Case No. 20-3728

IN THE

United States Court of Appeals for the Eighth Circuit

BARRY SEGAL,

PLAINTIFF AND APPELLANT,

—v.—

METROPOLITAN COUNCIL,

DEFENDANT AND APPELLEE,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA IN CASE NO. 18-CV-2333 (DSD/HB),
U.S. DISTRICT JUDGE DAVID S. DOTY

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF THE DEAF, THE NATIONAL DISABILITY RIGHTS NETWORK, THE NATIONAL FEDERATION OF THE BLIND, DISABILITY RIGHTS ADVOCATES AND THE DISABILITY RIGHTS BAR ASSOCIATION IN SUPPORT OF PLAINTIFF AND APPELLANT, AND IN SUPPORT OF REVERSAL

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RULE 26.1(a) DISCLOSURE STATEMENT

Amici are non-profit corporations. They have no parent corporations and, as they have no stock, no publicly held company owns 10 percent or more of their stock.

RULE 29(a)(2) PERMISSION TO FILE AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(a)(2), amici certify that all parties have consented to the filing of this amicus brief.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), amici certify that: (i) no counsel for a party authored this brief in whole or in part; (ii) no such counsel or party made a monetary contribution to fund the preparation or submission of this brief; and (iii) no person other than amici and their counsel made any such monetary contribution.

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INTEREST OF AMICI CURIAE

I. Amici Curiae: Advocates for People with Disabilities

The **National Association of the Deaf** (NAD) is the nation's premier civil rights organization of, by and for deaf and hard of hearing individuals in the United States of America. The NAD's mission is to preserve, protect, and promote the civil, human and linguistic rights of 48 million deaf and hard of hearing individuals in this country. Founded in 1880, the NAD has advocated for the rights of deaf and hard of hearing individuals in all parts of society, including accessible public transportation. The NAD has state association affiliates in virtually all 50 states and the District of Columbia, and its efforts reach all parts of the country and all aspects of life.

The **National Disability Rights Network** (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&A's and CAP's in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the

largest provider of legally-based advocacy services to people with disabilities in the United States.

The **National Federation of the Blind** (NFB) is the premier civil rights and membership organization of blind people in the United States. With tens of thousands of members, and affiliates in all fifty states, the District of Columbia, and Puerto Rico, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Since its founding in 1940, the NFB has devoted significant resources toward advocacy, education, research, and development of programs to ensure that blind individuals enjoy the same opportunities enjoyed by others. The NFB has a very active DeafBlind Division, and it confirms that the barriers faced by Mr. Segal are far from isolated. In a recent inquiry to its members, members of the Division, from coast-to-coast, reported recent, frequent and significant incidents very similar to Mr. Segal's.

Disability Rights Advocates (DRA) is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA has long championed the right of people with disabilities to use public transit systems as essential to independence, including *Guerra v. West Los Angeles College*, 812 Fed. Appx. 612 (9th Cir. 2020); *Center for Independence of the Disabled, New York v. Metropolitan Transportation Authority*, 184 A.D.3d 197 (N.Y. 1st Dep't 2020); and *Bronx Independent Living Services v. Metropolitan Transit Authority*, 358 F. Supp. 3d 324 (S.D.N.Y. 2019).

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 are disability rights attorneys who believe that the fundamental civil rights of people with disabilities are inadequately represented in our society, including in the area of public transit.

II. Why This Case Matters to Amici

Plaintiff-Appellant Barry Segal is DeafBlind man who relies on public buses to get to work. He seeks to enforce regulations that would, given his disabilities, provide him with a reliable means of safely identifying and boarding the buses that he needs to ride. Buses have been a flash point for civil rights movements in this country, and for good reason. From the Montgomery Bus Boycott in 1955-56 to the disability community's bus blockades in Denver in 1978[1] and beyond, marginalized communities have decried the segregation and inaccessibility of buses. Despite legislation designed to eradicate segregation and inaccessibility, buses continue to present barriers that require resolution by litigation. Absent the ability to enforce legislative and regulatory mandates for the accessibility of buses, many people with disabilities are left without any means of

[1] Connor McCormick-Cavanagh, Remembering Gang of 19 Forty Years After Denver Protests Changed Accessibility, *Westword* (July 4, 2018), https://www.westword.com/news/disability-protesters-gang-of-19-remembered-in-denver-10496346

transportation, severely restricting their opportunities to work, engage with their community, or otherwise live meaningful lives. This was not the intent of Congress when it passed the Americans with Disabilities Act (ADA).

