Nos. 97-1381, 97-1406, 97-1403

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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JACK L. DAVOLL; DEBORAH A. CLAIR; PAUL L. ESCOBEDO,

Plaintiffs-
Appellants/Cross-Appellees

v.

CITY AND COUNTY OF DENVER, et al.,

Defendants-
Appellees/Cross-Appellants

_____

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

CITY AND COUNTY OF DENVER, et al.,

Defendants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

_____

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE IN No. 97-1403

_____

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MISCELLANEOUS:

I. WHETHER TITLE II OF THE ADA APPLIES TO EMPLOYMENT IS NOT A QUESTION OF SUBJECT-MATTER JURISDICTION

Defendants in their supplemental authority letters suggest that the United States' complaint failed to allege a violation of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 et seq., because these provisions do not cover a public entity's treatment of its employees. That argument does not go to the question of the district court's jurisdiction to hear the claim.

28 U.S.C. 1345 provides that the district courts shall have "original jurisdiction of all civil actions, suits or proceedings commenced by the United States." Given this clear provision, "[n]o subject matter jurisdiction difficulties are presented when the United States is the plaintiff in an action in the federal courts." Wright & Miller, 14 Federal Practice & Procedure: Jurisdiction & Related Matters § 3651 at 208 (3d ed. 1998).

This Court also has jurisdiction under 28 U.S.C. 1331. Section 1331 grants the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." In its most recent discussion of "arising under" jurisdiction, the Supreme Court reiterated that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1010 (1998). "Rather, the District Court has jurisdiction if 'the right of petitioners to recover under their complaint will be sustained if the * * * laws of the United States are given one construction and will be defeated if they are given another,' unless the claim 'clearly appears to be immaterial and made solely for the purpose

of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" Ibid. Similarly, this Court has consistently held that whether a federal statute was violated by the facts alleged or proven goes to the merits, not jurisdiction.[1]

Even those courts that have concluded that Title II does not cover employment have not suggested that the contrary argument is "wholly insubstantial and frivolous." Indeed, the fact that a great number of courts, including the Eleventh Circuit, have held that Title II covers employment is powerful evidence to the contrary.[2] As the question is not jurisdictional and defendants did not preserve it for appeal, this Court should not address it.

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[1] See, e.g., Tilton v. Richardson, 6 F.3d 683, 685 (10th Cir. 1993) ("we conclude that Mr. Tilton has not stated a cause of action under § 1985(3) * * * , but we also conclude Mr. Tilton's claim was not insubstantial and therefore the district court and this court have jurisdiction and the matter must and will be addressed on the merits"), cert. denied, 510 U.S. 1093 (1994); Martinez v. United States Olympic Comm., 802 F.2d 1275, 1281 (10th Cir. 1986) ("We find initially * * * that this case is neither wholly frivolous nor too insubstantial for consideration, and hence the district court should have held it had federal question jurisdiction to decide the merits of the claim. Turning to the merits of the claim, however, we find that Martinez does not state a cause of action on which relief may be granted."); Dry Creek Lodge v. United States, 515 F.2d 926, 932 (10th Cir. 1975) ("We hasten to add that we do not judge either the sufficiency of the complaint or the case's intrinsic merits. We do hold that the allegations sufficiently allege the existence of federal jurisdiction entitling the plaintiffs to have their day in court.").

[2] See Martinez, 802 F.2d at 1280 (sufficient when other suits concerning same general subject, but not issue on appeal, "required detailed analysis by other courts"); Dry Creek Lodge, 515 F.2d at 932 n.5 (noting there are "some decisions" that recognize the cause of action plaintiffs asserted).

II. TITLE II APPLIES TO CLAIMS OF EMPLOYMENT DISCRIMINATION

Virtually every court to address the question has held that Title II of the ADA applies to employment discrimination. See Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 824-825 (11th Cir.), cert. denied, 119 S. Ct. 72 (1998) (so holding and collecting cases); see also Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998) (Title II applies to discrimination against contractor). A panel of the Ninth Circuit has reached the opposite result. Zimmerman v. Oregon Dep't of Justice, 170 F.3d 1169 (1999), petition for reh'g en banc filed (Apr. 7, 1999). This Court should join the majority of courts and reject the holding of Oregon.

