ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5238

JAHINNSLERTH OROZCO,
Appellant,

v.

MERRICK B. GARLAND,
Appellee.

BRIEF FOR APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civ. A. No. 19-3336

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amicus Curiae

The Appellant is Jahinnslerth Orozco, who was the Plaintiff in the District Court. The Appellee is Merrick B. Garland, in official capacity as Attorney General of the United States and head official of the U.S. Department of Justice, who was the Defendant in the District Court. There was no *amicus curiae*.

Ruling Under Review

Orozco seeks review of the September 30, 2021, Memorandum Opinion and Order by the Honorable Emmet G. Sullivan granting the government's Motion to Dismiss.

Related Cases

Undersigned counsel is not currently aware of any pending related cases involving the same parties, but a case presenting the same legal issue—whether Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, provides a private, non-administrative right of action for a federal employee to sue his agency employer—is pending in the district court. That case is *Ashley v. Murphy*, Civ. A. No. 18-0574 (JMC) (D.D.C.).

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GLOSSARY

APA	Administrative Procedure Act
EEO	Equal Employment Opportunity
FBI	Federal Bureau of Investigation
JA ___	Joint Appendix
R. ___	Docket entry in the district court proceeding

RELEVANT STATUTES

Text of pertinent statutes is contained in the Addendum to Brief for Appellant.

Section	**Statute**	**Title and Principal Function**
501	29 U.S.C. § 791	Title: Employment of individuals with disabilities prohibits employment discrimination against qualified individuals with disabilities in the federal sector
504	29 U.S.C. § 794	Title: Nondiscrimination under Federal grants and programs prohibits discrimination by "any program or activity conducted by any Executive agency" or "receiving Federal financial assistance"
505	29 U.S.C. § 794a	Title: Remedies and attorney's fees governs remedies and attorney's fees
508	29 U.S.C. § 794d	Title: Electronic information and technology requires that when a "Federal department or agency" develops, procures, maintains, or uses electronic and information technology, it must "ensure . . . that the [technology] allows . . . individuals with disabilities . . . to have access to and use of information and data . . . comparable to" nondisabled persons.

JURISDICTIONAL STATEMENT

Orozco invoked the District Court's jurisdiction under 28 U.S.C. § 1331 ("Federal question"), 28 U.S.C. § 1343 ("Civil rights and elective franchise"), and 28 U.S.C. § 2201 (Declaratory Judgment Act). (JA 9, ¶ 8: Am. Compl.) Orozco also asserted that this civil action was "authorized and instituted" pursuant to 42 U.S.C. § 1981a ("Damages in cases of intentional discrimination in employment") and 29 U.S.C. § 794d(f)(3) (the "Enforcement" provision of Section 508 of the Rehabilitation Act). (*Id.*) The District Court dismissed Orozco's claims on September 30, 2021, holding that the First Amended Complaint failed to state a valid claim for relief. (JA 36: Order.)

This Court has jurisdiction under 28 U.S.C. § 1291, because Orozco timely filed his notice of appeal on October 28, 2021. (JA 55-56: Notice of Appeal); Fed. R. App. P. 4(a)(1)(A).

ISSUE PRESENTED

Whether Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, waives sovereign immunity for a private, non-administrative cause of action brought by a federal employee against his agency-employer based on allegations that the agency developed, procured, maintained, or used "electronic and information technology" that does not provide individuals with disabilities access to and use of the technology

that "is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities."

STATEMENT OF THE CASE

Congress enacted the Rehabilitation Act in 1973 to "ensure that members of the disabled community could live independently and fully participate in society." *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1259 (D.C. Cir. 2008). In 1986, Congress amended the Rehabilitation Act by adding Section 508, which requires that agencies—when developing, procuring, or using technology—comply with standards developed and adopted by the Architectural and Transportation Barriers Compliance Board ("Access Board") to ensure comparable electronic and information accessibility for individuals with disabilities, unless achieving compliance would place an "undue burden" on the agency. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 603, 100 Stat. 1807, 1830 (1986). As amended, Section 508 now states, in part:

> (a) Requirements for Federal departments and agencies.
>
> (1) Accessibility.
>
> (A) Development, procurement, maintenance, or use of electronic and information technology.
>
> When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency,

> that the electronic and information technology allows, regardless of the type of medium of the technology--
>
> (i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities; and
>
> (ii) individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.
>
> (B) Alternative means efforts
>
> When development, procurement, maintenance, or use of electronic and information technology that meets the standards published by the Access Board under paragraph (2) would impose an undue burden, the Federal department or agency shall provide individuals with disabilities covered by paragraph (1) with the information and data involved by an alternative means of access that allows the individual to use the information and data.