When signing the ADA into law on July 26, 1990, President George H.W. Bush stated, "now I sign legislation which takes a sledgehammer to [a] . . . wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but could not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[2] Standing together, leaders from both parties described the ADA as "'historic,'" "'landmark,'" and an "'emancipation proclamation' for people with disabilities."[3]

This case is about achieving the ADA's mandate through its enforceable regulations. Without enforceability, prevalent barriers to access public programs and services, particularly in transportation, will persist as public entities neglect to resolve these problems in the absence of threatened or actual litigation.

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[2] Remarks of President George H.W. Bush at the Signing of the Americans with Disabilities Act (July 26, 1990), available at: https://www.ada.gov/ghw_bush_ada_remarks.html

[3] *See* National Council on Disability, The Americans with Disabilities Act Policy Brief Series – No. 1, Righting the Americans with Disabilities Act (October 16, 2002), https://ncd.gov/publications/2002/Oct162002

ARGUMENT

In December 2020, NDRN and Disability Rights Education and Defense Fund, Inc., filed an amicus brief in another appeal currently pending before this Court: *Gustafson v. Bi-State*, Case No. 20-3046. That appeal is reviewing a District Court order which incorrectly concluded that Department of Transportation (DOT) regulations implementing Title II of the ADA are not privately enforceable. *Gustafson v. Bi-State*, 2020 U.S. Dist. LEXIS 155782, at **17, 19 (E.D. Mo. 2020). The amicus brief in *Gustafson* explains in depth why people with disabilities do in fact have a private right of action to enforce these regulations.

This appeal is also about the enforceability of DOT regulations implementing Title II. Here, the District Court's order (Order) granting the motion for summary judgment of Defendant-Appellee Metropolitan Council (Metro Transit), and denying Mr. Segal's partial motion for summary judgment, determines that "a violation of the regulations at

issue here"[4] does not amount "to a violation of the ADA, Rehabilitation Act, or MHRA."[5] *Segal v. Metro. Council*, 2020 U.S. Dist. LEXIS 223036, at *16 (D. Minn. 2020) (cited hereafter as "*Segal* at *__"). According to the Order, "what could be construed as literal violations of 49 C.F.R. §§ 37.167(c) and 37.173" based on service issues that "have not been solved" do not suffice to establish "denial of meaningful access to services for disabled individuals." *Segal* at **19, 24. The Order concludes that Metro Transit's actions "taken as a whole" did not deny Mr. Segal meaningful access to its fixed-route bus services because Metro Transit made "*efforts* to bolster and enforce its training and policies regarding providing service to disabled passengers" and Metro Transit "has not engaged in a *pattern or practice* of violating DOT regulations." *Segal* at **19, 24-25 (emphasis added).

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[4] The regulations are 49 C.F.R. §§ 37.167(c) and 37.173. Section 37.167(c) provides:

> Where vehicles or other conveyances for more than one route serve the same stop, the entity shall provide a means by which an individual with a visual impairment or other disability can identify the proper vehicle to enter or be identified to the vehicle operator as a person seeking a ride on a particular route.

Section 37.173, entitled "Training requirements," provides:

> Each public or private entity which operates a fixed route or demand responsive system shall ensure that personnel are trained to proficiency, as appropriate to their duties, so that they operate vehicles and equipment safely and properly assist and treat individuals with disabilities who use the service in a respectful and courteous way, with appropriate attention to the difference among individuals with disabilities.
>
> 49 C.F.R. § 37.173.

[5] This brief focuses solely on the ADA.

Persons with disabilities have a right to enforce "valid and reasonable" regulations promulgated pursuant to Title II, including the DOT regulations here. *See Alexander v. Sandoval*, 532 U.S. 275, 284 (2001). It follows that violations of such regulations constitute Title II violations. *Id.* Enforcing these regulations per their terms, and without a judicially-imposed "efforts" defense or "pattern or practice" requirement, would not "contravene" the meaningful access standard. *Cf. Segal* at *17. Nor does concern about courts being flooded with ADA lawsuits (*see Segal* at **16-17) provide a valid basis to restrict enforceability of these regulations. Finally, the enforceability of sections 37.167(c) and 37.173 is especially important to ensuring meaningful access to fixed-route transit systems for people with visual and/or auditory disabilities.

