requiring the city to provide accessible on-street parking would violate its due process rights absent specific regulatory guidance. *Fortyune*, 766 F.3d at 1102. This Court rejected that argument, holding that the ADA's regulations did not "suggest[ ] that when technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations." *Id*. at 1103 (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076–78 (9th Cir. 2002) (holding that Title II requires public entities to maintain accessible public sidewalks, notwithstanding absence of implementing regulations addressing sidewalks)). "[P]ublic entities must ensure that all normal governmental functions are reasonably accessible to disabled persons, irrespective of whether the DOJ has adopted technical specifications for the particular types of facilities involved." *Id*. at 1106.

Similarly, in *Kirola v. City and County of San Francisco*, 860 F.3d 1164, 1183 (9th Cir. 2017), this Court explained that even if there were no technical accessibility requirements for buildings and facilities under Title II, "[p]ublic entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds." *Id*. at 1180. Instead, this Court applied Title II's "readily accessible" and "usable" standards to determine whether the city violated the ADA. Id. Although DOJ guidance might have been helpful, "[g]iving content to general standards is foundational to the judicial function." *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803)).

Under this clear precedent, the lack of scoping and technical requirements specifically addressing the length of pedestrian walkways or distance between points on the WLAC campus is not dispositive of Appellants' program access claims. Title II imposes on public entities a general mandate of accessibility and requires them to operate their services, programs and activities so that they are "readily accessible to and useable by" people with disabilities. 28 C.F.R. § 35.151. Under this general mandate, the length of a pedestrian walkway or distance between points on a college campus may prevent an otherwise qualified individual with disabilities from having "meaningful access" to the services, programs and activities provided on that campus. Accordingly, to the extent the District Court's finding that Appellants were provided "meaningful access" was based on the lack of scoping and technical

requirements specific to the length of the pedestrian walkway or distance between points on a college campus, it should be reversed and remanded.

III. The District Court's Reliance on Unobligated Third Parties in Evaluating "Meaningful Access" Was Erroneous.

In reaching the conclusion that Appellants have meaningful access to WLAC, the District Court considered the availability of city bus and paratransit services. *Amici* have serious concerns about such an approach to the meaningful access inquiry. Reliance on services provided by unobligated third parties is not a strategy supported by the plain language of the ADA, its implementing regulations or Department of Justice ("DOJ") technical assistance materials. Moreover, it runs afoul of existing case law and the ADA's above-cited goal of "eliminat[ing] discrimination against the disabled in all facets of society."

A. There is no authority or legal precedent for considering the services of unobligated third parties in a "meaningful access" inquiry.

There is nothing in the statutory language of the ADA or the regulations promulgated thereto to suggest that a public entity can rely on services provided by an unobligated third party as a method to fulfill its affirmative program access obligations. To the contrary, the plain language of the relevant regulation is active, strongly intimating that "other methods" are to be purposefully chosen, pursued, provided and/or under the control of, the entity itself. *See* 28 C.F.R. § 35.150(b)(1). This common-sense construal is also supported by the Title II Technical Assistance

Manual published by the DOJ ("TA Manual").[4] The TA Manual sets forth examples of "other methods" that may be "pursued" to meet an entity's program access requirements. None of these illustrations include or reference services provided by an unobligated third party. *See* TA Manual at Section II-5.2000.[5]

Similarly, there is no case precedent for the conclusion that a public entity can escape its affirmative duty to provide program access to people with disabilities by relying on unrelated services provided by an unobligated third party, despite any incidental benefit those services may afford. However, there is precedent holding that federal laws' "emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons." *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008); *see also Disabled in Action v. Board of Elections in the City*

---

[4] *See* U.S. Dep't of Justice, ADA Title III Technical Assistance Manual Covering State and Local Government Programs and Services, available at https://www.ada.gov/taman2.html (last visited on February 19, 2019).