29 U.S.C. § 794d(a)(1). Importantly, Section 508 exempts "national security systems, as that term is defined in section 11103(a) of Title 40."[1] *Id.* § 794d(a)(5).

It was not until Congress passed the Workforce Investment Act of 1998 ("Workforce Act"), however, that Congress provided any means of enforcing Section 508. *See* Pub. L. No. 105-220, § 408(b), 112 Stat. 936, 1203 (1998); *see also* 29 U.S.C. § 794d(f) (titled "Enforcement")). Indeed, within the Workforce Act,

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[1] Title 40 of the United States Code contains laws related to public buildings, property, and works. Section 11103 falls within Title 40's Subtitle III: "Information Technology Management."

Congress both rewrote the accessibility mandate to contain the language currently found in Section 508(a), which is quoted in relevant part above, and it added a subsection entitled "Enforcement" as Section 508(f). *See* Pub. L. No. 105-220, § 408(b), 112 Stat. 936, 1203–06. That Enforcement subsection states:

> (f) Enforcement.
>
> (1) General.
>
> (A) Complaints.
>
> Effective 6 months after the date of publication by the Access Board of final standards described in subsection (a)(2), any individual with a disability may file a complaint alleging that a Federal department or agency fails to comply with subsection [508](a)(1) in providing electronic and information technology.
>
> (B) Application.
>
> This subsection shall apply only to electronic and information technology that is procured by a Federal department or agency not less than 6 months after the date of publication by the Access Board of final standards described in subsection [508](a)(2).
>
> (2) Administrative complaints.
>
> Complaints filed under paragraph [508(f)](1) shall be filed with the Federal department or agency alleged to be in noncompliance. The Federal department or agency receiving the complaint shall apply the complaint procedures established to implement section 504 [29 U.S.C. § 794] for resolving allegations of discrimination in a federally conducted program or activity.
>
> (3) Civil actions.
>
> The remedies, procedures, and rights set forth in sections 505(a)(2) and 505(b) [29 U.S.C. § 794a(a)(2), (b)] shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph (1).

29 U.S.C. § 794d(f).

Thus, "any individual with a disability may file a complaint alleging that a Federal department or agency fail[ed] to comply with [Section 508(a)(1)] in providing electronic information and technology[,]" 29 U.S.C. § 794d(f)(1)(A), and the statute provides for two types of complaints. First, under Section 508(f)(2), an aggrieved individual who chooses to file a complaint "shall . . . file[] [the complaint] with the Federal department or agency alleged to be in noncompliance," and this "[a]dministrative complaint" must then be processed by the agency pursuant to "the complaint procedures established to implement" Section 504 [29 U.S.C. § 794] of the Rehabilitation Act. *Id.* § 794d(f)(2). Second, under Section 508(f)(3), entitled "Civil actions," the statute provides, in relevant part, that "[t]he remedies, procedures, and rights set forth in [Section 505(a)(2) of the Rehabilitation Act] . . . shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under" Section 508(f)(1). *Id.* § 794d(f)(3). At issue in this appeal is the scope of the judicially enforceable remedies and rights provided to a federal employee by this section of the statute.

SUMMARY OF ALLEGATIONS AND PROCEDURAL BACKGROUND

I. Orozco's Administrative and District Court Complaints

Orozco, a blind individual, has been employed at the Federal Bureau of Investigation ("FBI") since 2012. (JA 9, ¶¶ 11-12: Am. Compl.) To perform his duties as an Intelligence Analyst, Orozco "uses screen access software that converts

digital information to synthesized speech." (*Id.* ¶ 11.) On April 29, 2019, Orozco submitted a "formal complaint" to, among others, the FBI's Equal Employment Opportunity ("EEO") office. In that complaint, Orozco claimed that the FBI had committed multiple "violations of Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, . . . based on the FBI's use of software and other electronic information technology ('EIT') that is not accessible to blind users." (JA 29: Formal Complaint.)

