No. 07-3914

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL GERMANO,

Plaintiff-Appellant

v.

INTERNATIONAL PROFIT ASSOCIATION, INC., INTEGRATED BUSINESS ANALYSIS, INC., & INTERNATIONAL TAX ADVISORS, INC.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
U.S. DISTRICT COURT JUDGE GEORGE W. LINDBERG

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

RULES: **PAGE**

LEGISLATIVE HISTORY:

MISCELLANEOUS:

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QUESTION PRESENTED

The United States will address the following evidentiary question:

Whether a statement made by a representative of the defendants, which was conveyed to plaintiff through a telecommunications relay service, is hearsay or is admissible under Federal Rule of Evidence 801(d)(2).

INTEREST OF THE UNITED STATES

This case was brought by a job applicant against a private employer under Title I of the Americans with Disabilities Act (ADA). It presents an evidentiary question concerning the admissibility of statements made during a telephone conversation using a telecommunications relay service and facilitated by a communications assistant. The Department of Justice has authority to initiate suits against public employers under Title I of the ADA. 42 U.S.C. 12133. The Department is also charged with enforcing Titles II and III of the ADA, addressing state and local government programs and public accommodations, respectively, as well as other statutes protecting individuals with disabilities. Accordingly, the decision in this case may have a significant impact on the Department's enforcement program. Moreover, this issue has the potential to arise in *any* government case involving a party who uses a telecommunications relay service, and therefore its correct resolution is vital to the government's overall litigation program. Finally, the Federal Communications Commission (FCC) is responsible for administering Title IV of the ADA, which requires that telecommunications relay services be made available to individuals with hearing and speech disabilities so that "a rapid, efficient nationwide communication service" is available to "all individuals in the United States." 47 U.S.C. 225(b)(1). Thus, the resolution of this

evidentiary issue may have a significant impact on the FCC's ability to achieve Congress's mandate of nationwide, accessible telecommunications services.

STATEMENT OF FACTS

1. Background

Petitioner Michael Germano is a person with a disability as that term is defined in the Americans with Disabilities Act (ADA). See 42 U.S.C. 12102(2). He is deaf and relies on American Sign Language, lip reading, and various assistive technologies to communicate. Germano often places and receives telephone calls through a telecommunications relay service (TRS), which uses communications assistants[1] to facilitate calls between individuals with hearing and speech disabilities and individuals without such disabilities. The FCC, the agency that regulates TRS systems, explains TRS as follows:

> TRS uses operators, called communications assistants (CAs), to facilitate telephone calls between people with hearing and speech disabilities and [individuals without such disabilities]. A TRS call may be initiated by either a person with a hearing or speech disability, or a person without such disability. When a person with a hearing or speech disability initiates a TRS call, the person uses a [text telephone] or other text input device to call the TRS relay center, and gives the CA the number of the party that he or she wants to call. The CA in turn places an outbound traditional voice call to that person. The CA then serves as a link for the call, relaying the text of the

[1] A communications assistant is defined as "[a] person who transliterates or interprets conversation between two or more end users of TRS." 47 C.F.R. 64.601(a)(7).

> calling party in voice to the other party, and converting to text what the called party voices back to the calling party.

http://www.fcc.gov/cgb/consumerfacts/trs.html; see also 47 U.S.C. 225 (defining "telecommunications relay services" and requiring that such services be generally available to individuals with hearing and speech disabilities).

Germano applied for a tax consultant position with the defendants. One of the defendants' employees, Ron Sage, left a message on Germano's answering machine requesting that he call to discuss the possibility of working for defendants. Germano returned the call via TRS. The content of the conversation between Germano and Sage is in dispute.

2. District Court Proceedings

Germano sued the defendant companies alleging disparate treatment discrimination on the basis of deafness, in violation of the ADA. See 42 U.S.C. 12112. The defendants moved for summary judgment, asserting, *inter alia*, that Germano presented insufficient evidence of discriminatory intent. As part of his opposition to summary judgment, Germano cited his own deposition testimony that, in his conversation with Sage, Sage offered him an interview. In their reply, defendants argued that Germano's testimony was inadmissible hearsay because Sage's alleged offer of an interview was relayed through a communications

assistant, who did not testify or submit an affidavit attesting to the conversation.

The district court evaluated the evidence introduced by Germano and granted summary judgment to defendants. D. Ct's Mem. and Order, Doc. 77.[2] As part of its decision, the court determined that Germano's account of the conversation was inadmissible hearsay. In a footnote to its Order, the district court also stated that the testimony Germano sought to introduce was unreliable because Germano "chose the [] relay service"; the communications assistant might have made a mistake; no evidence was introduced as to the qualifications, skills, or experience of the communications assistant; and that the defendants' actions following the conversation were "clearly inconsistent" with Germano's allegations regarding the substance of his and Sage's conversation. D. Ct's Mem. and Order, Doc. 77 at 6 n.3.

Germano filed a motion to reconsider, arguing, *inter alia*, that the court's determination that his telephone conversation with Sage constituted inadmissible hearsay was a manifest error of law. Pl's Am. Br. in Supp. of Mot. to Recons., Doc. 83 at 3; see also Fed. R. Civ. P. 59(e). The district court denied Germano's motion to reconsider in a minute order issued on November 15, 2007. D. Ct's Min.

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[2] References to "Doc. __" refer to documents in the district court record as numbered in the district court's docket.

Order Den. Mot. To Recons., Doc. 89. The district court ruled that it would not entertain Germano's arguments because he had failed to establish the admissibility of the relayed statements in his prior filings. The court acknowledged that defendants had not challenged the admissibility of Germano's account of the conversation until its reply brief, but the court stated that it was Germano's obligation "to establish the admissibility of his deposition testimony when he" cited it in his opposition. D. Ct's Min. Order Den. Motion To Recons., Doc. 89 at 2. The court then determined that even if it entertained Germano's legal arguments, those arguments would not establish a manifest error of law. D. Ct's Min. Order Den. Motion To Recons., Doc. 89 at 2. The court explained that FCC regulations outlining the duties of communications assistants "do not provide guarantees of trustworthiness or supersede the Federal Rules of Evidence." D. Ct's Min. Order Den. Motion To Recons., Doc. 89 at 2. The court also discounted a number of court of appeals decisions involving the admissibility of statements translated by foreign language interpreters under Federal Rule of Evidence 801(d)(2) as inapposite (because they involved an interpreter rather than a communications assistant), not controlling, or distinguishable on the facts.

This appeal followed.

STANDARD OF REVIEW

The district court's decision to exclude Sage's statements on hearsay grounds is reviewed for abuse of discretion. *United States* v. *Lee*, 502 F.3d 691, 696 (7th Cir. 2007), cert. denied, No. 07-8705, 2008 WL 135224 (2008); *Cody* v. *Harris*, 409 F.3d 853, 860 (7th Cir. 2005). This Court will reverse a district court's evidentiary ruling if it is "based on an erroneous conclusion of law"; if there is no evidence in the record "on which the court rationally could have based its decision"; or if "the supposed facts which the court found are clearly erroneous." *Van Stan* v. *Fancy Colours & Co.*, 125 F.3d 563, 570 (7th Cir. 1997).

SUMMARY OF ARGUMENT

The district court abused its discretion when it excluded Sage's statements on hearsay grounds. Statements that are made by a party and relayed through a telecommunications relay service are not hearsay and are admissible under Federal Rule of Evidence 801(d)(2). The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, is a comprehensive legislative effort to eliminate discrimination against individuals with disabilities and remove barriers to their full participation in all aspects of American life. Title IV of the ADA requires that individuals with hearing and speech disabilities have access to telecommunications services that are functionally equivalent to services that are available to individuals

without such disabilities. This is accomplished through telecommunications relay services, which use communications assistants to relay conversations between persons with hearing disabilities and persons without such disabilities. The role of the communications assistant is that of a transparent language conduit, who relays conversations verbatim and in real time. Communications assistants are thus neutral communication facilitators who do not change the substance or dynamic of the relayed conversation.

Each court of appeals that has considered the issue has held that English translations of party statements made in a foreign language are admissible as statements of the party, provided certain conditions are present. When there is no evidence to suggest that the interpreter's translations are unreliable, interpreters are to be viewed as "language conduits," or agents of the speaker. In these circumstances, the translated statements are admissible as admissions of party-opponents under Federal Rule of Evidence 801(d)(2). The reasoning of those cases applies with equal force here. Indeed, the case for admitting relayed statements is even stronger.

The district court's conclusion that the relayed statements were unreliable is in error. Federal regulations ensure the reliability of relayed statements, as communications assistants must meet strict qualifications and undergo periodic

training. Communications assistants have no relationship with the parties and no motive to misrepresent conversations. Communications assistants are truly language conduits.

Excluding relayed statements as hearsay would frustrate the purpose of the ADA. TRS would not be the functional equivalent of traditional telephone service. Those with hearing and speech disabilities would not be able to rely on telephone communications, as those without such disabilities do. Moreover, denying the admission into evidence of relayed statements as statements of a party would deny litigants with hearing and speech disabilities an entire class of evidence that is available to individuals without disabilities. As a practical matter, relayed statements would never be admissible. Communications assistants would be unable to testify as to the content of the relayed conversations because regulations prohibit communications assistants from both disclosing the content of such communications and from keeping records of the relayed conversations. Finally, excluding such evidence would impede the enforcement of federal civil rights statutes that prohibit discrimination on the basis of disability.

ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED RELAYED STATEMENTS ON HEARSAY GROUNDS

The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing," that is "offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(b). A statement is not considered hearsay, however, if it is offered against the party and is "a statement by a person authorized by the party to make a statement concerning the subject," or is "a statement by the party's agent * * * concerning a matter within the scope of the agency." Fed. R. Evid. 801(d)(2)(C) and (D). The issue here is whether a statement made by a representative of a party, but transmitted through a telecommunications relay service (TRS) communications assistant, is considered a statement by a "party-opponent" under Rule 801(d)(2). To date, no appellate court has addressed this precise issue. It is the position of the United States that a statement made by a party through a TRS communications assistant is not hearsay and is admissible as the statement of a party-opponent under Federal Rule of Evidence 801(d)(2). The district court abused its discretion in excluding this type of evidence as hearsay.

A. The ADA And Its Accompanying Regulations Require That Communications Assistants Serve As Transparent Language Conduits For Persons With Disabilities

1. The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

To address discrimination in the area of communications, Congress enacted Title IV of the ADA. 47 U.S.C. 225. Title IV is designed to provide all persons in the United States "a rapid, efficient nationwide communications service." 47 U.S.C. 225(b)(1). Title IV thus requires the FCC to ensure that "telecommunications relay services [TRS] are available, to the extent possible and in the most efficient manner," to individuals with hearing and speech disabilities. 47 U.S.C. 225(b)(1).

In adopting Title IV of the ADA, Congress recognized that persons with hearing and speech disabilities have long experienced barriers to their ability to access, utilize, and benefit from telecommunications services. See, *e.g.*, H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 129 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. 77-78 (1989). Indeed, "[g]iven the pervasiveness of the telephone for both commercial and personal matters, the inability to utilize the telephone system fully has enormous impact on an individual's ability to integrate effectively in today's society." S. Rep. No. 116, *supra*, at 77. Moreover, as the FCC, the agency entrusted with implementation of Title IV, has explained, "[i]f people with hearing or speech disabilities cannot communicate by telephone, their ability to compete and succeed in today's job market is threatened." *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-67, FCC 00-56, 15 FCC Rcd. 5140, 5144 (Mar. 6, 2000) (*2000 TRS Order*).

Title IV is intended to further the goal of universal communications services[3] by providing to individuals with hearing or speech disabilities telephone

[3] Title IV is codified as Section 225 of the Communications Act of 1934. That statute mandates that all communications services be "[made] available, so far

(continued...)

services that are "functionally equivalent" to those available to individuals without such disabilities. See, *e.g.*, H.R. Rep. No. 485, Pt. 2, *supra*, at 129-130 (Section 225 "imposes on all common carriers providing interstate or intrastate telephone service[] an obligation to provide to hearing and speech-impaired individuals telecommunications services that enable them to communicate with hearing individuals. These services must be functionally equivalent to telephone service provided to hearing individuals."); S. Rep. No. 116, *supra*, at 78; 47 U.S.C. 225(a)(3).

Congress mandated the creation of a national TRS system to fulfill the goal of a universal communications systems that is accessible to all users. Title IV thus requires common carriers offering traditional telephone service to *also* provide TRS throughout their service areas so that persons with disabilities will have access to telecommunications services. Doing so, Congress explained, would constitute "a major step towards enabling individuals with hearing and speech impairments to achieve the level of independence in employment, public accommodations and public services sought by other sections of the [ADA]." S. Rep. No. 116, *supra*, at 79 (1989).

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[3](...continued)
as possible, to all the people of the United States." 47 U.S.C. 151.

2. Although TRS users must initially contact a relay service to facilitate a telephone call between persons with hearing and speech disabilities and persons without such disabilities, the completion of the outbound call to the TRS facility is considered functionally equivalent to receiving a dial tone. *2000 TRS Order*, 15 FCC Rcd. at 5142. Following this initial connection between the parties, "the [communications assistant's] role is simply to convert typed * * * messages into voice messages, and vice versa, so that the parties to the call can communicate back and forth, as any parties to a telephone call would do." *Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, CC Docket Nos. 90-571, 98-67, CG Docket No. 03-123, FCC 04-137, 19 FCC Rcd. 12475, 12534 (June 30, 2004). The communications assistant thus "serves as a *transparent conduit* between two people communicating through disparate modes." *Ibid.*; see also *Telecommunications Relay Services, and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, CC Docket No. 98-67, FCC 03-190, 18 FCC Rcd. 16121 at ¶¶ 4, 33, 42 (August 1, 2003).

Title IV and its accompanying regulations further ensure that the communications assistant's role remains limited and "transparent." For example, a

communications assistant must transmit conversations "in real time," 47 C.F.R 64.604(a)(1)(vii), and "must relay all conversation verbatim" unless the relay user requests summarization,[4] 47 C.F.R. 64.604(a)(2)(ii). Moreover, a communications assistant is prohibited from "intentionally altering a relayed conversation." 47 U.S.C. 225(d)(1)(G); 47 C.F.R. 64.604(a)(2)(ii). By transparently relaying conversations verbatim, and in real time, communications assistants are simply conduits of language – they do not change the substance of the conversation. Nor do they alter the dynamics of the conversation in any meaningful sense.

Relayed conversations are also afforded extensive privacy protections to ensure a measure of confidentiality that is functionally equivalent to that of traditional telephone conversations. Communications assistants are therefore prohibited from "disclosing the content of any relayed conversation regardless of content," or from "keeping records of the content of any such conversation beyond the duration of the call, even if to do so would be inconsistent with state or local law," 47 C.F.R. 64.604(a)(2)(i); see also 47 U.S.C. 225(d)(1)(F). And TRS users may file complaints against a telecommunications service provider if the provider breaches these confidentiality requirements or any of the other regulations

[4] There is nothing in the record to suggest that Germano requested the communications assistant to summarize his conversation with Sage.

governing relayed communications. 47 U.S.C. 225(e), (g); 47 C.F.R. 64.604(c)(6). As one district court explained, Congress intended Title IV "to protect the confidentiality of [relayed conversations] in situations where people not using assistive device technology often take confidentiality for granted." *Vacco* v. *Mid Hudson Med. Group*, 877 F. Supp. 143, 151 (S.D.N.Y. 1995).

B. Statements Made By A Party And Relayed Through A TRS Communications Assistant Are Not Hearsay And Are Admissible Under Federal Rule Of Evidence 801(d)(2)

To date, no court of appeals has considered whether a party's relayed statements are admissible statements by party-opponents under Rule 801(d)(2). However, this Court and the other courts of appeals that have considered the related question of the admissibility of a speaker's statements that have been communicated through a foreign language interpreter have held that such statements are admissible, provided certain conditions are present. See, *e.g.*, *Lee* v. *United States*, 198 F. 596 (7th Cir. 1912); *United States* v. *Da Silva*, 725 F.2d 828 (2d Cir. 1983); *United States* v. *Beltran*, 761 F.2d 1 (1st Cir. 1985); *United States* v. *Alvarez*, 755 F.2d 830 (11th Cir. 1985), cert. denied, 474 U.S. 905 (1987); *United States* v. *Nazemian*, 948 F.2d 522 (9th Cir. 1991), cert. denied, 506 U.S. 835 (1992); *United States* v. *Cordero*, 18 F.3d 1248 (5th Cir. 1994); *DCS*

Sanitation Mgmt. Inc. v. *OSHA*, 82 F.3d 812 (8th Cir. 1996). The reasoning of these cases applies here, as well.

In *Lee* v. *United States*, 198 F. 596 (7th Cir. 1912), this Court held that it was not necessary for a foreign language interpreter to testify as to the accuracy of his translations for the translated statements to be admitted as the speaker's own statements. This Court reasoned that

> [b]earing in mind that appellant is a party, and that it is his own statement which was sought to be proved, the law is well settled in favor of admissibility without the necessity of even calling the interpreter. When a conversation takes place between a person whose declaration is admissible in evidence and another, and they call in or assent to the use of an interpreter in order to enable them to speak with each other, each one adopts a mode of intercommunication in which they necessarily assume that the interpreter is trustworthy, and which makes his language presumptively their own.

Id. at 601. Although the interpreter testified in *Lee*, this Court based its reasoning on an earlier state case, *Commonwealth* v. *Vose*, 32 N.E. 355 (Mass. 1892), in which the interpreter did not testify. *Lee*, 198 F. at 601-602. And although *Lee* was decided prior to the adoption of the Federal Rules of Evidence, its reasoning is applicable to the present case. Sage and Germano used a communications assistant "to enable them to speak with each other," making the transmitted statements "presumptively their own." *Id.* at 601.

Other circuits have reached similar results. Indeed, all the courts of appeals to have considered the issue have concluded that a party-opponent's translated statements are presumptively admissible under Rule 801(d)(2)(C) or (D), provided there is no reason to question the reliability of the translated statements. Although the courts of appeals evaluate reliability in different ways, *all* courts will admit a translated statement if it is deemed reliable. For example, in *United States* v. *Da Silva*, 725 F.2d 828 (1983), the Second Circuit concluded that a translator is normally to be viewed as an agent of the speaker. The translation is thus attributable to the speaker and is properly admissible under Rule 801(d)(2)(C) or (D). Although the Second Circuit recognized limited circumstances that would negate an inference of agency between the speaker and translator (*i.e.*, a motive to mislead or incompetence), absent those circumstances the interpreter acts as "no more than a 'language conduit.'" 725 F.2d at 832 (citing *United States* v. *Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973)). Several courts have since adopted the reasoning of *Da Silva* and admitted translated statements as the speaker's own statements under Rule 801(d)(2)(C) or (D). See, *e.g.*, *United States* v. *Alvarez*, 755 F.2d 830 (11th Cir. 1985), cert. denied, 474 U.S. 902 (1987); *United States* v. *Beltran*, 761 F.2d 1 (1st Cir. 1985); cf. *DCS Sanitation Mgmt. Inc.* v. *OSHA*, 82 F.3d 812 (8th Cir. 1996).

The Ninth Circuit has adopted a case-by-case approach to determine "whether the translated statements fairly should be considered the statements of the speaker." *United States* v. *Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991), cert. denied, 506 U.S. 835 (1992). When deciding whether translated statements are properly admitted, the Ninth Circuit considers: (1) which party supplied the interpreter; (2) whether the interpreter had any motive to mislead or distort; (3) the interpreter's qualifications and language skill; and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated. *Ibid.*; see also *United States* v. *Martinez-Gaytan*, 213 F.3d 890, 892 (5th Cir. 2000) (applying *Nazemian* factors to determine admissibility under Rule 801(d)(2)(C) or (D)).

The reasoning of *Nazemian* and the *Da Silva* line of cases compels the conclusion that Sage's statement is admissible. Although the district court apparently considered the *Nazemian* factors in granting defendants' motion for summary judgment, see D. Ct's Mem. and Order, Doc. 77 at 6 n.3, and denying Germano's motion to reconsider, see D. Ct's Min. Order Den. Mot. to Recons., Doc. 89 at 2, the court's analyses were seriously flawed. More importantly, most of these factors are simply inapplicable to conversations relayed by a TRS

communications assistant. To the extent they *do* apply, they weigh in favor of admitting the party's transmitted statements under Rule 801(d)(2).

First, the district court erred in concluding that Germano's evidence (*i.e.*, his assertion that he was offered an interview) was unreliable based in part on the fact that Germano "chose the [] relay service." D. Ct's Mem. and Order, Doc. 77 at 6 n.3; D. Ct's Min. Order Den. Mot. to Recons., Doc. 89 at 2; see also *Nazemian*, 948 F.2d at 527. Germano did not "choose" the relay service. Relay services are provided by common carriers offering traditional telephone services as required by Title IV of the ADA. See 47 C.F.R. 64.603. To access a TRS, a user dials 711 – the universal number for accessing TRS – and interacts with the next available communications assistant provided by the relay service. See 47 C.F.R. 64.601(1); see also http://www.fcc.gov/cgb/consumerfacts/711.html. Moreover, the fact that Germano initiated the relay service call has absolutely no bearing on whether the communications assistant's transmissions were reliable. A communications assistant has no pre-existing relationship with either party and remains anonymous to both parties.

In any event, courts in criminal cases have repeatedly admitted a statement of a defendant translated by a law enforcement officer or government representative, holding that, despite his status as a government employee, the

interpreter acts as the defendant's agent for the purpose of translating and communicating the defendant's statements. *Da Silva*, 725 F.2d 828 (concluding that federal law enforcement officer acted as defendant's agent when translating defendant's statements for benefit of another law enforcement officer); see also *Alvarez*, 755 F.2d 830 (admitting statements made by a criminal defendant that were translated by one federal agent for the benefit of another federal agent); *Beltran*, 761 F.2d 1 (upholding admissibility of statements made by criminal defendants that had been translated by government-paid translator for benefit of federal agent); *United States* v. *Sanchez-Godinez*, 444 F.3d 957 (8th Cir. 2006) (explaining that ordinarily a government employee may act as a defendant's agent, but concluding hearsay concerns arose where federal law enforcement officer acted as more than a language conduit when he interpreted for other officers *and* actively questioned the defendant on his own initiative). If a statement translated by a *law enforcement officer* is admissible *against a criminal defendant* as the defendant's own statement, then certainly statements that are transmitted by an anonymous communications assistant should be admissible as well.

Second, there is no evidence to suggest that the communications assistant who facilitated the conversation between Sage and Germano had a motive to distort the conversation for the benefit of either party. See *Nazemian*, 948 F.2d at

527; *Da Silva*, 725 F.2d at 832. A communications assistant is simply required to "relay all conversation verbatim unless the relay user specifically requests summarization," and is never to "intentionally alter [] a relayed conversation." 47 C.F.R. 64.604(a)(2)(ii). As a truly anonymous party, the communications assistant has no discernible interest in the content of the transmitted statements.

In this respect, communications assistants are no different from sign language interpreters who merely translate spoken English into sign language. And courts have held that because sign language interpreters are neutral figures who merely relay conversations between parties, their presence during jury deliberations raises no concerns. As the Tenth Circuit observed, most people "have come to view such interpreters more as part of the background than as independent participants." *United States* v. *Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987); see also *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 405 (W.D. Pa. 1989) (rejecting suggestion that the presence of a sign language interpreter would violate the sanctity of the jury system and the secrecy of the jury's deliberations); cf. *People* v. *Guzman*, 76 N.Y.2d 1, 3 (N.Y. 1990) (noting that sign language interpreter was "neutral figure" who acted only as a "communications facilitator"). Because this case involved a neutral, anonymous communications assistant, it is unlike those where a court has determined that an interpreter working for a party

has a motivation to alter the conversation. See *Cruz* v. *Aramark Serv., Inc.*, 213 F. App'x. 329 (5th Cir. 2007) (upholding district court's refusal to admit translated affidavit where party's own attorney acted as the interpreter and had obvious motivation to distort).

The district court, addressing the third *Nazemian* factor, erred in basing its conclusion on the absence of evidence "regarding the qualifications, skill level, or experience of the third-party operator." D. Ct's Mem. and Order, Doc. 77 at 6 n.3; D. Ct's Min. Order Den. Mot. to Recons., Doc. 89 at 2; see also *Nazemian*, 948 F.2d at 527. Determining the qualifications, skill level, or experience of a foreign language interpreter before admitting the interpreter's translations is certainly understandable – especially when the translations are provided by a lay interpreter. Thus, those courts that have addressed this particular factor focused on the interpreter's ability to communicate in *two different languages* and to be understood by two different parties. See, *e.g.*, *United States* v. *Lopez*, 937 F.2d 716, 724 (2d Cir. 1991). But a communications assistant does not "interpret" a language. Rather, a communications assistant transmits a written language into the *same* spoken language, and vice versa.

Thus, there is little reason to question the accuracy of the transmission. See *Da Silva*, 725 F.2d at 832. Unlike interpreting a foreign language, where

subtleties, colloquialisms, or minor variances in dialect may lead to mistranslations, a relayed conversation does not involve *any* language translation. Rather, it entails only the conversion of written English to spoken English, and vice versa. To be sure, Germano admitted in a deposition that it was possible the communications assistant may have erred in transmitting Sage's statements. See Def's Statement of Uncontested Material Facts, Doc. 53 at ¶ 71, Ex. L at pp. 27, 33, 46. But the risk of an error in transmission during the course of a conversation relayed by a communications assistant is significantly less than with a foreign language interpreter. Cf. *Da Silva*, 725 F.2d at 831. If anything, there is much less chance of error with a communications assistant because the parties are communicating *in the same language*. In this sense, a communications assistant truly is nothing more than a "language conduit." See *Da Silva*, 725 F.2d at 832 (citing *Ushakow*, 474 F.2d at 1245); see also *United States* v. *Cordero*, 18 F.3d 1248, 1253 (5th Cir. 1994) (holding that absent unusual circumstances, "an interpreter is no more than a language conduit and therefore his translation [does] not create an additional level of hearsay") (internal quotation marks omitted); *Lopez*, 937 F.2d at 724 (same).

To the extent the qualifications of a communications assistant *are* relevant, federal regulations demand that communications assistants "be sufficiently trained

to effectively meet the specialized communications needs of individuals with hearing and speech disabilities." 47 C.F.R. 64.604(a)(1)(i). They must also have "competent skills in typing, grammar, [and] spelling," and "possess clear and articulate voice communications." 47 C.F.R. 64.604(a)(1)(ii). They receive training from the TRS providers, must maintain a minimum typing speed, and undergo "oral-to-type tests" to test their typing speed.[5] 47 C.F.R. 64.604(a)(1)(iii).

Finally, the district court erred in basing its decisions in part on the fourth *Nazemian* factor – whether the parties' subsequent actions were consistent with the relayed statements. See 948 F.2d at 527. This factor is certainly not dispositive here. The defendants did not bring Germano in for an interview, but failing to do so does not necessarily support their assertion that they never initially offered Germano an interview. Indeed, any concern about the consistency of the parties' actions following the conversation should go toward the *weight* of the evidence presented and the credibility of the person offering the evidence, not the evidence's

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[5] In some regard, the district court's concern over the accuracy of relayed statements is entirely misplaced. The rationale underlying the admissibility of statements under Rule 801(d)(2) turns on the nature "of the adversary system." See Fed. R. Evid. 801(d)(2), advisory committee note. Because of this, "*[n]o guarantee of trustworthiness is required* in the case of an admission." *Ibid.* (emphasis added). Even so, the regulations governing the qualifications and training of communications assistants ensure a level of accuracy and reliability that may be lacking in lay interpreters.

admissibility. Cf. *Beltran*, 761 F.2d at 10 (explaining that any inaccuracies in the recipient's recollection of the translated conversation would go toward his credibility, not the admissibility of the translated statements).

Inquiry into the factors identified by the district court as relevant is, for the most part, unnecessary when considering the admissibility of statements made through a communications assistant. For that reason, such statements should be presumptively admissible. Even if considered applicable, however, consideration of those factors supports the admissibility of statements relayed by communications assistants: the party who initially accessed the relay service does not have, or maintain, a relationship with the communications assistant; the communications assistant is obligated to transmit the statements accurately; federal regulations require that a communications assistant maintain a level of accuracy and efficiency that may be lacking in many lay interpreters; and, a communications assistant's ability to transmit accurately written language into spoken language (and vice versa) presents a significantly lower risk for error than that of a foreign language interpreter.

C. Denying Admission Of Relayed Statements Frustrates The Purposes Of The ADA And Impedes Enforcement Of Federal Statutes Barring Discrimination Against Those With Disabilities

Denying admission of relayed statements frustrates the purposes of the ADA. The ADA seeks to ensure that persons with disabilities enjoy equality of opportunity, full participation in society, independent living, and economic self sufficiency. See 42 U.S.C. 12101. The ADA thus guarantees persons with disabilities the opportunity to compete on an equal basis with, and to pursue opportunities that are otherwise available to, persons without disabilities.

Denying admission of relayed statements, however, would continue, rather than eliminate, the disparate treatment that persons with disabilities have heretofore experienced, because it treats relayed communications differently than traditional telephone communications. Doing so is also contrary to Congress's directive to establish telecommunication services for individuals with hearing and speech disabilities that are "functionally equivalent" to those used by individuals without hearing and speech disabilities. 47 U.S.C. 225.

Moreover, admitting relayed statements is necessary to ensure that litigants with hearing and speech disabilities are afforded the same access to the judicial process as are litigants without such disabilities. Courts have long recognized the admissibility of statements made through traditional telecommunication services.

See, *e.g.*, *United States* v. *Woods*, 301 F.3d 556, 560-561 (7th Cir. 2002) (admitting statement made by criminal defendant over the telephone as party admission under Rule 801(d)(2)(A)); *United States* v. *Townley*, 472 F.3d 1267, 1274 (10th Cir. 2007) (same), cert. denied, 127 S. Ct. 3069 (2007); *United States* v. *Wills*, 346 F.3d 476, 489-490 (4th Cir. 2003), cert. denied, 542 U.S. 939 (2004) (same); *United States* v. *Gartmon*, 146 F.3d 1015, 1021-1023 (D.C. Cir. 1998) (same). If relayed statements *were* considered hearsay, they could not be introduced at trial without calling the communications assistant to testify as to the content of the relayed statements. Communications assistants, however, are prohibited from "disclosing the content of any relayed conversation regardless of content" or "keeping records of the content of any such conversation beyond the duration of the call, even if to do so would be inconsistent with state or local law."[6] 47 C.F.R. 64.604(a)(2)(i); see also 47 U.S.C. 225(d)(1)(F). Thus, as a practical matter, individuals with hearing and speech disabilities could *never* introduce such evidence. As a result, they would be deprived of the opportunity to rely on an entire class of evidence that is currently available to persons without disabilities. Denying individuals with hearing and speech disabilities the opportunity to

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[6] Communications assistants may be required to disclose the content of a relayed conversation under 47 U.S.C. 605, which authorizes disclosure pursuant to a subpoena or "on demand of other lawful authority." 47 U.S.C. 605(a)(5) and (6).

introduce evidence produced through relayed conversations would be wholly inconsistent with the ADA's mandate to ensure that individuals with disabilities share equal footing with non-disabled individuals. See 42 U.S.C. 12101(b)(1).

Excluding relayed conversations from evidence would also impede enforcement of civil rights laws protecting those with disabilities, including (1) Title I of the ADA, 42 U.S.C. 12117; (2) Title II of the ADA, which prohibits discrimination on the basis of disability in all programs, activities, and services of public entities, see 42 U.S.C. 12132; (3) Title III of the ADA, which prohibits discrimination on the basis of disability in places of public accommodation, see 42 U.S.C. 12182; (4) Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of disability by 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, 29 U.S.C. 794; and (5) the Fair Housing Act, which prohibits, among other things, discrimination on the basis of disability in housing, 42 U.S.C. 3614. If relayed conversations were treated as inadmissible hearsay, the prosecution of *any* case that depended upon the admissibility of a relayed conversation would be jeopardized.

For example, in *United States* v. *Space Hunters*, 429 F.3d 416 (2d Cir. 2005), the government brought suit against a housing vendor under the Fair Housing Act, alleging a pattern and practice of discrimination against persons with hearing disabilities. Much of the government's evidence was gathered through relayed telephone conversations between prospective tenants and the vendor. See, *e.g.*, *id.* at 420. The evidence was admitted without objection; however, had the court excluded the evidence on hearsay grounds, it is unlikely the government would have been able to prosecute the case.

CONCLUSION

The district court's ruling that Sage's statement to Germano, made through a communications assistant, was hearsay should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B). This brief was prepared using WordPerfect 12.0 and contains no more than 6323 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that an electronic version of this brief, which has been sent to the Court by overnight delivery on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

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Date: February 21, 2008

CERTIFICATE OF SERVICE

I certify that on February 21, 2008, two copies and one electronic version of the foregoing Brief For The United States As Amicus Curiae Supporting Appellant And Urging Reversal were sent by overnight Federal Express delivery to the following counsel of record:

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