[5] An agency's interpretation of its own regulations is entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). The DOJ's interpretation of its ADA implementing regulations is entitled to " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir.2008)(quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)). The TA Manual is such " 'an interpretation[,] ... and, as such, is entitled to significant weight as to the meaning of the regulation[s].' " *Id.* (quoting *Disabled Rights Action Comm. v. Las Vegas Events, Inc.,* 375 F.3d 861, 875–76 (9th Cir.2004)). *See also Noel v. N.Y.C. Taxi & Limousine Comm'n*, 687 F.3d at 69 ("[T]he Technical Assistance Manual of the Department of Justice ... [ ] is persuasive authority as to the ADA's meaning, unless it is plainly erroneous or inconsistent with the ADA's regulations.").

of New York, 752 F.3d 189, 200 (2d Cir. 2014) (access "should not be contingent on the happenstance that others are available to help"); *California Council of the Blind v. Cty. of Alameda*, 985 F. Supp. 2d 1229, 1239 (N.D. Cal. 2013).

B. The District Court's reliance on *Kirola v. City and County of San Francisco* is misplaced.

The District Court's reliance on *Kirola v. City and County of San Francisco*, 860 F.3d 1164, 1183 (9th Cir. 2017) to justify consideration of city bus and paratransit services is misplaced. *Kirola* is inapposite and should be distinguished. In *Kirola*, the "program" at issue was the City of San Francisco's "public right-of-way." This singular program was defined broadly to include not only the City's sidewalks, but also, the City's public transportation and paratransit services. *Kirola*, 860 F.3d 1183 ("the trial record included evidence that the City's Municipal Transportation Agency provides both public transportation and paratransit services as part of the public right-of-way"). In light of this relationship, this Court found that the City's transportation and paratransit services were "other methods", as contemplated by 28 C.F.R. § 35.150(b)(1), that could satisfy program access to the City's public rights-of-way, even if other particular methods of benefitting from the program (*i.e.* via the City's sidewalks) were inaccessible.

Similar circumstances and relationships do not exist in the instant case. At issue here is a postsecondary educational program provided by Appellees to Appellants on a sprawling WLAC campus. The transportation services provided by

the city bus and Access paratransit are not "part of" this program, they are separate and distinct programs operated by a third party. Moreover, unlike the city-defendant in *Kirola*, Appellees do not own, operate, maintain, control, fund, contract or coordinate with, or otherwise exercise dominion over these transportation services, for the benefit of WLAC students or otherwise.

Consequently, the District Court's consideration of the city bus and Access paratransit while assessing whether Appellants' had meaningful access to WLAC was erroneous, despite the fact that such services may provide WLAC students with some incidental benefit.

C. Public policy is not thwarted by disregarding the incidental benefits provided by an unobligated third party.

The District Court cites the "public policy" of encouraging "coordination" between public services as justification for considering city bus and Access paratransit services in connection with WLAC's meaningful access inquiry. ER 22:16-22. However, such a policy, assuming one exists, is not thwarted if such services are disregarded in this case. As noted above, this case is unlike *Kirola*. There is no evidence of any relationship whatsoever between Appellees and the city bus system, or between Appellees and Access paratransit. These are separate entities, operating separate programs, without any connection or association. Simply stated, there is no "coordination" to encourage or discourage.

Additionally, the District Court's concern with "overlapping" transportation services (*id.*) is illusory. No factual findings were made to support the conclusion that that Appellee's intracampus shuttle duplicated city bus routes or the service area of Access paratransit (which by law is limited to ¾ mile of the fixed route bus system, *see* 49 CFR § 37.131(a)(1)(i)).

D. Allowing reliance on unobligated third parties for meaningful access will result in finger-pointing and avoidance of responsibility

A public entity's obligation to operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities is an affirmative one. 28 C.F.R. § 35.150(a); *Toledo v. Sanchez*, 454 F.3d 24, 32 (1st Cir.2006)("Title II imposes an affirmative obligation on public entities to make their programs accessible to qualified individuals with disabilities, except where compliance would result in a fundamental alteration of services or impose an undue burden.").

This District Court's rationale in this case id concerning as may be used by public entities to avoid this affirmative obligation and deflect responsibility for accessibility in the future. For example, a State park or governmental office may legitimately refuse to remediate existing parking facilities by claiming that there is already "meaningful access" to their services, programs and activities through city buses and paratransit services who can drop people off nearby. If such unchecked shifting of responsibility is permitted, people with disabilities will being

unnecessarily segregated, relegated to different or unequal services, and burdened with having to "figure access out" and adjust the way they utilize public services accordingly. This was not what Congress intended when enacting the ADA.