More specifically, Orozco's formal complaint named five computer programs that he asserted were "not accessible to blind users" and that the alleged "lack of comparable access and use [of software and electronic information] ha[d] prevented . . . [him] and other blind employees from efficiently accessing or using such data and information" and had "also resulted. . . in lost opportunities." (*Id.* at 29-30.) The complaint did not identify any specific "lost opportunities," nor did it allege that Orozco (or any other blind employee) was prevented from performing the duties of his or her job. (*See generally id.* at 29-31.) According to Orozco, he provided "a courtesy copy" of the formal complaint to the FBI's Accessibility Program Office, Office of the Chief Information Officer on the same day that he provided it to the EEO Office and again on May 9, 2019. (JA 26, ¶ 7: Declaration of Albert Elia ("Elia Decl."); JA 10, ¶ 17: Am. Compl.)

On August 7, 2019, the FBI's EEO office responded in a letter to Orozco (through his counsel), informing him that it could not process his complaint because

the complaint did not allege disability discrimination that falls within the jurisdiction of the Equal Employment Opportunity Commission. (JA 19-20: FBI EEO Letter of Aug. 7, 2019.) The letter also advised Orozco that "the appropriate mechanism for addressing [his] concerns [was] to contact the FBI's Accessibility Program Office, Office of the Chief Information Officer. (*Id.* at 20.)[2] Orozco did not discuss his complaints with the FBI's Office of the Chief Information Officer after receiving the August 7, 2019, correspondence from the FBI's EEO office, nor does he allege that he attempted to engage in such a discussion after receiving the FBI's August 2019 letter. (*See* JA at 26-27: Elia Decl. ¶¶ 11-13 (declaring that Orozco's counsel had no communication with the Office of the Chief Information Officer in or after August 2019); *see also* JA 9-10: Am. Compl. ¶¶ 16-25 (containing no allegations of contact with the Office of the Chief Information Officer in or after August 2019).)

On November 5, 2019, Orozco filed this action in the District Court and, on January 27, 2020—after the FBI moved to dismiss the original Complaint for failure to state a claim—Orozco filed his First Amended Complaint. (R.1: Orig. Compl.;

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[2] The Office of the Chief Information Officer is responsible for (among other things) overseeing and maintaining technologies within the agency's information technology infrastructure to ensure effective and appropriate use of information resources and information technology to support the goals of the agency.

JA 7-17: Am. Compl.)[3] Orozco's Amended Complaint alleged that certain computer programs used by the FBI were inaccessible for "independent" and "efficient" use by blind persons.[4] It provided the following information and descriptions of the programs that Orozco alleged were inaccessible to blind persons:

- Sentinel, a "web-based management system" developed by FBI and used to "review and manage case files, create and review official communications, and process incoming leads." (JA 10-11, ¶¶ 27-28: Am. Compl.)
- Enterprise Process Automation System ("EPAS"), a web-based system developed by the FBI and used "to perform administrative tasks such as travel requests, expense reimbursement, security alerts, access to applications and promotions, and outside work alerts." (*Id.* at 10-11, ¶¶ 32-33.)
- Palantir analytics software used "to tie disparate intelligence resources together, search across and manage those resources, and track relationships among disparate entities." (*Id.* at 11-12, ¶¶ 38-39.)
- Global Mission Analytics ("GMAN"), a web-based system developed by FBI and used to "search across internal and external intelligence sources." (*Id.* at 11-12, ¶¶ 43-44.)
- Virtual Private Networking ("VPN"), a "misattribution software to enable analysts to securely and anonymously access external data sources without identifying that access as coming from the FBI." (*Id.* at 12-13, ¶¶ 48-50).

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[3] On January 28, 2020, the District Court issued a Minute Order "denying as moot" the FBI's first motion to dismiss "in light of Plaintiff's First Amended Complaint." (JA 3: Dist. Ct. Docket.)

4 The term "program" is used throughout this brief to refer generally to computer software and web-based systems and applications that are the subject of Orozco's lawsuit.

- "secure mobile applications" that are not identified by name and are only described as applications that the FBI "developed or procured to run on Android mobile devices. . . for messaging, calendars, contact management, and other typical and specialized mobile application functions." (*Id.* at 13, ¶¶ 52-53.)
- "other software systems" that are not identified by name and are only described as systems the FBI "developed or procured for administrative and job-specific functions." (*Id.* at 13-14, ¶¶ 57-58.)