I. Title II's Private Enforceability Includes Enforcement of Title II Implementing Regulations

a. Title II of the ADA

Congress enacted the ADA against "a backdrop of pervasive unequal treatment" of persons with disabilities "in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004). It found that "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4). Consequently, Congress enacted the ADA's anti-discrimination standards with the intent that they "'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities'" (*Lane*, 541 U.S. at 516

(quoting 42 U.S.C. §§ 12101(b)(1), (b)(4)) and further that its requirements be broadly enforceable by those individuals (*see* P.L. 110-325, 122 Stat. 3553, section 2(b)(1) (Sept. 25, 2008) (ADA Amendments Act of 2008)).

Title II forbids discrimination against persons with disabilities in "public services, programs and activities." *Lane,* 541 U.S. at 516-17. In enacting Title II, Congress specifically recognized that "the discriminatory effects of inaccessible transportation posed a pervasive and substantial barrier to the integration of the disabled into American society." *Ash v. Md. Transit Admin.*, 2019 U.S. Dist. LEXIS 39849, at *25 (D. Md. 2019). "Moreover, Congress determined that the irrational discrimination against the disabled in public transportation, in particular, threatened to undermine the promise of the ADA in its entirety" because "'[t]ransportation affects virtually every aspect of American life'" and "is the 'linchpin which enables people with disabilities to be integrated and mainstreamed into society.'" *Id.* at ** 25-26 (quoting H.R. Rep. No. 101-485 at 37, 88). "Congress also documented that discrimination in transportation isolated disabled Americans and barred them from participation in civic life," including by creating barriers to working, voting and exercising their "'rights and obligations as citizens.'" *Id.* at *26 (quoting H.R. Rep. No. 101-485 at 37).

At the heart of Title II is a broad prohibition of discrimination in the administration of *all* public services, programs and activities:

> [N]o 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. Title II also includes anti-discrimination provisions clarifying what is "considered discrimination" for purposes of section 12132 in the context of public entities operating certain transportation programs or activities. *See* 42 U.S.C. §§ 12143, 12144, 12146, 12147, 12148, 12162. Significantly, in Title II, Congress expressly required that the Department of Justice (DOJ) and the DOT promulgate regulations that implement Title II's statutory provisions. *See* 42 U.S.C. §§ 12134(a), 12143(b), 12149(a), 12164; *see also Ash*, 2019 U.S. Dist. LEXIS 39849, at *9.

b. Precedent Confirms Title II's Private Enforceability

Simply put, "Title II creates a private right of action against noncompliant public entities." *Gustafson,* 2020 U.S. Dist. LEXIS 155782, at *18. As explained by the Sixth Circuit:

> Title II stipulates that "the remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act, 29 U.S.C. § 794a,] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title." . . . 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act, in turn, adopts "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964."[6] 29 U.S.C. § 794a(a)(2). [footnote omitted] In short, the remedies, procedures, and rights available under Title II of the ADA parallel those available under Title VI of the Civil Rights Act of 1964. . ..
>
> [A] private right of action [thus] exists under . . . 42 U.S.C. § 12133, and derives from the fact that [§ 12133] ultimately adopts the remedies,

[6] Title VI of the Civil Rights Act of 1964, like section 504 of the Rehabilitation Act (*see* note 9 *infra*), bars discrimination in federally assisted programs, but on the ground of race, color or national origin. *See* 42 U.S.C. § 2000d.

> procedures, and rights set forth in Title VI, which, . . . is itself enforceable through a private right of action.

Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 905-06 (6th Cir. 2004).

The Supreme Court and at least seven federal circuits have acknowledged the private enforceability of Title II. *See Lane*, 451 U.S. at 517; *Iverson v. City of Boston*, 452 F.3d 94, 100 (1st Cir. 2006); *Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 118 (2d Cir. 2011); *Bowers v. NCAA*, 346 F.3d 402, 419 (3d Cir. 2003); *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011); *Ability Ctr. of Greater Toledo*, 385 F.3d at 906-07 (6th Cir.); *Lonberg v. City of Riverside*, 571 F.3d 846, 851 (9th Cir. 2009); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003).

c. *Alexander v. Sandoval* Guides Analysis of Whether a Title II Regulation Is Privately Enforceable

Under *Sandoval*, a private party may bring suit to enforce a regulation that is (1) authorized by and (2) validly construes a statute which itself is privately enforceable. "A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be so enforced as well." *Sandoval*, 532 U.S. at 284. In other words, when Congress creates a private right of action to enforce a statute, and authorizes the promulgation of regulations necessary to implement that statute, Congress necessarily intends to create a private right of action to enforce those regulations so long as they are "valid and reasonable." *See id.* Thus, it is "therefore meaningless to talk about a separate cause of action to enforce the regulations

apart from the statute." *Id.* When an individual sues to enforce a regulation, they are enforcing the statute that the regulation implements.