IV. The City Bus and Paratransit Fall Short of Giving Appellants the "Meaningful Access" the ADA Requires.

While the ADA's Title II regulations allow for considerable flexibility in how an entity provides people with disabilities meaningful access to existing facilities, they nonetheless require that where methods other than structural changes are pursued, those methods (1) be effective in making the entity's services, programs and activities "readily accessible to or usable by" individuals with disabilities; and (2) prioritize "methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate." 28 C.F.R. § 35.150(b)(1). *Assuming arguendo* that it was appropriate for the District Court to consider the transportation services of the city bus and access in connection with its meaningful access inquiry involving WLAC, those services fall woefully short of meeting these regulatory standards. The District Court engaged in a speculative analysis, unsupported by factual findings, in concluding otherwise.

A. The District Court's conclusion that the city bus and paratransit were "viable solutions" and effective for Appellants is speculative and unsupported by factual findings.

The WLAC campus is a purposeful design, spread out over "70 park-like acres." *See* http://www.wlac.edu/About/index.aspx. "[N]ot all buildings within the campus site are connected to each other, or connected to the bus stop, accessible

parking and public street via an accessible route." ER 310. Even assuming the existing walkways over the 70-acre campus are compliant with applicable scoping and technical requirements pertaining to characteristics like slope, cross-slope and width, when the campus is looked at "in its entirety" it poses undeniable difficulties for students with mobility disabilities like Appellants to navigate.

As discussed in Appellants' Opening Brief, the factual record is replete with testimony about why and how the city bus and paratransit are ineffective in overcoming the barriers the layout of WLAC's campus present to Appellants. *See* Opening Brief (Docket Entry 14), at pp. 32-33 (citing ER 86-88, 99-109, 115-116, 119-120, 174-175, 191-194). The District Court expressly acknowledges a number of tAppellants' concerns and experiences with public transportation in its factual findings.[6] *See* ER 14:16-24 (Mr. Guerra's concerns about an "uphill" walk from the bus stop and the unreliability, timeliness, lack of flexibility and lack of independence of paratransit); 15:20-27 (Ms. Chrystal's concerns about the difficulties she would have transporting her belongings – including her oxygen tank – on the bus, and "very bad experiences" with paratransit being late and excessively long due to shared rides); 16:28-17:8 (Mr. Bontrager's concerns regarding the unreliability of the bus and nature of paratransit (i.e. reservations needed, pickup windows)).

[6] Although later, these same concerns and experiences are characterized, dismissively, as a preference not to use services that are "inconvenient or otherwise less than ideal." ER 24:17-19.

The District Court also makes additional factual findings regarding the city bus and paratransit, none of which support a conclusion that those services are, or will later be, "effective" in providing meaningful access to Appellants. *See* ER 11:7-11 (campus has one bus stop and one paratransit stop); ER 14:16-17 (Mr. Guerra has never used the bus or paratransit to get to campus); ER 15:2021 (Ms. Chrystal has never used the bus or paratransit to get to campus); ER 17:4-5 (Mr. Bontrager has not used paratransit to get to campus).

The Court nevertheless concludes, through speculation and hypothetical posturing, the city bus and paratransit are "viable solutions" for the barriers on WLAC's campus, and that they ensure meaningful access to Appellants. ER 22:28-25:3. This conclusion is not supported by factual findings and must be reversed.

B. The nature and limits of paratransit and fixed route bus services highlight how "ineffective" they are for meaningful access.

Access paratransit is, by its own admission, a "[s]hared-ride service." *See* Access Paratransit Riders Guide ("Riders Guide")[7]at p. 4. In its Riders Guide, Access warns eligible riders that they "probably will not go directly to [their] destination because other riders need to be picked up or dropped off first." *Id.* at pp. 4; 12. Access publishes estimated travel times for its services, based on the distance to be traveled. Those times, listed below, are quite excessive:

[7] Available at: https://accessla.org/uploads/files/15-2335_Access_RG_Jun15_ENG_web.pdf (last visited on February 19, 2019).