For none of the programs did Orozco allege the date the program had been procured or developed by the FBI, nor did he allege that he had taken any steps to uncover information about the procurement or development process or the ability (or potential inability) for the FBI to procure or develop alternatives for blind employees to use the program independently. Nowhere did Orozco reference any standards adopted by the Access Board or claim that using the alternate means of access provided caused him any harm in his employment. Rather, for each program, Orozco alleged that the FBI "could have provided [him] and other blind employees with an alternative means of accessing [the program] . . . to independently use the information and data involved, but did not do so." (*Id.* at 11-14, ¶¶ 31, 37, 42, 47, 51, 56.)

Despite acknowledging in his Amended Complaint that programs like Sentinel, Enterprise Process Automation System, and Palantir serve important intelligence and law enforcement functions at the heart of the FBI's mission—e.g., "processing incoming leads", providing "security alerts", and "[tying] disparate

intelligence resources together" (*id.* at 10-12, ¶¶ 28-29, 31-33, 38-39)—Orozco's Amended Complaint sought broad injunctive and declaratory relief that included issuance of an immediate and "permanent injunction enjoining the FBI from using Sentinel, EPAS, Palantir, . . . or any other electronic and information technology that is not compliant with Section 508 standards unless and until such technology is made compliant with those standards" (*id*. at 15-16, Prayer for Relief).[5]

II. The Government's Motion to Dismiss

On January 28, 2020, the FBI moved to dismiss Orozco's Amended Complaint, arguing primarily that Orozco had failed to state a valid claim for relief because Section 508 does not provide a federal employee with a private, non-administrative remedy or a judicially enforceable right of action against his employer for alleged violations of Section 508 of the Rehabilitation Act. (*See generally* R.13: FBI's 2d Mot. to Dismiss). The FBI asserted that no express or implied cause of action existed for Orozco because the statute's plain language in the "Civil actions" provision at Section 508(f)(3) explicitly limits the "remedies, procedures, and rights" available under the provision as only those "remedies, procedures, and rights" set forth in Sections 505(a)(2) and 505(b), neither of which

[5] The relief requested in Orozco's original Complaint included a demand for "economic and non-economic compensatory damages in amounts to be proven at trial" as well as an award of "pre-judgment and post-judgment interest." (R.1: Orig. Compl.) The Amended Complaint dropped the claim for monetary relief but maintained a demand for a jury trial. (JA 16: Am. Compl.)

includes a cause of action brought by a federal employee against his agency-employer in district court as one of the available remedies, procedures, and rights. (*Id.* at 5-7.)

In the alternative, the FBI argued that even if Section 508 generally provides a right of action for federal employees in Orozco's circumstances, Orozco's claim should still be dismissed because he had failed to exhaust administrative remedies prior to filing suit. (*Id.* at 8-9.) The motion explained that the August 2019 letter from the FBI's EEO office advised Orozco of "the appropriate mechanism" for addressing concerns related to Section 508 compliance, but Orozco failed to avail himself of this administrative process. (*Id.* at 8.) Further, the FBI's motion noted that the failure to exhaust the administrative process was particularly important in this case because it precluded the agency from having "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision[s]," which is the principal function of administrative exhaustion requirements. (*Id.* at 8-9.) The FBI also argued that, had Orozco attempted to bring his claim under the Administrative Procedure Act ("APA")—which he had not—

such a claim would also warrant dismissal as a result of Orozco's failure to exhaust administrative remedies. (*Id.* at 7-8.)[6]

Orozco opposed dismissal, contending primarily that Section 508 provides an express cause of action for federal employees because, by "cross-referenc[ing] . . . the rights and remedies [in Section 504] that address the programs and activities of federal agencies," Section 508(f)'s Enforcement provision extends to federal employees the rights and remedies available under the "comprehensive remediation scheme" of Section 504, including the right to bring private civil actions (R.14 at 3-4: Orozco's Opp. to FBI's 2d Mot. to Dismiss). He also argued that, because Section 508 explicitly applies to conduct of "Federal departments and agencies" and Congress used the phrase "civil action" as the subsection heading to Section 508(f)(3), this establishes that Congress created an express cause of action for the statute's compliance-related requirements to be enforced through private civil actions against federal agencies by federal employees. (*Id.* at 5-8.) Orozco also argued, in the alternative, that an implied cause of action exists because he sought only equitable relief and attorney's fees, and the circumstances of this case satisfied

[6] The parties disagree regarding whether Orozco has exhausted administrative remedies in a manner required by Section 508; however, this Court need not resolve or otherwise examine the issue of administrative exhaustion because the District Court did not address whether Orozco had exhausted administrative remedies prior to filing suit. *See* JA 54: Memo. Op. at n.3 ("Since the Court holds that there is no [express or] implied cause of action available, it . . . need not address whether Mr. Orozco has satisfied his administrative remedies.").

the "test for establishing an implied cause of action," as discussed by the Supreme Court in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). (*Id.* at 8-11.)

