No. 04-15782

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHERON GEORGE and SHARRICCI FOURTE-DARCY,

Plaintiffs-Appellees

v.

BAY AREA RAPID TRANSIT DISTRICT,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
ON BEHALF OF APPELLANT

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STATEMENT OF JURISDICTION

Appellant's statement of jurisdiction is complete and correct.

STATEMENT OF THE ISSUE

Whether the Department of Transportation's ("DOT") regulations enforcing Title II of the Americans With Disabilities Act ("ADA") with respect to accessible routes in public transit stations are arbitrary and capricious.

INTEREST OF THE UNITED STATES

This case involves the interpretation of regulations promulgated by DOT and the Department of Justice ("DOJ") under Title II of the ADA, 42 U.S.C. 12101 *et*

seq. Title II prohibits discrimination against individuals with disabilities in the provision of public services; Part B of that Title governs public transportation provided by public entities. 42 U.S.C. 12141-12165.

Congress gave the Secretary of Transportation authority to promulgate regulations to enforce Part B. 42 U.S.C. 12149(b). Congress also directed the Architectural and Transportation Barriers Compliance Board ("Access Board"), a panel with expertise in architecture, design, and disabilities, to publish minimum accessibility guidelines for public entities, including public transportation. 42 U.S.C. 12204. In 1991, DOT adopted the Access Board's ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), publishing those guidelines as Standards for Accessible Transportation Facilities. 49 C.F.R. Pt. 37, App. A. DOT may refer violations of the regulations to the Department of Justice for suit.

Authority for promulgating regulations under Part A of Title II, which governs public entities other than public transportation authorities, is vested in the Attorney General. The Attorney General has the responsibility, in consultation with other agencies, for developing a plan to inform public entities covered by Title II of their responsibilities under the ADA. 42 U.S.C. 12206(a). The Secretary of Transportation is responsible for implementing that plan with respect to Part B. 42 U.S.C. 12206(c)(2)(B)(ii).

The district court held that DOT's Title II regulation was arbitrary and capricious. The United States has an interest in defending the validity of federal regulations.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Bay Area Rapid Transit District ("BART") is a public entity providing rapid transit services in the San Francisco Bay Area. Sheron George and Sharricci Fourte-Dancy, two individuals with serious visual impairments, filed suit alleging that BART violated Title II of the ADA, as well as Section 504 of the Rehabilitation Act, 29 U.S.C. 794 *et seq*., and California state law, because public entrances at four BART stations were not accessible to persons with visual impairments. (E.R. 1109).[1] Plaintiffs sought injunctive relief ordering BART to install accessible handrails and color contrast striping on the stairways at the public entrances at the stations, to remove phones on the platforms that partially blocked the path of travel from those entrances, and to provide audible announcements of train arrivals. Plaintiffs also sought compensatory damages and attorneys fees.

BART moved for summary judgment, arguing that under DOT's Title II regulations it was required to provide only one accessible route to patrons with disabilities. See 49 C.F.R. Pt. 37, App. A 10.3.2(1) (public transportation facilities must provide "at least one accessible route from an accessible entrance to those areas necessary for use of the transportation system"). BART contended that the accessible route at each station, designed in large part to accommodate patrons in wheelchairs and with mobility impairments, satisfied that requirement.

The district court agreed, ruling that "'[i]f BART can create a route that is

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[1] References to "E.R. __" are to pages in the Excerpts of Record filed by the appellant.

accessible to all disabled patrons, including the visually disabled, the law does not require it to provide additional routes. On the other hand, if, for example, the wheelchair accessible route was not accessible to the visually disabled, BART would have to provide a route that was.'" (E.R. 1110 (quoting E.R. 316)).

The plaintiffs moved for summary judgment on whether BART's accessible routes are accessible to persons with visual impairments. BART maintained that its compliance with Part 37 of DOT's regulations and the ADAAG (codified as an Appendix to that Part), made its stations accessible as a matter of law. See 49 C.F.R. 37.9(a).

Plaintiffs conceded that they could not identify any violation of the ADAAG in the accessible routes at the stations. (E.R. 1111). But plaintiffs argued that people with visual impairments are trained to follow the flow of foot traffic, and that foot traffic leads them to the public entrances, not the handicapped accessible route. They contended that BART's accessible routes were less safe and more circuitous than the public routes, and that persons with visual impairments would be able to use the public entrances if those entrances were modified as they requested. Plaintiffs also argued that BART's accessible routes did not satisfy DOJ ADA regulations requiring (1) appropriate signage directing persons with visual impairments to use the accessible route and (2) that services for persons with disabilities be administered in the most integrated setting appropriate.

The district court granted plaintiffs' motion in part. The court found that

BART's accessible routes did not comply with DOJ regulations requiring that public entities provide patrons with disabilities, including those with impaired vision or hearing, with "information as to the existence and location of accessible services, activities and facilities," and with signage at inaccessible entrances directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. 28 C.F.R. 35.163(a). Nor did BART's accessible route meet the requirement that public entities must "administer services, programs, and activities in the most integrated setting appropriate," 28 C.F.R. 35.130(d).

The district court rejected plaintiffs' argument that the only way to satisfy those requirements was to make the public routes accessible to the individuals with visual impairments. The district court also rejected BART's claim that the DOT regulations excused BART from complying with the DOJ regulations. (E.R. 1111 (discussing 49 C.F.R. 37.9(a) (a "facility shall be considered to be readily accessible to and useable by individuals with disabilities if it meets the requirements of [Part 37 and the ADAAG]")).

BART moved for reconsideration of the court's order. For the first time, BART argued that Section 35.102(b) of DOJ's ADA regulations excuses public transportation entities covered by subtitle B of Title II from complying with the DOJ regulations. See 28 C.F.R. 35.102(b) ("To the extent that public transportation services, programs, and activities of public entities are covered by

Subtitle B of title II of the ADA, they are not subject to the requirements of this

part.") (citation omitted). The district court accepted BART's new defense, noting that the section by section analysis of DOJ's regulations confirmed this understanding. Accordingly, the court held that BART was not subject to the signage requirements in Section 35.163 of the DOJ regulation or the requirement that services be administered in the most integrated setting appropriate.

The district court went on, however, to summarily rule that DOT's regulations were arbitrary and capricious, even though neither party had raised or briefed the issue of whether DOT's regulations were a valid interpretation of the ADA. The district court reasoned that the ADA requires transportation authorities to make at least one route accessible to persons with visual impairments, but that an authority's compliance with DOT's regulation does not ensure that the single accessible route is accessible to those patrons. BART appealed.

SUMMARY OF ARGUMENT

Congress did not provide specific accessibility requirements for public transportation in Title II of the ADA. Rather, Congress directed DOT to promulgate regulations to govern providers of public transportation. Under *Chevron, U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837 (1984), DOT's regulations must be upheld so long as they are a reasonable interpretation of the statute.

Contrary to the district court's opinion, DOT's regulations are not arbitrary, capricious or manifestly contrary to the intent of Congress, but rather reasonably interpret the accessibility requirements of the ADA. The ADA requires that covered

public transportation facilities "be readily accessible to and usable by" individuals with disabilities. The district court erred by not considering whether DOT's regulations taken as a whole enforce this statutory directive. When viewed as a whole, DOT's regulations ensure that public transportation facilities, such as BART's, are "readily accessible to and usable by" individuals with disabilities, including those with visual impairments. As a result, the regulations are a reasonable interpretation of the ADA.

Furthermore, DOT and the Access Board carefully considered accessibility requirements for public transportation programs and facilities in a detailed and reasoned fashion. DOT and the Access Board also considered the signage requirements for transportation facilities, deliberately reserving action in some areas pending further study. As such, DOT's regulations are not arbitrary and capricious and are entitled to deference.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed *de novo*. *San Jose Christian Coll.* v. *City of Morgan Hill*, 360 F.3d 1024, 1029-1030 (9th Cir. 2004). The district court's ruling was based on its conclusion that DOT's regulation was not a valid interpretation of the statute, but rather was arbitrary and capricious. An agency's authority to administer a program created by Congress

includes "the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). "Such legislative regulations

are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute." *Chevron, U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984). This is a determination of law which this Court reviews *de novo*. *Parravano* v. *Babbitt*, 70 F.3d 539, 543 (9th Cir. 1995).

ARGUMENT

A. Congress Left A Gap In Title II For DOT To Fill

In reviewing a federal administrative agency's interpretation of a statute Congress directed the agency to administer, "[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 842-843. Both a court and an agency "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843.

When, however, a "court determines that 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 (footnote omitted). 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." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). "If Congress

has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to statute." *Chevron*, 467 U.S. at 843-844; *Defenders of Wildlife* v. *Browner*, 191 F.3d 1159, 1162 (9th Cir. 1999).

The first inquiry here is whether Congress unambiguously expressed its intent regarding how public transportation programs and facilities were to be made accessible to persons with disabilities, including those with visual impairments. See *Chevron*, 467 U.S. at 843. It did not. Instead, Congress directed DOT to promulgate regulations to govern providers of public transportation, consistent with the minimum accessibility guidelines issued by the Access Board. 42 U.S.C. 12149. Congress thus explicitly left a gap for DOT to fill. Under *Chevron*, DOT's regulations must be upheld so long as they are a reasonable interpretation of the statute.