Distance Travelled	Length of Ride
1-10 miles	Up to 1 and ½ hours
11-20 miles	Up to 2 and ½ hours
21-30 miles	Up to 3 hours
30+miles	3 and ½ hours or more

Id. at p. 12.

Additionally, Access utilizes a "one-hour reservation window," meaning "the Reservationist can offer [riders] a pick-up time up to one hour before or after [their] requested time." Id. at p. 8. There is also a "20-minute pick-up window." *Id*. at p. 8. "This means that a vehicle is considered on time if it arrives up to 20 minutes after the scheduled time." *Id*. Getting to campus and classes on time will always be a struggle for students using Access as their primary means of transportation, regardless of how diligent their efforts may be.[8]

City bus service, although not a reservation-based service like Access, presents its own set of constraints and limits on flexibility. Significantly, neither service is a viable and/or timely option for students with disabilities requiring assistance traveling from point to point within the campus community (e.g. between classes, to various clubs, meetings or offices). There is only one drop off location

[8] "Standing orders" are available for people who need a series of rides on the same day(s) of the week, at the same pick-up time and from the same pick-up/drop-off address for an extended period of time. *Id.* at p. 12. However, these orders are limited, may not be approved, and are still subject to the 20-minute pick-up window and delays created by sharing rides. Riders Guide at p. 13.

for the city bus and Access paratransit serving the entire 70-acre campus, and neither entity provides intracampus travel. ER 11:7-11

In light of the above-described burdens, obstacles, inconveniences, difficulties and constraints, the District Court's conclusion that the availability of the city bus and paratransit ensure Appellants have meaningful access to WLAC was clearly erroneous.

V. The District Court's Judgment Introduces a Mitigation Requirement to the Meaningful Access Inquiry.

The District Court heavily weighs and relied on the "possibility" of Mr. Guerra and Ms. Chrystal utilizing motorized scooters in concluding that they have meaningful access to WLAC's programs and facilities.[9] ER 22:23-24:10. In so doing, the District Court introduces an mitigation requirement to the meaningful access inquiry that is an affront to long standing concepts of self-determination and personal autonomy and threatens to undermine the ADA's goal of "clear, strong, enforceable" standards. This is of utmost concern to *Amici*.

A. People with disabilities have the right to self-determination and personal autonomy.

Respect for individuality and autonomy is a central value in our society and legal system. Treating an individual's decisions regarding the management of their

[9] Notably, Ms. Chrystal did not even have a motorized scooter at the time of the District Court's judgment, and her doctor did not recommend that she use one. ER 15:13-18. Mr. Guerra had been provided a motorized scooter, but had not used it yet, had no lift to transport it, and did not want to use it on campus. ER 14:10-15.

disability as a personal matter is consistent with this value. *See* Bruce A. Arrigo & Jeffrey J. Tasca, 23 Law and Psychol. Rev. 1, 6 (1999)(noting that "the doctrine of the right to refuse treatment can be traced back to its ancestry in the common law right of autonomy and self-determination"); S. Elizabeth Wilborn Mallory, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 Wake Forest L. Rev. 1035, 1043 (1998)(discussing the importance of personal autonomy and the right to refuse treatment).

The common-law doctrine of self-determination has long recognized an individual's right to control their own body without interference by others. Arrigo & Tasca, *supra* at 6; Mallory, *supra* at 1036. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. V. Botsford*, 141 U.S. 250, 251 (1891). Like other constitutionally protected autonomy rights, the right to self-determination in matters of personal health is deeply rooted in our constitutional traditions. The right is an outgrowth of the "historic liberty interest" in "personal security" and "bodily integrity." *See Ingraham v. Wright*, 430 U.S. 651, 673 (1977)(noting that "among the historic liberties so protected was a right to be free from … unjustified intrusions on personal security").

B. Policing an individual's decisions about how to manage their disability is inherently antithetical to the purposes of the ADA.