Section 202 of Title II, 42 U.S.C. 12132, provides that "no qualified individual with a disability shall, by reason of such disability, [1] be excluded from participation in or [2] be denied the benefits of [3] the services, programs, or activities of a public entity." It concludes with a catch-all phrase providing that such individuals shall not "[4] be subjected to discrimination by any such entity."[3] We think it beyond dispute that when a qualified individual with a disability is fired from, or not hired for, a job because of his disability, that person has been "excluded from participation in" public service and "denied the benefits of" a job (i.e. salary, insurance, etc.), as well having been "subjected to" employment discrimination. Cf.

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[3] We have added the bracketed numbers to assist the Court in comparing the same phrases in the different statutes we refer to.

Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1955 (1998) (denying prisoner permission to join motivational boot camp because of disability was covered by Title II). Even the Oregon decision did not dispute this. The question, then, is whether employment is a part of the "programs or activities" of a public entity.

A. The Settled Meaning Of "Programs or Activities" Includes Employment. The phrase "programs or activities" has long been interpreted to include employment. The same phrase appeared in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which provides that "[n]o person in the United States shall, on the ground of race * * *, [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under [4] any program or activity receiving Federal financial assistance." Congress realized that the language "program or activity" was broad enough to cover employment by recipients of federal funds. Not wishing to regulate the employment practices of all recipients, it specifically limited Title VI's coverage "with respect to any employment practice of any employer" to those situations "where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. 2000d-3; see Reynolds v. School Dist. No. 1, 69 F.3d 1523, 1531 (10th Cir. 1995); Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6 (1987). When that condition was satisfied, however, courts heard employment discrimination claims under Title VI. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).

Congress used Title VI as a model for Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), but elected not to include a provision similar to 42 U.S.C. 2000d-3. Title IX provides that "[n]o person in the United States shall, on the basis of sex [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under [4] any education program or activity receiving Federal financial assistance." In North Haven v. Bell, 456 U.S. 512 (1982), the Court held that employment discrimination was prohibited by Title IX. Rejecting the dissent's argument that the term "program or activity" should be read to exclude recipients' treatment of employees, see id. at 541-542, the Court held that employees who "directly participate" in federally funded programs or who "directly benefit from federal grants * * * clearly fall within the first two protective categories," id. at 520, that is [1] and [2]. It also concluded that "a female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is * * * forced to work under more adverse conditions than are her male colleagues." Id. at 521. Again in Grove City College v. Bell, 465 U.S. 555 (1984), the Court confirmed that "employees who 'work in an education program that receive[s] federal assistance' are protected under Title IX even if their salaries are 'not funded by federal money.'" Id. at 571 n.21 (quoting North Haven, 456 U.S. at 540).

Congress also used Title VI as a model for Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), the predecessor

of Title II. Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, [1] be excluded from the participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under [4] any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." In Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632 (1984), a unanimous Court held that the prohibition of "discrimination against the handicapped under 'any program or activity receiving Federal financial assistance'" was "intended to reach employment discrimination." In response to the claim that North Haven was not controlling because it had relied on the unique legislative history of Title IX, the Court answered that the defendant's "observations do not touch on that aspect of North Haven--its analysis of the language of [Title VI]--that is relevant to the present case." Id. at 633 n.13.

B. Congress Incorporated The Settled Interpretation Of The Phrase "Program or Activity" When It Enacted Title II. Congress intended Title II to "simply extend[] the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments." H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990); see S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989) (similar). It thus borrowed Section 504's language, almost word-for-word, in enacting Title II. In doing so, Congress incorporated the settled interpretation of the statute, see

Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998), including the previous understanding of "program or activity." See Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 1999 WL 351126, at *3 (9th Cir. June 3, 1999); Johnson v. City of Saline, 151 F.3d 564, 570 (6th Cir. 1998). By using the same phrase that had been consistently interpreted to encompass a recipient's employment practices, the text makes clear that Congress intended the prohibition on exclusion from "participation in" and denial of the "benefits of" "programs[] or activities of a public entity" to include the exclusion from and the denial of employment. See Bledsoe, 133 F.3d at 821.