Title II regulations that "do not prohibit otherwise permissible conduct," and instead interpret and "provide the details necessary to implement" the rights created by Title II, are privately enforceable under *Sandoval*. *Chaffin*, 348 F.3d at 858. On this basis, many cases have held that Title II regulations are privately enforceable. *See, e.g., Ability Ctr. of Greater Toledo*, 385 F.3d at 907; *Chaffin.*, 348 F.3d at 856-59; *Frame,* 657 F.3d at 224, 232-33; *S.S. v. City of Springfield*, 146 F. Supp. 3d 414, 425 (D. Mass. 2015); *Access Living of Metro. Chi. v. Chi. Transit Auth.,* 2001 U.S. Dist. LEXIS 6041, at **20-21 (N.D. Ill. 2001).

II. The DOT Regulations at Issue Are Privately Enforceable

Instead of analyzing sections 37.167(c) and 37.173 under *Sandoval*, the Order mischaracterizes their enforcement as improperly establishing "strict liability for any violation" based on their "literal" reading. *Segal* at ** 16-19. But if these regulations are "valid and reasonable," then precedent dictates that they are privately enforceable per their terms because they "authoritatively construe" Title II. *See Sandoval*, 532 U.S. at 284.

Indeed, the DOT states that Part 37 regulations such as sections 37.167(c) and 37.173 are privately enforceable:

> Individuals have a *private right of action* against entities who violate the ADA *and its implementing regulations.* The DOJ can take violators to court. These approaches are not mutually exclusive with the administrative enforcement mechanisms described in this section. An aggrieved individual can complain to DOT about an alleged transportation violation and go to

> court at the same time. Use of administrative enforcement procedures is not, under titles II and III, an administrative remedy that individuals must exhaust before taking legal action.

49 C.F.R. Pt. 37, App. D, § 37.11 Administrative Enforcement (emphasis added); *cf. Segal* at *16 (relying on this DOT explanation of administrative enforcement priorities as authority for *denying* individuals with disabilities the right to enforce DOT implementing regulations in court).

Section 37.173's training "to proficiency" requirements construe and implement Title II because a failure to "*effectively* train . . . employees how to deal with disabled individuals" is itself an ADA violation. *See Camarillo v. Carrols Corp.*, 518 F.3d 153, 157 (2d Cir. 2008) (emphasis added). Title II

> requires that employees of covered entities be trained. Although the statutory language of Title II, Part B, which mandates that public transportation be "accessible" to people with disabilities, does not specifically refer to training, it directs the [DOT] to "issue regulations . . . necessary for carrying out" that mandate. 42 U.S.C. § 12164. Pursuant to that directive, the DOT promulgated 49 C.F.R. Part 37, which includes specific "service requirements," including . . . [the training requirements of] 49 C.F.R. § 37.173 . . .

Stamm v. New York City Transit Auth., 2011 U.S. Dist. LEXIS 36195, at ** 82-83 (E.D.N.Y. 2011). Thus, section 37.173 is privately enforceable.

Section 37.167(c), which applies to bus stops serving "more than one route," and which requires providing "a means by which" a bus rider "with a visual impairment or other disability can identify the proper" bus "to enter," obviously implements "Title II's requirement of program accessibility." *Lane*, 541 U.S. at 531. This regulation is about

providing bus riders with disabilities with the "means" to gain access to the correct bus. Without this "means," they are denied one of the main "benefits" of bus service. *See* 42 U.S.C. § 12132.

The facts of this case illustrate how section 37.167(c) provides a ruler to measure whether a transit agency has run afoul of Title II's discrimination prohibition. Mr. Segal relies on buses to travel to work. However, unlike millions of other Metro Transit customers, Mr. Segal's daily commute is anything but routine. Every workday, Mr. Segal does not know what to expect when he disembarks from one bus and waits for his connecting bus to get to work.

A DeafBlind individual, Mr. Segal can see some shapes and objects, but not clearly. He is profoundly deaf. He uses a service dog and his Orientation and Mobility training to navigate the bus system. Per his training, he waits at transit bus stop signs (T-Signs) for buses. He can tell when a bus has arrived at the T-Sign, but he cannot discern which bus it is. He cannot read the electronic sign on the bus and cannot hear announcements. Mr. Segal likewise cannot hear a bus operator if they yell to him from their bus while he is waiting at the T-Sign.[7] At a bus stop serving multiple routes, the only way Mr. Segal can tell whether the bus that has pulled up to the T-Sign is the one that he wants is by entering the bus with his service dog and communicating with the bus operator using hand signals or his voice. Appellant's Pr. Br. at 11-13; *Segal* at **4-6.

[7] While an operator might assume that Mr. Segal is blind because of his service dog, the operator would not know that he is deaf by looking at him.

Metro Transit's "Where to Stop" policy is its "means" to comply with section 37.167(c). *See Segal* at *17 n.9. If, at a stop serving multiple routes, *all* of the buses comply with that policy by stopping properly at the T-Sign, Mr. Segal can board each bus and determine if the bus is the one that he needs. If it is the incorrect bus, he can disembark, return to the T-Sign, and wait for the bus he needs.

But if some of the buses do not stop at the T-Sign, Mr. Segal has no way of knowing whether the correct bus has left without him. This happens when one bus is already stopped at the T-Sign, a second bus arrives and, instead of waiting its turn to stop at the T-sign, the second bus goes around the first bus and onto its route. Appellant's Pr. Br. at 15; *Segal* at **5-6. And if a bus stops without aligning with the T-sign, Mr. Segal is unable to safely board. In that situation, "it is extremely difficult, and at times unsafe, for [Mr.] Segal to try to navigate to the bus doors to communicate with the operator about route information." *Segal* at *6.

The negative impact on Mr. Segal of buses failing to stop or to stop properly at the T-Sign is much greater than on people without disabilities. The latter can hear bus announcements, see route information displayed on the bus, or use other visual/audio cues to find their bus. They can see if the bus they want pulls up behind another bus, i.e., not at the T-Sign, and they can walk (or run) over to that bus to board it wherever it is (and do so without a service dog in tow). They can hear a bus operator yell important information from open bus doors. When they see that the bus they wanted has blown past their stop,

they can understand that they will have to wait for the next bus from that route, or that they will need to find alternative transportation if they want to get to work on time.

When buses do not stop as they should at the T-sign, Mr. Segal and riders like him do not have the options that people without disabilities have. The solution is simple and provided by section 37.167(c) (per the "means" Metro Transit selected): every bus that arrives at a multiple-route stop is to stop squarely at the T-Sign. Section 37.167(c) thus defines in this context what constitutes Title II discrimination, confirming its enforceability.

III. These DOT Regulations Should Be Given Controlling Weight

If this Court determines that sections 37.167(c) and 37.173 are not privately enforceable, then they still should be given controlling weight because they are not in conflict with other ADA regulations or statutory provisions. *Nat'l Fed'n of the Blind v. Lamone,* 813 F.3d 494, 506 (4th Cir. 2015); *see also Martin v. Metro. Atlanta Rta,* 225 F. Supp. 2d 1362, 1374-75, 1379 (N.D. Ga. 2002) (giving controlling weight to sections 37.167(c) and 37.173). To conclude otherwise with respect to these or like regulations would render a 30-year-old seminal civil rights law merely theoretical.[8]

[8]As an agency's interpretations of its own regulations, the FTA Guidance §§ 6.7.2. and 12.8 relied on by Mr. Segal regarding monitoring requirements (*see* Appellant's Pr. B. at 38) are likewise entitled to substantial deference, considerable respect, and are to be given controlling weight as they are not plainly erroneous or inconsistent with the regulations at issue. *See K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013); *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995); *see also Olmstead v. L.C. by Zimring*, 527 U.S. 581, 597-98 (1999) (views of DOJ, as agency directed by Congress to issue regulations implementing Title II, warrant respect).

IV. Meaningful Access and Title II Regulations

a. The Meaningful Access Standard

Section 12132, the anti-discrimination provision central to Title II, "is universally understood as a requirement to provide 'meaningful access.'" *Lonberg*, 571 F.3d at 851. As explained by the Sixth Circuit,

> Title II does more than prohibit public entitles from intentionally discriminating against disabled individuals. It also requires that public entities make reasonable accommodations for disabled individuals so as not to deprive them of meaningful access to the benefits of the services such entities provide.

Ability Ctr. of Greater Toledo, 385 F.3d at 907; *see also Loye v. County of Dakota*, 625 F.3d 494, 496, 499 (8th Cir. 2010) (Title II requires "'meaningful access' to a public entity's services, not merely 'limited participation'"; it requires that qualified persons with disabilities be afforded an "'equal opportunity'" to "'gain the same benefit'" as people without disabilities).

The Supreme Court's opinion in *Alexander v. Choate,* 469 U.S. 287 (1985) is the source of the "meaningful access" standard. *K.M.*, 725 F.3d at 1102. In *Choate*, the Court considered whether proof of discriminatory intent "is always required to establish violation of" section 504 of the Rehabilitation Act[9] "and its implementing regulations," or whether they also prohibit discrimination "by effect rather than by design." 469 U.S. at

[9] Section 504 provides in relevant part that no otherwise qualified person with disabilities shall, "solely by reason of" their 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 . . .." 29 U.S.C. § 794(a).

292. Rejecting both that only purposeful discrimination is prohibited, and also "that all disparate-impact showings constitute prima facie" section 504 discrimination (*id*. at 299), the Court instead declared that it is discriminatory to fail to provide "meaningful access to the benefit that the [federal] grantee offers." *Id.* at 301. The standard requires that people with disabilities be afforded "'equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement . . ..'" *Id*. at 305 (quoting § 504 regulation).

Contrary to what the Order asserts, *Choate* does not support keeping the ADA "'within manageable bounds'" by refusing to recognize violations of DOT regulations as ADA violations. *Cf. Segal* at *16 (quoting *Choate*, 469 U.S. at 299). That language relates to the Court's consideration of the proper scope of section 504, and ultimately led to adoption of the "meaningful access" standard. Indeed, the Court relied on section 504 regulations in its analysis, and noted that Congress had made clear that "those charged with administering [section 504] had substantial leeway . . . to devise regulations to prohibit" discrimination against people with disabilities in areas in which such discrimination "posed particularly significant problems." *Choate*, 469 U.S. at 304 n.24.

b. Title II Regulations Define and Construe Title II's Anti-Discrimination Mandate

In Title II's statutory provisions, Congress wisely did not attempt to provide all the details of what constitutes discrimination under Title II. *See Chaffin*, 348 F.3d at 858-59 ("Congress intentionally chose 'not to list all of the types of actions that are included

within the term "discrimination"'" under Title II; quoting H.R. Rep. No. 101-485, pt. 2, at 84 (1990)). Instead, Congress directed that the appropriate agency provide those details in implementing regulations. Those regulations add substance to, guide posts for, and ways to measure what is discriminatory and violative of Title II in particular settings and situations. *See Chisolm v. McManimon*, 275 F.3d 315, 324-25 (3d Cir. 2001) (Title II regulations "require that public entities take certain pro-active measures to avoid the discrimination proscribed by Title II"); *Loye v. County of Dakota*, 647 F.Supp.2d 1081, 1087 (D. Minn. 2009), *aff'd* 625 F.3d 494 (8th Cir. 2010) (Title II regulations "illustrate those services public entities *must* provide to assure meaningful access."; emphasis added).

While Title II "regulations flesh out public entities' statutory obligations with more specificity, . . . a public entity may violate the ADA even if no regulation expressly proscribes its particular conduct." *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014). Conversely, violating a "valid and reasonable" regulation is an ADA violation because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be so enforced as well." *Sandoval*, 532 U.S. at 284.

c. Enforcing Title II Regulations Is Not at Odds with the Meaningful Access Standard and Does Not Warrant Judicial Imposition of a "Pattern or Practice" Requirement or "Efforts" Defense

The Order asserts that recognizing each violation of the regulations at issue would "contravene the Eighth Circuit's meaningful access standard." *Segal* at **16-17. It

addresses this perceived problem by imposing a "pattern or practice" requirement that is apparently not satisfied by 150 violations (*Segal* at **9 n.4, 24-25) and despite the fact that no such requirement appears in these regulations. *See* note 4 *supra.* Significantly, the Order does not state that the regulations are in any way ambiguous, or in conflict with other Title II regulations or provisions. But recognizing regulation-based ADA violations is not only consistent with the meaningful access standard as articulated in the Eighth Circuit and elsewhere, it is required.

The defendant school districts in *K.M.*, 725 F.3d 1088, similarly asserted that the plaintiff had to prove *more* than a regulatory violation, arguing that "ADA liability requires plaintiffs to show that they were denied 'meaningful access'" *independent from* violation of Title II regulations. *Id.* at 1102. The Ninth Circuit rejected this argument, explaining:

> [I]n considering Title II's "meaningful access" requirement, we are guided by the relevant regulations interpreting Title II. Consequently, in determining whether [the plaintiffs] were denied meaningful access to the [public entity's] benefits and services, we are guided by the specific standards of the [applicable] Title II . . . regulation. ¶ In other words, *the "meaningful access" standard incorporates rather than supersedes applicable interpretive regulations*, and so does not preclude [the plaintiffs] from litigating their claims under those regulations. The school district's suggestion to the contrary therefore fails.

Id. (emphasis added; citations and footnote omitted).

In support of its ruling that Metro Transit provided Mr. Segal with meaningful access to its services, the Order also relies on Metro Transit's "*efforts* to bolster and enforce its training and policies regarding providing service to disabled passengers" while

acknowledging that, despite such efforts, service complaints "have not been solved." *Segal* at **24-25 (emphasis added). Nowhere in the ADA's statutory provisions and regulations does it say that merely making an effort to provide service suffices. On the contrary, the provision of actual access to people with disabilities is required. *See Folkerts v. City of Waverly,* 707 F.3d 975, 984 (8th Cir. 2013) (Title II and its regulations require that the aid afforded "*results* in meaningful access to a public entity's services"). Were it otherwise, public entities could evade compliance with the ADA by enacting policies and neglecting to enforce them. *Cf. Martin*, 225 F. Supp. 2d at 1379 (until the transit agency "practice[s] what it promises" by enforcing its ADA-compliant stop announcement policies, "it is violating the ADA").

DOT regulations that define and construe Title II's anti-discrimination mandate have the force of law. *See Sandoval,* 532 U.S. at 284-86. Unless ambiguous or in conflict with other Title II statutes or regulations, they should be interpreted and applied as any other controlling law. *See Lamone*, 813 F.3d at 506.

d. Concern about Courts Being Flooded with ADA Lawsuits Is Not a Valid Basis to Restrict Enforceability of These Regulations

The Order expresses concern that if "the court were to recognize every single violation of § 37.167(c) or § 37.173, courts could soon be flooded with lawsuits . . .." *Segal* at *16. This is an additional rationalization for the improper restrictions that the Order imposes on the enforceability of sections 37.167(c) and 37.173. In fact, the

Constitution, Congress and authorized agencies have already placed many "brakes" on ADA litigation, and Congress can choose to add more, if it determines they are needed.

For example, a plaintiff bringing an ADA action must show a cognizable injury, traceable to violation of the regulation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see, e.g., Frame*, 657 F.3d at 235-36 (to establish Article III standing, plaintiffs required to show inaccessible sidewalk affected their "activities in some concrete way"). In some situations, a single incident may not suffice to satisfy Article III requirements. *See Tandy v. City of Wichita*, 380 F.3d 1277 (10th Cir. 2004) (analyzing standing of plaintiffs testing a transit agency's fixed-route bus system).

Also, Title II and its implementing regulations already contain many such "brakes." As the Supreme Court explained in *Lane,* Title II "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." *Lane*, 541 U.S. at 532 (citing 42 U.S.C. § 12131(2)). "And in no event is the [public] entity required to undertake measures that would impose an undue financial or administrative burden, . . . or effect a fundamental alternation in the nature of the service." *Id.* (citing 28 C.F.R. §§ 35.150(a)(2), (a)(3)).

Similarly, many ADA regulations do "not require perfection on the part of public entities." *Cf. Segal* at *17. They make allowances for disruptions in service or access due to maintenance, repairs, or restocking, as well as for circumstances beyond the public entity's control, such as mechanical failures, inclement weather, and unexpected traffic

conditions. *See, e.g.,* 49 C.F.R. § 37.131(f)(3)(ii) (operational problems beyond public entity's control)[10]; *see also Chapman v. Pier I Imps. (U.S.) Inc.,* 779 F.3d 1001, 1006-08 (9th Cir. 2015) (discussing regulations allowing for isolated or temporary interruptions in service or access due to restocking shelves, mechanical failures, maintenance or repairs).

Enforcing sections 37.167(c) and 37.173 does not trigger application of any of these "brakes," as demonstrated by this case. There are no facts suggesting that complying with these regulations is beyond Metro Transit's control, as it is a simple matter of having its bus operators stop where they are supposed to stop. Nor does Metro Transit assert that it would be unduly burdensome for it to comply. And this case does not implicate the Order's flooding concern as it involves a *single* case with evidence of "approximately 300 complaints from disabled passengers, including [Mr.] Segal" regarding violations of these regulations. *Segal* at **24-25. The restrictions that the Order imposes on the enforceability of sections 37.167(c) and 37.173 are thus not justified.

Finally, the decision to limit the right of people with disabilities to seek redress for ADA violations based on concern about the number of ADA cases is one properly made by Congress and authorized agencies, not the courts. *See Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 866 (1984) (courts "have a duty to respect legitimate policy choices made by" the legislative branch and the "responsibilities for assessing the wisdom of such

[10] In contrast to 49 C.F.R. § 37.131(f)(3), which includes a "pattern or practice" standard for violations in the paratransit context, the DOT did not impose any such standard in sections 37.167(c) and 37.173. *Cf. Segal* at **23-24 (noting "pattern and practice" standard in paratransit regulations).

policy choices and resolving the struggle between competing views of the public interest are not judicial ones"); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) (only Congress may limit access to the federal courts as "Congress rather than the courts controls the availability of remedies for violations of statutes.").[11]

V. The Enforceability of Transportation Accessibility Statutes and Regulations is the Only Way to Ensure Meaningful Access for People with Visual and/or Auditory Disabilities to Fixed-Route Transit Systems

In the U.S., approximately 7.7 million people have a visual disability[12] and at least 48 million people are deaf or hard of hearing.[13] There are an estimated 50,000 people who have both a visual disability and are deaf or hard of hearing.[14] Public transportation is important for most people, but is essential for those who do not drive, including those who

[11] Instead of seeking to limit the number of ADA cases, Congress in 2008 responded to restrictive appellate and high court decisions by amending the ADA to clarify its intended broad scope. *See* P.L.110-325, 122 Stat. 3553, section 2(a) (expressly overriding *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184 (2002), *Sutton v. United Airlines*, 527 U.S. 471 (1999) and companion cases).

[12] National Federation of the Blind, Blindness Statistics, Blindness Among Adults, Prevalence of Visual Disability (2016), https://www.nfb.org/resources/blindness-statistics (updated Jan. 2019).

[13] Frank R. Lin, et al., Hearing Loss Prevalence in the United States, 171 Arch Intern Med. 1851-52 (Nov. 14, 2011), available at: https://www.ncbi.nlm.nih.gov/entrez/eutils/elink.fcgi?dbfrom=pubmed&retmode=ref&cmd=prlinks&id=22083573

[14] NLS: National Library Service for the Blind and Print Disabled, Library of Congress, Deaf-Blindness (2019), https://www.loc.gov/nls/resources/deaf-blindness/#:~:text=The%20National%20Consortium%20on%20Deaf,blind%20in%20the%20United%20States

are blind, visually impaired, or DeafBlind. Every year, both the NFB and the NAD receive complaints from their members about the inaccessibility of public transportation.

Short of litigation, what can people with disabilities do to ensure that transit agencies follow the law and ensure their safe transport, just as they do for millions of other transit users? Very little. Here, for example, it was only after Mr. Segal initiated this lawsuit – which he did almost two years after first complaining to Metro Transit about these issues – that Metro Transit took "efforts to ensure that bus operators servicing [Mr.] Segal's route were following" policies which were, themselves, "new or adapted policies" intended specifically "to address [the T-Sign issues identified by Mr.] Segal's complaints." *Segal* at **7, 10-12. But for Mr. Segal's consistent reporting of T-Sign issues and the threat of litigation, Metro Transit likely never would have created a "Where to Stop" policy. *See Segal* at *10.

The Order informs Mr. Segal that he has no legal recourse. This is not what Congress envisioned when enacting the ADA. *See Disabled in Action of Pa. v. SEPTA*, 635 F.3d 87, 94 (3d Cir. 2011) (the ADA is "meant to bring an end to discrimination against individuals with disabilities in all aspects of American life; it must be construed with all liberality necessary to achieve such purposes.")

CONCLUSION

The Order must be reversed to ensure that people with disabilities who depend on public transportation to lead independent lives have recourse if their public transportation is not accessible due to not being in compliance with federal law.

For the forgoing reasons, amici submit this brief in support of reversal of the Order's grant of summary judgment to Metro Transit.

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Respectfully submitted,

/s/ Bridget A. Clarke

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

This brief complies with: (1) the type-volume limitation of Fed. R. App. P. Rule 29(a)(5) because it contains 6,382 words, excluding the parts exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the body of the brief has been prepared in 14-point Times New Roman font using Microsoft Word 2016.

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