B. DOT's Regulations Reasonably Interpret The Accessibility Requirements Of The ADA

Contrary to the district court's opinion, DOT's regulations are not arbitrary, capricious or manifestly contrary to the intent of Congress, but rather reasonably interpret the accessibility requirements of the ADA.

1. Taken As A Whole, DOT's Regulations Appropriately Interpret The ADA's Directive That Public Transportation Programs Be Readily Accessible To And Usable By Individuals With Disabilities

The ADA requires that public transportation programs and activities "when viewed in the entirety" be "*readily accessible to and usable by* individuals with disabilities." 42 U.S.C. 12148(a)(1) (emphasis added). Further, the ADA requires that new transit facilities be *"readily accessible to and usable by* individuals with

disabilities, including individuals who use wheelchairs." 42 U.S.C. 12146 (emphasis added). The ADA also requires that all "key stations (as determined under criteria established by the Secretary [of Transportation] by regulation) in rapid rail and light rail systems *shall be readily accessible to and usable by* individuals with disabilities." 42 U.S.C. 12147(b)(2)(A) (emphasis added). Existing facilities, other than key rail stations, are covered by the ADA only when altered. Any alteration must, "to the maximum extent feasible," be performed so as to leave the altered portion readily accessible. 42 U.S.C. 12147(a).

DOT's regulations appropriately interpret the statutory directive that public transportation programs and activities "be readily accessible to and usable by" individuals with disabilities, including those with visual impairments. DOT's regulations implement this directive by requiring, *inter alia*, that each public transportation entity:

- provide at least one accessible route (which must be usable by persons in wheelchairs) to those areas necessary for use of the transportation system, 49 C.F.R. Pt. 37, App. A, 10.3.2(1) ("ADAAG");

- make available to individuals with disabilities adequate information concerning transportation services, including adequate communications capacity to enable users to obtain information and service schedule, 49 C.F.R. 37.167(f);

- provide signs indicating the direction to the accessible entrance, and

  ensure that the signs use the international symbol of accessibility and minimum character proportions and heights, 49 C.F.R. Pt. 37, App. A, 10.3.2(2), 10.3.1(1);

- ensure that any identifying signs at entrances use braille complying with minimum standards, 49 C.F.R. Pt. 37, App. A, 10.3.2(2), 10.3.1(4);

- minimize glare on signs, 49 C.F.R. Pt. 37, App. A, 10.3.2(2), 10.3.1(11);
- provide detectable warnings on platform edges bordering drop-offs; 49 C.F.R. Pt. 37, App. A, 10.3.1(8);
- announce stops, 49 C.F.R. 37.167(b), (c); and
- permit use of service animals, 49 C.F.R. 37.167(d).

The district court erred by not considering whether these regulations taken as a whole enforce the statutory command that public transportation systems be accessible. Nothing in the ADA mandates the placement of particular signs in any particular form at any particular place. Under DOT's regulations, public transportation programs, such as BART, must make adequate information available to disabled persons. In addition, public transportation programs, such as BART, must provide large and easily-readable signs directing individuals to accessible routes, and must place braille signs at entrances to accessible routes.

Thus, contrary to the district court's decision, compliance with the DOT regulations in their entirety does ensure that public transportation programs, such as BART, are "readily accessible to and usable by" individuals with disabilities, including those with visual impairments. As a result, the regulations are a reasonable interpretation of the ADA.

2. DOT's Regulations Are Not Arbitrary And Capricious

In addition, the district court failed to review the regulatory history or give DOT's interpretation of the ADA the proper deference. "The court may reverse 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. Ins. Co.*, 463 U.S. 29, 43 (1983)). None of those conditions applies to DOT's rulemaking in this case.

a. DOT And The Access Board Carefully Considered Accessibility Requirements For Public Transportation Facilities

DOT and the Access Board carefully considered accessibility requirements for public transportation programs and facilities. As stated previously, Congress gave the Secretary of Transportation authority to promulgate regulations to enforce Part B. 42 U.S.C. 12164. Congress also directed the Access Board, a panel with expertise in architecture, design, and disabilities, to publish minimum accessibility guidelines for public entities, including public transportation. 42 U.S.C. 12204. The Access Board includes representatives from federal agencies, including DOT. 29 U.S.C. 792(a)(1)(B). DOT's regulations incorporate all of the Access Board's

guidelines, as well as impose some additional requirements.

During the notice and comment period for its final rule, the Access 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. 45,500, 45,503 (Sept. 6, 1991); the use of large characters on signs, 56 Fed. Reg. at 45,502; methods to make schedules, timetables, and route identification accessible to those with visual impairments, 56 Fed. Reg. at 45,503, and whether audible signs or other new technology might be substituted for tactile signage and maps, 56 Fed. Reg. at 45,503.

DOT published a notice of proposed rulemaking six months prior to its final rule, and received over 260 comments. Transportation for Individuals with Disabilities, DOT, 56 Fed. Reg. 45,584 (Sep. 6, 1991). DOT also held six public hearings that took in an additional 120 comments. 56 Fed. Reg. at 45,584. DOT invited comments from the public, including individuals with visual impairments, at both the proposed and final rulemaking stages. Further, during the process of promulgating its regulations, DOT also considered all of the comments given to the Access Board during the development of the ADAAG. See 56 Fed. Reg. at 45,587.

DOT responded to several comments on accessibility for persons with visual impairments, some of which related to signage. See 56 Fed. Reg. at 45,741 (signage, continuous pathways and public address systems accessible to 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, 56 Fed. Reg. at 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. at 45,584, 45,622; use of service animals, 56 Fed. Reg. at 45,624; and eligibility for paratransit as applied to those with visual impairments, 56 Fed. Reg. at 45,601-45,602.

As described, *supra* p. 10-11, at the conclusion of this rulemaking process, the Access Board and DOT adopted numerous provisions to ensure that public transportation programs and facilities are readily accessible to and usable by disabled individuals, including the visually impaired.

Thus, DOT and the Access Board considered the accessibility requirements for public transportation programs and facilities in a "detailed and reasoned fashion." *Chevron*, 467 U.S. at 865. As such, the regulations are not arbitrary and capricious and are entitled to deference. *Ibid.*

b. DOT And The Access Board Carefully Considered Signage Requirements For Transportation Facilities

Moreover, the Access Board deliberately "reserved action in some areas pending further study or research." 56 Fed. Reg. at 45,500. Signs indicating the location of the accessible route for persons with serious visual impairments in public transit stations was one such area.

When promulgating its rules, the Access Board specifically requested

comments on signage location in transit stations. The Access 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.

After reviewing the comments it received, the Access 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. Further, in order for patrons in wheelchairs or with other mobility impairments to see and use signage, the Access Board determined that it might be necessary to place the signs above the heads of standing people. The Access Board did not believe that requiring duplicate tactile signs was practical. See 56 Fed. Reg. at 45,504.

Therefore, the Access Board ultimately determined not to require tactile signs indicating the location of the accessible route. The Access Board explained that it made this determination because:

> [I]f sighted individuals including wheelchair users or those who use other mobility aids are to make use of signage in crowded facilities, it must be usable and this may require that it be placed above the heads of standing people. * * * In the final guidelines the Board has required signage to comply with 4.30.1 (General), 4.30.2 (Character Proportion), 4.30.3 (Character Height), 4.30.5 (Finish and Contrast), and 4.30.7(1) (Symbols of Accessibility). The provision is intended to make such signage more visible to persons with low vision and, by
>
> requiring the use of the International Symbol of Accessibility, more readily identifiable for persons traveling an accessible route. No 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.

56 Fed. Reg. 45,500, 45,505 (Sept. 6, 1991) (emphasis added).

Thus, the Access Board specifically considered how to ensure that signs in public transportation facilities were accessible to the visually impaired and adequately indicated the accessible route, and concluded that it did not have sufficient information to promulgate a *specific* rule for signs indicating the accessible route to patrons with severe visual impairments. This decision is reasonable and, therefore, entitled to deference. See *Environmental Def. Ctr.*, 344 F.3d at 860 (agency decision not to regulate entitled to deference where agency "articulated a rational connection between record facts indicating insufficient data to categorically regulate facilities * * * and its corresponding decision not to do so"). Moreover, DOT's decision to accept the Access Board's careful recommendation was also rational and, therefore, entitled to deference. *Ibid*. In light of the many measures DOT adopted improving accessibility for persons with visual impairments, its decision to await further study on this issue in no way undercuts the conclusion that the regulation reasonably interprets the accessibility requirements of the ADA.

CONCLUSION

This Court should vacate the district court's order granting summary judgment to plaintiffs and remand for appropriate proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points, and contains 3706 words.

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October 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that on October 6,, 2004, two copies of the Brief For The United States As *Amicus Curiae* On Behalf of Appellant were served by First Class Mail to the following counsel of record:

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