The court in Oregon declined to reach this conclusion based on the erroneous premise that Congress had materially changed the statutory language. It believed that Congress replaced the phrase "under any program or activity receiving Federal financial assistance" in Section 504 with the phrase "in the services, programs, or activities of a public entity" in Title II, and that this replacement language was narrower. 170 F.3d at 1181-1182. But there was no such replacement. The word "under" in Section 504 is part of the phrase "be subject to discrimination under," not "any program or activity." Section 504 and Title II both currently prohibit exclusion from "participation in" and denial of "the benefits of" the "program or activity" of a recipient of federal financial assistance or a public entity, respectively. This was the same language the Court interpreted in North Haven and Darrone to cover employment. Thus, there is no textual

support for Oregon's conclusion that Title II's language is narrower than Section 504's.[4]

The Oregon court also asserted that, unlike Title IX and Section 504, there was no evidence that Congress intended Title II to cover employment discrimination. 170 F.3d 1181-1182. In both North Haven and Darrone, the Court looked to the legislative history in assessing congressional intent. 456 U.S. at 523-530; 465 U.S. at 632 n.12, 634. Here, the legislative history makes clear that Congress intended Title II to cover employment discrimination. "Extensive legislative commentary regarding the applicability of Title II to employment discrimination * * * is so pervasive as to belie any contention that Title II does not apply to employment actions." Bledsoe, 133 F.3d at 821 (reprinting provisions of House Reports); see also S. Rep. No. 116, supra, at 45 (discussing how, under Title II, "[t]he existence of non-disability related factors in the rejection decisions does not immunize employers" (emphasis added)).[5]

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[4] Indeed, a recent Ninth Circuit case has limited the holding of Oregon in this respect. See Antioch, 1999 WL 351126, at *3.

[5] The last phrase of 42 U.S.C. 12132 provides that qualified individuals with disabilities shall not "be subjected to discrimination by any [public] entity." This Court has held that this provision applies "when a public entity intentionally discriminates against a qualified disabled person, regardless of whether that discrimination occurs in the context of a public service, program, or activity." Patton v. TIC United Corp., 77 F.3d 1235, 1245 (10th Cir.), cert. denied, 518 U.S. 1005 (1996); accord Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997). But see Oregon, 170 F.3d at 1175-1176; Johnson, 151 F.3d at 569. For the reasons discussed in the text, there is no need to reach that issue here. However, to the extent the Court elects to discuss it, we note that Patton's

(continued...)

C. Congress' Instructions About Title II Regulations Also Manifest Its Intent To Prohibit Employment Discrimination. A separate provision of Title II also makes clear that it was intended to cover employment discrimination. In enacting the ADA, Congress vested the Attorney General in Section 204(a) with authority to promulgate regulations to "implement" Title II. 42 U.S.C. 12134(a). If Congress had done nothing more, the Attorney General's Title II regulation prohibiting discrimination in employment, see 28 C.F.R. 35.140, would be entitled to "a great deal of deference" in deciding the meaning of Title II. Smith v. Midland Brake, Inc., 1999 WL 387498, at *6 n.5 (10th Cir. June 14, 1999) (en banc); Bragdon, 118 S. Ct. at 2209.

But Congress imposed a specific direction on the Attorney General concerning the content of the regulations. It instructed the Attorney General in Section 204(b) to promulgate regulations "consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations * * * applicable to recipients of Federal financial assistance under section 794 of Title 29." 42 U.S.C. 12134(b). Those regulations included prohibitions on employment discrimination. See 28 C.F.R. 41.52-41.55. Thus, in

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[5](...continued)
holding that Title II's prohibition on "discrimination" only extends to intentional discrimination has been superceded by the Supreme Court's decision in Olmstead v. L.C., 119 S. Ct. 2176 (1999) ("Congress had a more comprehensive view of the concept of discrimination advanced in the ADA" than simply "uneven treatment of similarly situated individuals" or actions taken "on account of [individuals'] disabilities").

promulgating the Title II regulation prohibiting employment discrimination, the Attorney General was obeying Congress' express statutory command as to what obligations were to be imposed on entities governed by Title II. "[B]ecause Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations [of the Rehabilitation Act], the former regulations have the force of law." Marcus v. Kansas, 170 F.3d 1305, 1307 n.1 (10th Cir. 1999) (quoting Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir.), cert. denied, 516 U.S. 813 (1995)).[6]

The Oregon court asserted that because Part 41 embraced "several topics, of which employment is but one," it could not infer that Congress intended to incorporate the employment regulations. 170 F.3d at 1179-1180. But Congress made finely-tuned choices in Section 204(b). Although Part 41 contained regulations concerning "program accessibility, existing facilities," Congress instructed the Attorney General to promulgate regulations on this subject that were consistent with a different set of regulations. 42 U.S.C. 12134(b). The fact that this provision is so specific as to carve out different regulatory provisions for different treatment weighs in favor of

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[6] See also Amos v. Maryland Dep't of Pub. Safety, 1999 WL 454509, at *7 (4th Cir. June 24, 1999) ("Congress incorporated § 504 of the Rehabilitation Act's implementing regulations into Title II of the ADA."); L.C. v. Olmstead, 138 F.3d 893, 898 (11th Cir. 1998) ("the plain language of the ADA makes clear that Congress * * * sought to ensure that the Attorney General's Title II regulations tracked the § 504 coordination regulations"), aff'd in part, 119 S. Ct. 2176 (1999).

the inference that Congress would have specifically mentioned employment if it had intended to exclude it.

The court in Oregon also said that requiring the Attorney General to promulgate regulations "consistent" with Part 41 required only that the regulations be "'compatible' to the extent that they overlap." 170 F.3d at 1179. But Congress intended the requirement to have more substance than that. "Specific sections on employment and program access in existing facilities are subject to the 'undue hardship' and 'undue burden' provisions of the regulations which are incorporated in Section 204. No other limitation should be implied in other areas." H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 50 (1990) (emphasis added). And if the term "consistent" is subject to more than one reading, the Attorney General's interpretation of that term is entitled to deference. Cf. Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697-698 (1991) (deferring to agency's determination of what constituted compliance with Congress' direction to issue regulations not "more restrictive than" existing rules).

D. Congress' Subsequent Legislative Enactments Show That It Intended Title II To Cover Employment. Congress also evidenced its understanding of the scope of Title II when it extended its "rights and protections" to Congressional offices in 1995 and the White House in 1996. See 2 U.S.C. 1331(b)(1); 3 U.S.C. 421(a). These statutes provide that remedies for violations will be the same as under Title II "except that, with respect to any claim of employment discrimination," only Title I remedies will be

available. 2 U.S.C. 1331(c); 3 U.S.C. 421(b). This exception makes no sense unless Title II otherwise provides an independent remedy for employment discrimination.

E. The ADA's Structure Is Consistent With Reading Title II To Prohibit Employment Discrimination. The Oregon court relied on the "structure" of the ADA to conclude that Title II was not intended to apply to employment. 170 F.3d at 1177-1178, 1182-1183. Primarily, it asserted that the existence of Title I showed that Congress wanted to regulate employment discrimination claims separately from regulations governing public entities. But the Supreme Court in North Haven rejected an almost identical argument. Congress enacted Title IX in the same year that it extended Title VII's protections to employees of educational institutions, see 456 U.S. at 528 n.18,[7] and in the same piece of legislation that extended the Equal Pay Act to teachers, see id. at 545 (Powell, J., dissenting). Yet the Court held that the fact that Congress was enacting legislation specifically barring sex discrimination in employment by educational institutions at the same time it enacted Title IX was irrelevant to whether Title IX should be interpreted to cover employment. Id. at 536 n.26. Similarly, the prohibitions of employment discrimination in Title VI and Title VII of the Civil Rights Act of 1964, upon which Title I and II of the ADA were modeled, both applied to some

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[7] As originally enacted, Title VII did not apply to "the employment of individuals * * * to perform work connected with the * * * educational activities of [educational] institutions." Pub. L. No. 88-352, Tit. VII, § 702, 78 Stat. 255 (1964).

employers and thus provided employees with two distinct sets of enforcement mechanisms to vindicate their right to be free from discrimination by their employer.

Indeed, in seeking to vindicate individuals' rights to be free from employment discrimination, Congress has often seen fit to establish overlapping sets of protections and remedial schemes.[8] While reading Title II of the ADA to cover employment does create some overlap, it will not make either title redundant. Title I covers private employers, entities not covered by Title II; Title II regulates more than just employment discrimination and also covers public employers with too few employees to be covered by Title I. Moreover, reading Title II to exclude employment claims, as Oregon did, will not channel all disability discrimination in employment claims through Title I. Section 504's prohibition on employment discrimination is enforceable through a private right of action without regard to exhaustion of administrative remedies, see Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1381-1382 (10th Cir. 1981), and the ADA preserved Section 504's cause of action. See 42 U.S.C.

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[8] See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 457-461 (1975) (Title VII and 42 U.S.C. 1981 can be used to remedy discrimination in employment); Brown v. Hartshorne Pub. Sch. Dist., 864 F.2d 680, 682-683 (10th Cir. 1988) (Title VII and 42 U.S.C. 1983); Tidwell v. Fort Howard Corp., 989 F.2d 406 (10th Cir. 1993) (Title VII and Equal Pay Act); Brine v. University of Iowa, 90 F.3d 271, 275-276 (8th Cir. 1996) (Title VII and Title IX), cert. denied, 519 U.S. 1149 (1997); cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-417 (1968) (42 U.S.C. 1982 and Fair Housing Act); Urban v. Jefferson County Sch. Dist., 89 F.3d 720, 725-728 (10th Cir. 1996) (Title II and IDEA); Forest City Daly Housing, Inc. v. Town of N. Hempstead, 175 F.3d 144, 151 (2d Cir. 1999) (Title II, Section 504, and Fair Housing Act).

12201(b); Roberts v. Progressive Indep., Inc., 1999 WL 492557 (10th Cir. July 13, 1999) (Section 504 employment case). There is no basis for concluding that Title II, which was intended to "extend[] the nondiscrimination policy in section 504 of the Rehabilitation Act of 1973 to cover all State and local governmental entities," H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990); S. Rep. No. 116, supra, at 44, was not intended to be similarly enforced.

There is also no reason to believe that the overlapping coverage of Title I and Title II will result in public employees not bringing their claims under Title I. First, Title I grants claimants the benefit of having the EEOC investigate and attempt to conciliat claims on their behalf. In Fiscal Year 1998, for example, EEOC was able to successfully conciliate or settle almost 50% of ADA complaints (1689 out of 3405) that were not administratively closed or found to have no merit. See Americans with Disabilities Act of 1990 (ADA) Charges (available at www.eeoc.gov/stats/ada.html). Moreover, this Court has recently held that the remedies under Title I and Title II differ: compensatory damages under Title I are available for failures to reasonably accommodate unless the jury finds the employer engaged in "good faith" efforts, see Roberts, 1999 WL 492557, at *6-*7, while such damages are available under Title II only when a defendant has manifested "deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." Powers v.

MJB Acquisition Corp., 1999 WL 476011, at *6 (July 8, 1999).

III. THE EFFECTS ON OUR CASE IF THE COURT REJECTS THESE ARGUMENTS

The United States' action on behalf of Davoll was consolidated with Davoll's private suit for purposes of trial (App. 923 n.1), and the jury issued a single verdict (App. 1468), but the district court correctly issued separate judgments for each action (App. 1379-1381, 1383-1384). Unlike Davoll's private suit, which was brought under Title I and Title II, the United States' suit on behalf of Davoll was brought solely under Title II. Thus, if this Court holds that Title II does not cover employment actions, then the judgment entered on behalf of the United States for Davoll cannot stand.[9]

Respectfully submitted,

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[9] Along with Davoll's private suit, the United States' pattern-or-practice case was brought pursuant to Title I, see 42 U.S.C. 12117(a) (incorporating 42 U.S.C. 2000e-6(a)), and would not be affected by a decision on this issue. We note that as part of the remedial phase of the pattern-or-practice claim, the United States identified 13 individuals as victims of defendants' unlawful practices. On defendants' motion for summary judgment, the district court found that there were material issues of fact in dispute as to whether each individual was eligible for relief. See United States v. City & County of Denver, 1999 WL 374339 (D. Colo. June 4, 1999). We did not consider including Davoll or his co-plaintiffs among our identified victims because the district court had granted them full relief in these actions. If this Court were to find that the judgments rendered for Davoll or his co-plaintiffs were barred in their entirety, we would review whether it would be appropriate to ask the district court for leave to amend our filings to seek relief on their behalf.

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 1999, two copies of the foregoing Supplemental Brief for the United States as Appellee in No. 97-1403 were served by first-class mail, postage prepaid, on the following counsel:

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