Given the importance of self-determination and personal autonomy in making decisions regarding one's body, courts should not be permitted to police or second-guess an ADA plaintiff's decision not to use mitigating measures or corrective devices. Nor should they be permitted to use such choices against such a plaintiff in evaluating their access rights under federal law. Because a central purpose of the ADA is to prevent discrimination based on public perception of an individual's disability, deference must be shown to the manner in which individual with a disability chooses to overcome the limitations created by their disabling condition. *See e.g. Sullivan By & Through Sullivan v. Vallejo City Unified Sch. Dist*., 731 F. Supp. 947, 958 (E.D. Cal. 1990)(instructive case decided under Section 504 of the Rehabilitation Act regarding the deference to be given an individual's choice in accommodation). The ADA should both protect such choices from scrutiny and protect individuals from discrimination for such choices. *Id. See also* 28 C.F.R. § 35.130(e)(1)(ADA regulation providing that individuals with disabilities cannot be compelled to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept).

There are many factors that guide an individual's decisions regarding the treatment and management of their disability, including emotional and physical considerations, aesthetic norms, disability awareness, economics, barriers in the

physical environment, the availability of support systems, systemic policies and personal preferences. Use of a mobility aid is a highly individualized process, often requiring special assessment, training, coordination with other treatments and therapies, and significant time and lifestyle changes. It is difficult to fathom how the ADA's goals of "equality of opportunity, full participation, [and] independent living"[10] are met if the ADA is construed to require that disabled individuals conform such significant and personal decision and processes to the views of public entities and judges. Therein lies the danger in the District Court's Judgment. It has the very practical effect of telling Appellants, and others similarly situated, that public entities like WLAC have the right to control how they will manage their disabilities, how they will access public programs, and ultimately, how they will interact (or not interact) with fellow students, peers and professors. This is inherently antithetical to the express purposes of the ADA.

Additionally, courts are not immune to the "stereotypic assumptions" about people with disabilities that Congress sought to combat in enacting the ADA.[11] They may not perceive, understand or agree with an ADA plaintiff's decision not to use mitigating measures or corrective devices. Allowing such subjective judgments and opinions to influence how the ADA is applied in particular cases threatens to

[10] 42 U.S.C. 12101(a)(8)
[11] 42 U.S.C. 12101(a)(7)

undermine the ADA's goal of "clear, strong, enforceable" standards. 42 U.S.C. 12101(b)(2).

C. A mitigation requirement is unnecessary to the meaningful access inquiry.

A public entity is only obligated to provide reasonable modifications to qualified individuals with disabilities when those modifications do not create undue financial or administrative burdens or do not fundamentally alter the nature of the entity's services, programs or activities. 28 C.F.R. §§ 35.150(a), 35.150(b)(7). Given these statutory protections, there is no practical need to police or second guess an ADA plaintiff's use of mitigating measures or corrective devices in analyzing a program access claim. The ADA already has mechanisms in place to protect public entities from the undue financial, administrative and programmatic harms that may arise from unreasonable accessibility demands or modification requests.

Additionally, had Congress or the Department of Justice intended that an individual's behavior and choices around disability management be considered in evaluating a public entity's obligations to provide program access or reasonable modifications under the ADA, those things would have been referenced in the statute and implementing regulations as relevant factors. Notably, they are not. Rather, only potential financial and operational burdens on the public entity are implicated.

Finally, there is no widespread incentive for people not to mitigate or correct an impairment to increase access where there exists a way or means to do so. It will

be rare that an individual chooses not to mitigate a disability-related impairment solely for the purpose of gaining the perceived benefit of a potential accommodation. Such slight overinclusion, should it exist, must be viewed as necessary costs public entities must tolerate to achieve the ADA's broad remedial goals.

CONCLUSION

For the foregoing reasons, Amici respectfully requests that the judgment of the district court be reversed, and this matter remanded for evaluation of Appellants' entitlement to reasonable modifications to ensure meaningful access to the programs, services, and activities of WLAC.

Respectfully Submitted,

LAW OFFICE OF MICHELLE UZETA

By: /s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: February 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-56236

I am the attorney or self-represented party.

This brief contains 6496 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Michelle Uzeta **Date** February 22, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov