Nos. 07-15661 & 07-15896

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

SHARON GEORGE & SHARRICCI FOURTE-DANCY,

Plaintiffs-Appellees

v.

BAY AREA RAPID TRANSIT DISTRICT,

Defendant-Appellant

UNITED STATES OF AMERICA,

Intervenor-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

_____

OPENING BRIEF FOR THE UNITED STATES AS APPELLANT

_____

RENA J. COMISAC
Acting Assistant Attorney General

MARK L. GROSS
KARL N. GELLERT
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-4441

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STATEMENT OF JURISDICTION

The plaintiffs brought claims against defendant Bay Area Rapid Transit District (BART) under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 1201 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* R.1.[1] The district court had federal question jurisdiction over these claims under

[1] This brief uses the following abbreviations: "R." indicates the entries on the district court docket, No. 00-cv-02206. "E.R." indicates the "Excerpts of Record" filed by Appellant BART.

28 U.S.C. 1331. The district court had supplemental jurisdiction over the plaintiffs' state-law claims under 28 U.S.C. 1367. The district court entered its final order on March 20, 2007 (R. 206), and entered its final amended judgment on March 22, 2007 (R. 210). On April 18, 2007, BART filed a notice of appeal in No. 07-15661. On May 17, 2007, the United States filed its notice of appeal in No. 07-15896, which was timely. See Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over these consolidated appeals from the district court's final order and judgment under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court erred when it invalidated as arbitrary and capricious 49 C.F.R. 37.9(a), which is one of the regulations promulgated by the United States Department of Transportation (DOT) to implement the public transportation provisions of the ADA.

STATEMENT OF THE CASE

This is the second appeal in this case. The plaintiffs are two individuals who have low vision. Defendant BART is a public entity that provides public transportation services in the San Francisco Bay area.

1. On June 21, 2000, the plaintiffs sued BART, alleging that in 1999, each plaintiff, twice, had difficulty using the stairs at BART stations. The plaintiffs alleged that BART violated the ADA, the Rehabilitation Act, and California law.

In response, BART asserted, among other things, that its compliance with the ADA regulations, promulgated by the Department of Transportation (DOT), constituted compliance with the ADA as a matter of law.

On January 10, 2003, the district court granted summary judgment to plaintiffs, holding that the DOT regulations on which BART relied were arbitrary and capricious and therefore invalid. E.R. 17. After further proceedings, including stipulated injunctive relief, on March 18, 2004, the district court entered a final judgment in favor of plaintiffs (E.R. 15), and BART appealed (R. 150).

The United States had not been a party nor participated in the proceedings prior to that first appeal, but filed a brief as *amicus curiae* in this Court, arguing that the DOT regulations were not arbitrary and capricious. On April 21, 2006, this Court vacated the district court's order and remanded so that the United States could be joined as a party to defend the validity of the regulations. *George* v. *Bay Area Rapid Transit District*, 175 Fed. App'x 809 (9th Cir. 2006).

2. On May 23, 2006, the district court granted the motion of the United States to intervene (E.R. 166), and the parties filed briefs addressing whether DOT's regulations were arbitrary and capricious (R. 184, 192, 193; E.R. 95, 100). The district court again found the regulations to be arbitrary and capricious, E.R. 3, and again entered judgment in favor of the plaintiffs (E.R. 1). BART and the United States appealed. E.R. 91, 93.

STATEMENT OF FACTS

BART is a public entity that provides automated rapid transit service in the San Francisco Bay Area. E.R. 4. Because BART receives funding through DOT, BART must comply with DOT's regulations as part of its compliance with the Rehabilitation Act. See 49 C.F.R. 37.21. Most of BART's stations were built between 1964 and 1972, and BART began operating in 1972. E.R. 28. Plaintiff Sharricci Fourte-Dancy uses BART's transit services and is visually impaired because of congenital cataracts. E.R. 4. Plaintiff Sheron George died while this case was pending on its first appeal; her personal representative, Corina Joseph, has been substituted for her. E.R. 4. Ms. George had been visually impaired because of progressive glaucoma. E.R. 4.

The plaintiffs alleged that each had difficulty using BART stations on two occasions because BART did not have color-contrast striping on the stairs at its stations. E.R. 60-61. Ms. George claimed that in June 1999, she fell down the stairs at BART's Powell Street Station because the stairs did not have color-contrast striping. E.R. 61.[2] Ms. George also claimed that in July 1999, she fell down the stairs at BART's Hayward Station, because there were no color-contrast stripes on the stairs. E.R. 61. Similarly, Ms. Fourte-Dancy claimed that in January 2000, she had difficulty descending stairs at BART's MacArthur Station because

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[2] The district court concluded that the stairs down which plaintiff George fell were not part of BART's Powell Station. See E.R. 44-45.

there were no color-contrast stripes on the stairs. E.R. 61. Ms. Fourte-Dancy claimed that in March 2000, she had difficulty using the stairs to exit BART's 19th Street Station, because there were no color-contrast stripes on the stairs. E.R. 61.[3]

STATUTORY AND REGULATORY SCHEME

1. Congress adopted the ADA to address the problem of widespread discrimination against people with disabilities. The Act has three major subchapters. Title I addresses employment discrimination, see 42 U.S.C. 12111–12117; Title II addresses discrimination in the programs and services provided by public entities, see 42 U.S.C. 12131–12165; and Title III addresses discrimination in public accommodations, see 42 U.S.C. 12181–12189. Because this case involves a public entity providing public transportation services, it is governed by Title II.

Title II has two parts. Part A, 42 U.S.C. 12131–12134, includes the basic requirement that public entities not discriminate: "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. Part B, 42 U.S.C. 12141–12165, applies that prohibition in the context of public transportation.

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[3] The 19th Street Station subsequently has been altered, and the plaintiffs no longer have claims relating to that station. E.R. 4.

Part B has three Sections that address the facilities a public transit entity such as BART provides. Section 12146 requires public entities, when constructing new facilities, to ensure that the facilities are "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12146. Section 12147 governs existing facilities. Generally, existing facilities need not be modified, but when existing facilities are altered, the altered portion must be made "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12147(a). Section 12147(b)(1) creates a special rule for existing facilities that are "key stations." 42 U.S.C. 12147(b)(1). Under that Section, it is considered discrimination in violation of Section 12132 for a public entity "to fail * * * to make key stations * * * in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. 12147(b)(1).[4] Section 12148 governs programs and activities conducted by a public entity in existing facilities. Such programs or activities, "when viewed in the entirety," must be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12148(a)(1).

The ADA also requires public transportation entities that use a "fixed route system" (such as BART) to provide comparable paratransit services for those persons with disabilities who cannot use the fixed route system. See 42 U.S.C.

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[4] The BART stations that are the subject of this suit are "key stations."

12143.[5] To receive paratransit services, one must meet certain statutory eligibility criteria. Specifically, paratransit services must be provided "to any individual with a disability who is unable, as a result of a physical or mental impairment (*including a vision impairment*) * * * to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12143(c)(1)(A) (emphasis added). Paratransit service goes from "origin to destination" rather than being restricted to a "fixed route," see 49 C.F.R. 37.129(a), and usually must be scheduled prior to the time the rider wishes to travel, see 49 C.F.R. 37.131(b).

2. Congress directed the Attorney General to promulgate regulations implementing Title II generally, with the exception of those matters within the scope of the Secretary of Transportation's rulemaking power. See 42 U.S.C. 12134(a). Congress directed the Secretary to promulgate regulations implementing the transportation-specific provisions of Part B, see 42 U.S.C. 12143, 12149, 12164. Also, Congress directed the Architectural and Transportation Barriers Compliance Board (Access Board or Board) to publish minimum accessibility guidelines for public entities, including public transportation. See 42 U.S.C.

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[5] A "fixed route system" travels along a fixed route and according to a set schedule. See 42 U.S.C. 12141(3).

12204.[6] Congress directed the Secretary to make DOT's regulations "consistent" with the minimum guidelines issued by the Access Board. 42 U.S.C. 12149(b). In 1991, the Access Board issued the ADA Accessibility Guidelines (ADAAG).[7] That same year, DOT issued its ADA regulations, which also incorporate the ADAAG. See 49 C.F.R. Pt. 37, App. A.

Congress did not set out in the ADA the specific requirements that would make a facility or program "readily accessible to and usable by" people with disabilities; it chose rather to defer to the expertise of DOT and the Access Board. DOT, following the congressional mandate to implement the statute, defined this term in 49 C.F.R. 37.9(a). Under that regulation, a facility is "readily accessible" if it complies with requirements set out in the DOT regulations, including the incorporated ADAAG, which set out in detail specific accessibility design features that facilities must have.

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[6] The Access Board has 25 members, and has expertise in architecture and design for people with disabilities. See 29 U.S.C. 792. Twelve of the Board members are representatives from various federal agencies, including DOT. See 29 U.S.C. 792(a)(1). The other 13 Board members are individuals who are appointed by the President, a majority of whom must be individuals with disabilities. *Ibid.*

[7] The Board initially issued the ADAAG on July 26, 1991. See 56 Fed. Reg. 35,408. In that initial version, the Board reserved Sections for guidelines that specifically addressed transportation facilities, and issued those transportation-related guidelines on September 6, 1991. 56 Fed. Reg. 45,500.

During the notice and comment period prior to the Access Board issuing the ADAAG, the Board considered several comments involving accessibility for those with visual impairments.[8] Before adopting its ADA regulations, DOT published a notice of proposed rulemaking, held six hearings, and received nearly 400 comments, some of which dealt with access for people with limited vision. DOT's Transportation for Individuals with Disabilities, 56 Fed. Reg. 45,584 (1991).[9] DOT's regulations include numerous requirements specifically addressing the needs of people with visual impairments.

Most relevant to this case, the incorporated ADAAG requires specific accessibility features for newly constructed stations, including light rail stations, see ADAAG § 10.3.1(1) – (19), and requires that light rail key stations have "at least one accessible route from an accessible entrance to those areas necessary for use of the transportation system," ADAAG § 10.3.2(1). The accessible route in a

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[8] See ADA Accessibility Guidelines for Buildings and Facilities; Transportation Facilities, 56 Fed. Reg. 45,503 (1991) (suggestions on design criteria and layout to aid those with visual impairments); *Ibid.* (the use of large characters on signs); *Ibid.* (methods to make schedules, timetables, and route identification accessible to those with visual impairments); *Ibid.* (whether audible signs or other new technology might be substituted for tactile signage and maps).

[9] See 56 Fed. Reg. 45,741 (signage, continuous pathways and public address systems accessible to people with visual impairments); 56 Fed. Reg. 45,584 (priority seating); 56 Fed. Reg. 45,623 (edge detection, lighting, schedules in alternate formats); 56 Fed. Reg. 45,624 (use of service animals); 56 Fed. Reg. 45,601-45,602 (paratransit).

key station must have 15 of the 19 accessibility features required of new stations. See ADAAG § 10.3.2(2).

An accessible route can include ramps or elevators, but not escalators or stairs. See ADAAG § 4.3.8 (changes in level). Where elevators are part of the accessible route, those elevators must include accessible features, see ADAAG §§ 10.3.1(17) (new construction), 10.3.2(2) (key stations), many of which specifically address the needs of individuals with visual impairments. For example, elevators must have audible signals and audible floor indicators, ADAAG §§ 4.10.4, 4.10.13, Braille or raised characters at the entrances and on the floor indicators, ADAAG §§ 4.10.5, 4.10.12, and tactile identification on the emergency communication device, ADAAG § 4.10.14.

Many of the other design features required in stations address the needs of people with visual impairments. For instance, where the circulation path for people with disabilities is not the same as the path used by the general public, stations must include signs indicating the direction to the accessible entrance and the accessible route, and must ensure that the signs use the international symbol of accessibility (the wheelchair icon) and have specific minimum character proportions and heights. ADAAG §§ 10.3.1(1) (new construction), 10.3.2(2) (key stations). In addition, identifying signs at entrances must include Braille and must comply with the technical requirements for such signs. ADAAG §§ 10.3.1(4) (new

construction), 10.3.2(2) (key stations). Signs must also comply with provisions intended to minimize glare. ADAAG §§ 10.3.1(11) (new construction), 10.3.2(2) (key stations). Stations must also provide "detectable warnings" on platform edges bordering drop-offs. ADAAG §§ 10.3.1(8) (new construction), 10.3.2(2) (key stations). Lighting along circulation paths must be uniform. ADAAG §§ 10.3.1(11) (new construction), 10.3.2(2) (key stations).

The ADAAG also includes guidelines governing objects such as telephones that protrude into the circulation path, see ADAAG §§ 4.1.3(2), 4.4, so that such objects will be detectable by individuals using a cane. Newly constructed stations that are below ground must also provide color-contrast stripes on escalators. ADAAG § 10.3.1(16).

Transportation entities must also announce stops, 49 C.F.R. 37.167(b), (c), permit the use of service animals, 49 C.F.R. 37.167(d), and provide individuals with disabilities adequate information concerning transportation services, 49 C.F.R. 37.167(f).[10]

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[10] On October 30, 2006, DOT issued revised regulations that incorporated the Access Board's revised ADAAG. DOT's new regulations became effective November 29, 2006. See 71 Fed. Reg. 63,263 (2006). The substantive changes in the ADAAG and DOT regulations do not directly affect issues of visual impairment and public transit, and they do not change any issues relevant to this case. Most important, under the new 49 C.F.R. 37.9(c), existing facilities such as BART's key stations, need comply only with the prior regulations, unless the existing stations are modified. See 71 Fed. Reg. 63,265. Thus, BART's key stations continue to be governed by the prior regulations.

PROCEEDINGS BELOW

A. The Initial Litigation And The First Appeal

1. On June 21, 2000, plaintiffs sued BART under the ADA, the Rehabilitation Act of 1973, 29 U.S.C. 794, and state law, claiming that some of BART's stations were not accessible to persons with visual impairments. R.1. In June 2001, BART moved for partial summary judgment, arguing that under the DOT regulations implementing the ADA, it only had to provide one accessible route at its stations for all people with disabilities. Therefore, BART argued, it did not have to provide a separate accessible route for people with visual impairments. BART relied upon ADAAG § 10.3.1(1), which states that operators of key stations "shall provide at least one accessible route from an accessible entrance to those areas necessary for use of the transportation system." See E.R. 66.

The district court interpreted this provision as requiring that *every* individual with a disability must be able to actually access the station. E.R. 67. Accordingly, the court concluded that if a person with a visual impairment could not use the accessible route that was usable by a person in a wheelchair, BART would have to provide another accessible route usable by people with visual impairments. E.R. 67-68.

2. The parties subsequently moved for summary judgment, and the court granted each motion in part. The court understood the plaintiffs to be asking for

color-contrast striping on stairs and longer handrails. E.R. 32. While the plaintiffs conceded that they could not show that BART's stations violated any of the DOT's ADA regulations (E.R. 34), plaintiffs contended that BART's stations violated the Department of Justice's ADA regulations. E.R. 34-35. The plaintiffs argued that Department of Justice (DOJ)'s regulations required BART to modify (i) the accessible route in its key stations to include directional cues to visually disabled patrons, or (ii) its "stairs and handrails for use by visually disabled patrons." E.R. 36.

The district court concluded that the record showed that "there are no raised letter signs, Braille signs, or audio cues along BART's 'universal' accessible routes." E.R. 36. BART argued that the DOT regulations did not require such cues, and that under the DOT regulations, if their stations satisfied the DOT requirements, they were accessible under the ADA as a matter of law. E.R. 37-38. The court concluded, however, that "compliance with the Department of Transportation regulations * * * does not excuse BART from compliance with the separate and independent DOJ Regulations." E.R. 36. The court then found that BART violated a DOJ regulation that requires a public entity to provide information regarding "the existence and location of accessible services, activities, and facilities." E.R. 39 (quoting 28 C.F.R. 35.163).

3. BART moved for reconsideration of this finding. BART argued that DOJ's ADA regulations do not apply to public transportation matters covered by DOT's ADA regulations. E.R. 21 (relying on 28 C.F.R. 35.102(b)). BART argued that because DOT's regulations included a specific signage requirement that applied to key stations, BART did not have to comply with analogous DOJ signage requirements. E.R. 21-22. In response to that motion for reconsideration, the district court concluded that BART was correct regarding the applicability of DOJ's regulations, but held that DOT's regulations were arbitrary and capricious because they failed to consider the needs of persons with visual impairments. E.R. 24.

After further proceedings, the district court entered a judgment against BART on March 18, 2004. E.R. 15. BART was required to pay each of the plaintiffs compensatory damages and was ordered to make various modifications to its stations, including providing color-contrast striping, accessible handrails, and cane-detectable warnings on projecting objects. E.R. 15-16. BART appealed that judgment. R. 150.

On appeal, the United States filed an *amicus* brief, arguing that the DOT regulations validly implemented the ADA. This Court vacated the district court's judgment, and remanded the case so that the United States could be added as a

party to defend the regulations. *George* v. *Bay Area Rapid Transit District*, 175 Fed. App,x 809 (9th Cir. 2006).

B. Proceedings After Remand

After remand, the district court granted the United States' motion to intervene and ordered the government to file a brief addressing the validity of the DOT regulations. E.R. 166. The district court again held that the DOT regulations were arbitrary and capricious. E.R. 14.

The United States argued that neither the ADA nor the DOT regulations require that BART's stations or entrances actually be accessible for *every* person with a disability. The district court agreed, stating that it had intended to state that the ADA required that "'persons with all types of disabilities' must be able to access public transportation." E.R. 10.

Further, the United States argued that the fact that a person with a visual impairment was not able to use a station did not, by itself, prove that the station failed to comply with the ADA. Rather, the government contended that the statute itself recognizes that some people with disabilities will be unable to use "readily accessible" facilities, and that for those individuals, the ADA requires entities like BART to provide comparable paratransit services.

The district court, however, held that paratransit has a very narrow role under the ADA: "[A]lternate services, such as paratransit, are intended to serve as

a last resort for those individuals with disabilities so severe that even readily accessible public transportation is not an option." E.R. 10. The court, therefore, held that the ADA's requirement of paratransit services did not alter its view that the term "readily accessible" required actual access to stations for all people with visual impairments. The court noted that "the regulations fail adequately to ensure that public transportation is readily accessible to individuals with visual impairments. Therefore, the requirement of alternate services for those so disabled that they cannot use even readily accessible services does not defeat Plaintiffs' claims." E.R. 10.

The court then held that the DOT regulations were arbitrary and capricious, identifying two flaws. First, the court concluded that DOT had recognized that further "accommodations" were necessary to make public transportation stations accessible to the visually impaired, but then failed to require those "accommodations." E.R. 11. Second, the court stated that while the Access Board required "performance standards" regarding physical access to key stations for people with mobility impairments, it failed to include any such standards for people with severe visual impairments. E.R. 12-13. The court held that the agency's decision not to regulate concerning visual impairments "is not reasoned," stating that while DOT recognized that more information was needed on the

subject of access for people with poor vision, "DOT has not provided evidence that it sought information or conducted research on the issue." E.R. 13.

SUMMARY OF ARGUMENT

Under well-settled law, DOT's ADA regulations are presumptively valid, and plaintiffs have the burden of proving them invalid. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers Of Am.* v. *United States Dep't of Agriculture*, 415 F.3d 1078, 1093 (9th Cir. 2005). Congress expressly delegated to DOT the authority to promulgate regulations implementing the ADA's provisions, see 42 U.S.C. 12149. Accordingly, under the familiar framework of *Chevron, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), DOT's regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute," *id.* at 843-844. DOT's regulations are neither manifestly contrary to the ADA, nor are they arbitrary and capricious.

1. DOT's regulatory definition of "readily accessible" for facilities such as BART's key stations, 49 C.F.R. 37.9(a), is fully consistent with the ADA. The district court appears to have concluded incorrectly that whether a station was "readily accessible" under the ADA turned on whether plaintiffs or some other individuals with visual impairments could use it. That interpretation contradicts the plain language of the ADA. Whether any particular individual or individuals can access a station is not determinative of whether it complies with the ADA. The

ADA requires that public entities such as BART provide comparable alternate transportation services, called "paratransit," for individuals with disabilities who are unable to use public transportation even though vehicles and stations are readily accessible. See 42 U.S.C. 12143(c). That provision expressly states that individuals with "vision impairments" will be eligible for alternate paratransit services. 42 U.S.C. 12143(c). The district court's conclusion that Congress did not intend paratransit services to be an acceptable mode of public transportation for some people with visual impairments was error.

2. Moreover, DOT's regulatory definition of "readily accessible" is not arbitrary and capricious. The district court committed three fundamental errors in reaching the contrary conclusion. First, the district court misunderstood the rulemaking record regarding the Access Board's consideration of signage and color-contrast warnings. Contrary to the district court's understanding, the Board did not conclude that further "accommodations" were required to make stations accessible and then failed to require such "accommodations." Rather, the Board concluded that it lacked sufficient information to determine whether and what wayfinding features might be needed to assist persons with severe visual impairments who could not benefit from signs. Also, the Board concluded that there was not sufficient evidence to justify requiring color-contrast striping on stairs. The Board's decisions were clearly related to the facts before it, and those

decisions in no way show that 49 C.F.R. 37.9(a) is arbitrary and capricious. See *Environmental Def. Ctr.* v. *EPA*, 344 F.3d 832, 860 & n.39 (9th Cir. 2003).

Second, the district court misunderstood the rulemaking record regarding the "performance standard" required by the ADAAG. That performance standard seeks to minimize the travel distance for people with mobility or other disabilities, including poor vision, that prevent them from using stairs. ADAAG § 10.3.1(1). While the district court concluded this standard was not intended to help persons with visual impairments, the court misunderstood the rulemaking record: The Access Board concluded that, among others, people with visual impairments would benefit from this requirement. 56 Fed. Reg. 45,504.

Finally, the district court appears to have based its decision on unsupported factual assumptions. Stated most simply, the plaintiffs did not attempt to offer any facts to show that DOT's regulations were invalid. Without a factual basis in the record, the district court erred in assuming a generalized, large-scale, nation-wide problem.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING DOT'S REGULATORY DEFINITION OF "READILY ACCESSIBLE" INVALID

A. Introduction And Standard Of Review

The plaintiffs alleged that four of BART's key stations did not comply with the requirements of the ADA. As noted above, the ADA requires that key stations be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12147(b).

The ADA does not define the term "readily accessible." Rather that term is defined by DOT's regulation, 49 C.F.R. 37.9(a). The plaintiffs did not allege that BART's key stations violated the regulatory definition of "readily accessible." E.R. 9. Thus, so long as DOT's regulation validly interprets the statutory term "readily accessible," the plaintiffs have not shown that BART violated the ADA's requirement to provide "readily accessible" key stations.

DOT promulgated its ADA regulations, including the regulatory definition in 49 C.F.R. 37.9(a), after notice and comment, and there has been no suggestion that the regulations were procedurally defective. Under well-settled precedent, those regulations have a presumption of validity, and any party challenging them bears a substantial burden to show that they are invalid. See *Ranchers Cattlemen Action Legal Fund United Stockgrowers Of Am.* v. *United States Dep't of*

Agriculture, 415 F.3d 1078, 1093 (9th Cir. 2005) (presumption of validity requires deference to agency action).

This case is controlled by the familiar framework set out in *Chevron, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under that framework, a court "first determine[s] whether Congress has expressed its intent unambiguously on the question before the court." *Environmental Def. Ctr.* v. *EPA*, 344 F.3d 832, 852 (9th Cir. 2003) (citing *Chevron*, 467 U.S. at 842-844). This Court reviews that issue *de novo*. See *Saberi* v. *Commodity Futures Trading Comm'n*, 488 F.3d 1207, 1212 (9th Cir. 2007).

When, however, a "court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron*, 467 U.S. at 843. An agency's authority to administer a program created by Congress includes "the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Ibid.* (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). Accordingly, where Congress has not unambiguously expressed its intent, the court should defer to the agency's expertise in the subject matter, and must determine only whether the agency's regulations reasonably implement the statutory language. *Ibid.* Moreover, where, as here, Congress expressly delegates rulemaking authority to an agency, "[s]uch

legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-844.

B. DOT's Regulatory Definition Of "Readily Accessible" Is Consistent With The ADA And Fully Implements The Statute

As noted previously, the ADA does not define the term "readily accessible." DOT defined this term in 49 C.F.R. 37.9(a), which provides that a facility is "readily accessible" if it complies with the specific requirements set out in the DOT regulations, including the incorporated ADAAG. That is, under the DOT regulations, whether a key station is "readily accessible" as required by 42 U.S.C. 12147(b) depends on what features it has. Accordingly, whether any *particular* individual with a disability can access a *particular* key station is not determinative of the issue of whether the station is "readily accessible."

The district court apparently rejected DOT's interpretation. The court apparently concluded that the government had argued that providing alternate paratransit services would defeat a claim that DOT's regulations were arbitrary and capricious even if DOT had *entirely* ignored the needs of people with visual impairments. See E.R. 10. That clearly was not the government's argument. Rather, the government argued that Congress understood that some individuals with disabilities, including some with visual impairments, would not be able to use facilities or vehicles even if the facilities or vehicles were "readily accessible." For those relatively few individuals, the statutorily mandated paratransit services

provide a critical "safety net" to enable those individuals to use public transportation. See 49 C.F.R. Pt. 37, App. D (explaining 49 C.F.R. 37.121).

This understanding of the ADA is confirmed by the language of the statute when read as a whole. See *Morales-Izquierdo* v. *Gonzales*, 486 F.3d 484, 490 (9th Cir. 2007) (en banc) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The meaning of the term "readily accessible" in Section 12147(b)(1) is significantly informed by Section 12143, which requires transportation entities such as BART to provide alternate paratransit services. That provision requires that paratransit be provided to

> any individual with a disability who is unable, as a result of a physical or mental impairment (*including a vision impairment*) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is *readily accessible* to and usable by individuals with disabilities.

42 U.S.C. 12143(c)(1)(A)(i) (emphasis added). Thus, Congress did not intend "readily accessible" to mean that *all* individuals with disabilities would be able to use public transportation stations. Rather, Congress intended that those who could not use readily accessible stations would be eligible for paratransit, and recognized that some individuals with visual impairments would be among them.

The district court, on the other hand, concluded that paratransit is available only for people with "severe" disabilities. See E.R. 9-10. Eligibility for

paratransit, however, turns on the nature of one's disability, not on its "severity." Eligibility is conditioned *only* on whether the individual's disability prevents him or her from boarding, riding, or disembarking from a transportation vehicle, see 42 U.S.C. 12143(c)(1)(A)(i), (ii), or from traveling to a boarding location or from a disembarking location, 42 U.S.C. 12143(c)(1)(A)(iii). In fact, it has been DOT's experience that whether a person with a visual impairment can use a key station or needs to rely on paratransit will often depend less on the extent of the individual's impairment than it does on other factors, such as whether the individual has received training on how to find a station and navigate through it and whether the individual uses a cane or service animal.

The decision of what features to require for readily accessible stations requires a balance of feasibility and effectiveness. Determining what features or modifications are reasonable is a decision informed by the agencies' expertise. Because Congress left a gap for DOT to fill by leaving "readily accessible" undefined, Congress delegated those decisions to DOT. See *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2347 (2007) (Court inferred Congress intended delegation to promulgate definition to include authority to determine policy questions that might turn on agency's expertise).

C. DOT's Regulatory Definition Of "Readily Accessible" Is Not Arbitrary And Capricious

The district court concluded that DOT's regulatory definition of "readily accessible" was arbitrary and capricious. But the burden of showing a regulation to be arbitrary and capricious is very high, and, as discussed below, it was not met here.

A court may reject a regulation "under the 'arbitrary and capricious' standard only if the agency: 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Environmental Def. Ctr.*, 344 F.3d at 858 (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)); see also *Ranchers*, 415 F.3d at 1093 (reiterating standard). Review under the arbitrary and capricious standard, however, does not permit a court to "substitute [its] judgement for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

1. DOT And The Access Board Carefully Considered Accessiblity Requirements For Public Transportation Programs And Facilities

Congress gave the Secretary of Transportation authority to promulgate regulations to enforce that portion of the ADA governing public transportation,

see, *e.g.*, 42 U.S.C. 12149, and directed the Board to promulgate minimum accessibility guidelines, including guidelines for public transportation facilities, see 42 U.S.C. 12204.

During the process of promulgating its regulations, DOT considered all of the comments given to the Board during the Board's development of the ADAAG. See 56 Fed. Reg. 45,587. DOT also invited comments from the public, at both the proposed and final rulemaking stages. Before adopting its ADA regulations, DOT held six hearings, and received nearly 400 comments, some of which dealt with access for people with limited vision.

During the notice and comment period for its final rule, the Board considered several comments involving accessibility for those who are blind or have low vision. These comments included suggestions on design criteria and layout to assist persons with visual impairments, ADA Accessibility Guidelines for Buildings and Facilities; Transportation Facilities, 56 Fed. Reg. 45,503 (1991); the use of large characters on signs, 56 Fed. Reg. 45,502; methods to make schedules, timetables, and route identification accessible to those with visual impairments, 56 Fed. Reg. 45,503; and whether audible signs or other new technology might be substituted for tactile signage and maps, *Ibid.*

Similarly, during its rulemaking process, DOT considered several comments relating to the accessibility of public transportation facilities for persons with

visual impairments. For example, DOT adopted the suggestion of a blind individual that persons with disabilities not be compelled to sit in priority seating. See 56 Fed. Reg. 45,584. DOT also responded to comments on edge detection for persons with visual impairments, adequate lighting for persons with low vision, providing schedules in alternate formats (*e.g.*, large print, Braille, readers) for persons with visual impairments, 56 Fed. Reg. 45,584, 45,623; use of service animals, 56 Fed. Reg. 45,624; and eligibility for paratransit as applied to those with visual impairments, 56 Fed. Reg. 45,601-45,602.

As described above, pp. 9-11, *supra*, at the conclusion of its rulemaking process, DOT adopted numerous provisions to ensure that public transportation programs and facilities are readily accessible to and usable by disabled individuals. These provisions require numerous features that benefit individuals with visual impairments, including signage that is more visible to people with low vision, and detectable warnings, which are important safety features for people with low vision or who are blind. The DOT regulations also require entities to announce stops, permit the use of service animals, and provide information in a form that is usable by people with visual impairments.

Quite obviously, DOT considered the needs of people with visual impairments as it devised its regulations, as it did for people with other impairments, in a "detailed and reasoned fashion," and therefore the regulations are

entitled to deference. *Chevron*, 467 U.S. at 865-866. That deference is particularly due here as promulgating appropriate minimum accessibility guidelines involved substantial agency expertise. See *Ranchers*, 415 F.3d at 1093 ("Deference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of technical expertise."). The district court erred by refusing to give DOT the deference it was due and instead substituting its judgment for that of the agency regarding what design features should be required in key stations. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

2. DOT's Decision Not To Require A Particular Wayfinding Feature Or A Particular Type Of Color-Contrast Warning Does Not Render Its Regulatory Definition Of "Readily Accessible" Arbitrary And Capricious

In holding DOT's definition of "readily accessible" to be arbitrary and capricious, the district court stated that "[a]fter recognizing that further accommodations were needed for public transportation facilities to be readily accessible to those with visual impairments, the Access Board failed to require additional accommodations." See E.R. 11. The court identified two areas in which DOT supposedly failed to address the needs of the visually impaired: "signage and contrast striping on stairs." E.R. 11. But the district court's predicate is wrong: The Board did not find that further "accommodations" were needed and then failed to require them. Rather, it specifically concluded that it did not have enough

information to determine what design features should be required, or to craft a guideline to address those needs in light of other policy considerations.

In fact, contrary to the district court's understanding, the Access Board, in promulgating the ADAAG, and DOT, in adopting them as part of its regulatory definition of "readily accessible," included numerous design features that address the needs of individuals with visual impairments. The Board, however, explained that based on the information it had before it, it would not require some other features that could address the needs of the visually impaired. The Board's decision not to require a specific design feature where it lacked sufficient information to make a reasoned decision about that feature, or where it concluded that insufficient need for the feature had been shown, in no way indicates that its reasoning was invalid. See *Environmental Def. Ctr.*, 344 F.3d at 860 & n. 39 (agency decision not to regulate entitled to deference where agency "articulated a rational connection between record facts indicating insufficient data to * * * regulate * * * and its corresponding conclusion not to do so"); see also *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distib. Cos.*, 498 U.S. 211, 231 (1991) ("agency need not solve every problem before it in the same proceeding"); *Natural Res. Def. Council* v. *EPA*, 489 F.3d 1364, 1375 (D.C. Cir. 2007) (court rejected petitioner's challenge to agency's decision not to create a separate regulatory category for petitioner's equipment, noting that Congress vested agency

with "substantial authority" to determine appropriate categories in rule, "and its exercise of that authority involves an expert determination, [therefore petitioner] carries a heavy burden to overcome deference to the agency's articulated rational connection between the facts found and the choices made").

(i) Directional Signage And Other Wayfinding Features

The district court misapprehended the Access Board's explanation of its decision to require some signage features, but not others, to assist persons with visual impairments. Contrary to the district court's decision, the Board did not decline to address the needs of people with visual impairments. The Board required features for signs in stations specifically to assist people with low vision, but because it lacked information regarding the wayfinding needs of people with severe visual impairments, the Board did not require any particular feature addressing those needs.

When promulgating its rules, the Board specifically requested comments on signage location in transit stations. The Board knew that, unlike a building, which normally has defined spaces and entrances, transit stations are often large, open areas without walls and doors; therefore, developing a standard convention for these spaces might be difficult or impracticable. 56 Fed. Reg. 45,505.

After reviewing the comments it received, the Board found that signs usually were not placed uniformly even within a single public authority's system, much

less in the sector as a whole. In its final guidelines, the Board required signage to have features such as specific character proportions, character height, and contrast. 56 Fed. Reg. 45,505. It noted that these provisions were "intended to make such signage *more visible to persons with low vision*." *Ibid.* (emphasis added).

The Board noted that it was declining to require tactile signs or other wayfinding features or devices for people "with severe vision impairments who require who require directional information regarding the accessible route." 56 Fed. Reg. 45,505. In order for patrons in wheelchairs or with other mobility impairments to see and use signage, the Board determined that it might be necessary to place the signs above the heads of standing people. The Board did not believe that requiring duplicate tactile signs was practical. *Ibid*. The Board also declined to promulgate a specific rule for signs or some other wayfinding features indicating the direction to the accessible route for patrons with severe vision impairments. *Ibid.* The Board noted that "[n]o provision has been added to address the needs of persons with severe vision impairments who require directional information regarding the accessible route because the Board has very little information to adequately address the wayfinding needs of such persons at this time." *Ibid.*

Thus, contrary to the district court's conclusion, the Board did *not* find that further requirements were needed to make stations accessible; rather, it specifically

concluded that it did not have enough information to make that determination, or to craft a regulation to address such needs in light of other policy considerations. Such rational decisions to defer regulatory action in light of insufficient information are not arbitrary and capricious. See *Environmental Def. Ctr.*, 344 F.3d at 860 & n. 39.

The district court also noted that 15 years have passed since the Board stated that it had insufficient information regarding the wayfinding needs of persons with severe low vision. E.R. 12. But a mere passage of time does not show that DOT has not addressed an important part of the problem of ensuring public transportation to individuals with visual impairments. The court similarly criticized DOT for failing to "provide[] evidence that it sought information or conducted research on this issue" after initially promulgating its regulations. E.R. 13. A court's review of an agency decision, however, is limited to reviewing "the administrative record in existence at the time of the decision to act." *National Wildlife Fed'n* v. *Burford*, 871 F.2d 849, 855 (9th Cir. 1989). If a regulation was valid when it was enacted, it does not become invalid because of subsequent events. See *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997).[11]

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[11] The Access Board is currently conducting a research project on communication access in transportation facilities and vehicles to collect information on best practices for conveying information to persons with hearing or vision impairments for improving access in various transportation facilities, including rail stations. See Access Board Current and Future Research at http://www.access-board.gov/research/current-projects.htm. The Access Board is

(ii) Color-Contrast Warnings

Color-contrast stripes on stairs was the other design feature that the district court relied upon in concluding that the Board had failed to make key stations adequately accessible to persons with visual impairments. The Board carefully considered this issue as well, and after doing so, required color-contrast warnings in some circumstances, but not others. Escalators in new facilities must have color-contrast striping. See ADAAG § 10.3.1(16). Color-contrast warnings are a part of the broader area of "detectable warnings," which includes color and resonance contrasting as well as tactile warnings. See ADAAG § 4.29.2. A detectable warning is an important safety feature that permits visually impaired individuals to identify a hazard, such as a drop off. The ADAAG requires such detectable warnings in some circumstances, notably on platform edges in key stations. See ADAAG §§ 10.3.1(8), 10.3.2(2).

Color-contrast striping addresses the needs of individuals with only one type of visual impairment — individuals whose low vision is such that they must rely on being able to see contrasts between light and dark. The "detectable warnings" required under the ADAAG address the needs of those individuals, as well as the

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also exploring the need to supplement the ADAAG by adding provisions to improve communication access for persons with vision and hearing impairments, including new technologies for audible or "talking" signs and wayfinding cues. See Access Board FY 2006 Annual Report (January 2007) at http://www.access-board.gov/about/annualreport/report.htm#access.

needs of individuals with more severe visual impairments. The detectable warnings under the ADAAG must have a color that contrasts with the adjoining area (light to dark or dark to light), but must also have a contrasting resonance, which will alert a person who taps it with a cane, and also must have raised bumps, which are a tactile warning that even a person who is totally blind would be able to detect underfoot. See ADAAG § 4.29.2.

When the Board promulgated the generally applicable provisions of the ADAAG in July 1991, the Board responded to several commenters who had suggested that color-contrasting striping should be required on stairs. The Board, in response, stated that its research had not disclosed that such a requirement was generally advantageous. The Board explained:

> The Board is not aware of any research that supports these recommendations. There is some controversy over whether each step should have the contrast nosing or only the top and bottom step of each stair. The Board is aware that the February 1991 draft revisions to the ANSI A117.1 standard proposed to add a technical specification for tread markings on stairs. Pending further research or action by the ANSI A117 Committee, the Board is not inclined to include this provision in the guidelines.

See 56 Fed. Reg. 35,432 (1991) (addressing ADAAG § 4.9 (stairs)).[12] Although the Board ultimately chose not to require striping on stairs, the Board fully considered the issue. Again, the Board did *not* conclude that further requirements were needed to make stations accessible. It concluded the opposite: Such a need had not been shown. Accordingly, this rational decision in light of the factual record is not arbitrary and capricious. See *Environmental Def. Ctr.*, 344 F.3d at 860 & n. 39. The district court's contrary conclusion was error.

3. The District Court's Conclusion That The "Performance Standard" Regarding Travel Distance That Was Included In The ADAAG Was Flawed Is Utterly Without Basis

The district court also criticized the Board for supposedly failing to include a "performance standard" related to the severely visually impaired. The court stated:

> In deciding not to regulate "specific facility design criteria," the Access Board expressed its belief "that a performance standard allows greater flexibility in design that can better address the unique aspects of each system and system type." However, the Board did not go on to include any performance standard in the ADAAG itself. This lack of regulation contrasts with the Board's decision to minimize travel distances for the accessible routes for individuals with mobility impairments by using a "performance criterion which seeks to encourage good efficient design." To ensure compliance with that goal, the Board explicitly included in the ADAAG a provision requiring facilities to be designed "to minimize the distance which

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[12] The Board also declined to require that key stations follow the requirements for escalators, including color-contrast striping, that are required in new facilities. Seventy percent of commenters opposed requiring this, and the Board concluded that imposing this requirement in key stations, which are existing facilities, would be difficult and costly. See 56 Fed. Reg. 45,515. That decision was not arbitrary and capricious.

> wheelchair users and other persons who cannot negotiate steps may have to travel compared to the general public." There is no similar directive that facilities must meet any level of accessibility for individuals with severe visual impairments.

E.R. 12-13 (citations to Federal Register and ADAAG omitted).

The court is mistaken. The "performance standard" to which the court referred is found in ADAAG § 10.3.1(1). See 56 Fed. Reg. 45,504. That performance standard addresses travel distance for persons with disabilities who cannot use stairs: "Elements such as ramps, elevators or other circulation devices, fare vending or other ticketing areas, and fare collection areas shall be placed to minimize the distance which wheelchair users *and other persons who cannot negotiate steps* may have to travel compared to the general public." ADAAG § 10.3.1(1) (emphasis added). This requirement applies to key stations. ADAAG § 10.3.2(2). The Board explained that this standard would "assist all persons, but especially persons with cognitive, *visual* or stamina-limiting disabilities." 56 Fed. Reg. 45,504 (emphasis added).

Moreover, even if the district court were not mistaken about what the Board understood, the district court also offered no explanation or analysis to support its conclusion that if the ADAAG includes one type of performance standard, it must also incorporate some other performance standard directed toward individuals with severe visual impairments. The United States is aware of no argument or authority to support such a conclusion. Nor did the court explain or analyze what such a

standard would accomplish. The court's reliance on this supposed failure is therefore unsupported.[13]

4. The District Court Also Relied On Unsupported Factual Assumptions

In addition to the errors discussed above, the court's analysis contains unsupported factual assumptions that make its conclusions erroneous. The court did not address the factual issues that might support a claim that DOT had entirely ignored an important aspect of the problem of public transportation for persons with disabilities. First, the court appears to have assumed that the two plaintiffs' difficulties using BART's stations were evidence of a general, similar problem for all people with low vision. Presumably there is support in the summary judgment record for a finding that the two plaintiffs had difficulty using stairs in BART's key stations. But the district court pointed to no evidence showing that this problem was general with BART's patrons, let alone that it was a nation-wide problem. Plaintiffs did not file this suit as a class action, and without some evidence of widespread difficulties similar to those of these two plaintiffs, the court's apparent factual assumption that the problems these two plaintiffs had with

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[13] The court also stated that "neither the Access Board nor the DOT created any regulation to ensure that the 'performance standard' the Board elected to rely upon would be enforceable." E.R. 13-14. It is unclear why the district court so concluded. This standard, as part of the ADAAG, was incorporated by DOT into its regulations. Under 49 C.F.R. 37.9(a), this requirement is part of the regulatory definition of the statutory term "readily accessible," compliance with which is required under 42 U.S.C. 12147(b)(1). This standard is therefore enforceable like any other regulatory requirement.

the stairs generally reflected the problems of a great number of people with low vision, either in BART's system or nation-wide, is unsupported.

Second, the court did not conclude that the plaintiffs have shown that they had difficulty in BART's key stations because the stations lacked some particular type of directional information regarding the accessible routes or because they did not have features based on the court's unspecified "performance standard" for people with serious visual impairments. And again, most importantly, the court's decision pointed to nothing in the record that would support the conclusion that the absence of these features created problems for others who used BART's key stations, let alone that their absence created problems for a large number of persons with visual impairments nation-wide.

CONCLUSION

This Court should reverse the district court's finding that 49 C.F.R. 37.9(a) is arbitrary and capricious.

Respectfully submitted,

RENA J. COMISAC
Acting Assistant Attorney General

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MARK L. GROSS
KARL N. GELLERT
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-4441

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.7, the government states that the only related case of which it is aware is the appeal by appellant BART, No. 07-15661, which is consolidated with the appeal of the United States, No. 07-15896.

KARL N. GELLERT
Attorney

Dated: October 26, 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 12.0 and contains no more than 8,602 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

KARL N. GELLERT
Attorney

Dated: October 26, 2007

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2007, two copies of the foregoing OPENING BRIEF FOR THE UNITED STATES AS APPELLANT were served by certified first-class mail, postage prepaid on the following counsel of record:

Paul L. Rein
Patricia Barbosa
LAW OFFICES OF PAUL L. REIN
200 Lakeside Drive, Suite A
Oakland, CA 94612

Bryce C. Anderson, Esq.
1011 "A" Street
Antioch, CA 94509

Robert G. Schock, Esq.
1970 Broadway, Suite 1200
Oakland, CA 94612

Sidney J. Cohen, Esq.
SIDNEY J. COHEN PROFESSIONAL CORPORATION
427 Grand Avenue
Oakland, CA 94610

Joseph A. Hearst, Esq.
1563 Solano Ave., #525
Berkeley, CA 94707

Jeffery L. Podawiltz, Esq.
GLYNN & FINLEY, LLP
One Walnut Creek Center
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

KARL N. GELLERT
Attorney