Orozco also argued that he was not required to exhaust administrative remedies and that, even if there was such a requirement, he had "fulfilled his good faith obligations in pursuing an administrative remedy" by relying on the EEO office to forward the formal complaint to the FBI's Office of the Chief Information Officer and waiting until November 2019 to file his action in District Court. (R.14 at 12-13.) Orozco then argued that administrative exhaustion would serve no purpose because the FBI's Office of the Chief Information Officer allegedly has "no special expertise in the substantive question of whether or not an agency's [electronic information technology] complies with Section 508" and "Section 508 technical standards are quite specific, providing this Court ample guidance for judicial review." (R.14 at 14-15.)

III. <u>The District Court's Decision</u>

On October 1, 2021, the District Court granted the FBI's motion to dismiss, declining to find either an express or implied private right of action for a federal employee to sue his employer for alleged violations of Section 508. (JA 36-54: Order and Memo. Op.) The District Court first examined the statute's text. Upon determining that the remedies contained in Section 505(a)(2) are expressly adopted as the remedies available under the "Civil actions" provision at Section 508(f)(3),

the District Court analyzed Section 505(a)(2)'s language limiting the available remedies to a "person aggrieved by an[] act or failure to act by any *recipient of Federal assistance or Federal provider of such assistance*." (JA 47-49: Memo. Op. (quoting 29 U.S.C. § 794a(a)(2) (emphasis added)).) Then, applying the Supreme Court's interpretation of Section 505(a)(2) in *Lane v. Peña*, 518 U.S. 187 (1996), the District Court held that "the FBI is not a provider of Federal assistance" in its role as an employer. (JA 47-49: Memo. Op.)

The District Court then rejected Orozco's arguments for implying a right of action under Section 508 for federal employees like Orozco, holding that neither the statute's plain language nor Orozco's citation to legislative history that pre-dated by twenty years the enactment of Section 508's enforcement provision were "strong indicia" that Congress intended to create such a cause of action. (*Id* at 50-54: Memo. Op.) Throughout the decision, the District Court noted that Orozco's arguments had previously been rejected or undermined by "persuasive authority which holds that 'section 508 provides no express cause of action'" and "establishes that Section 508 does not contain an implicit cause of action." (*Id*. at 47, 52: Memo. Op. (discussing *Clark v. Vilsack*, Civ. A. No. 19-0394 (JEB), 2021 WL 2156500, at *3-4 (D.D.C. May. 27, 2021)). The District Court also noted that Orozco "d[id] not distinguish

Clark, or present an argument for why it is not persuasive." (*Id.* at 48: Memo. Op. (citing R.20: Notice of Supplemental Authority)).[7]

SUMMARY OF ARGUMENT

The question presented in this case is whether the District Court erred when holding that Section 508's "Enforcement" provision—29 U.S.C. § 794d(f)—does not create a non-administrative private right of action for a federal employee against his federal agency-employer for alleged violations of Section 508(a)'s requirements related to electronic information and technology. The District Court's decision is correct and should be affirmed because Section 508(f)(3) provides a private right of action for individuals aggrieved by agency action only when the agency acts in its role as a provider of federal funding and the claim Orozco sought to assert against the FBI lies outside the remedial scheme established by Congress for federal employees. Further, although Orozco asserts that Section 508(f)(3)—through its cross-reference to Section 505(a)(2) of the Rehabilitation Act—provides a private civil right of action to "any individual with a disability," the District Court properly recognized that this interpretation is not supported by the statute's plain text.

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[7] Briefing regarding the FBI's motion to dismiss concluded when the FBI filed its reply memorandum (R.15) on February 18, 2020. Notably, on June 24, 2021, Orozco filed a Notice of Supplemental Authority (R.20) advising the Court of the decision in *Clark* issued on May 27, 2021. Thus, Orozco had a fair opportunity to present argument below.

The District Court's determination that Section 508 does not create an express or implied cause of action for federal employees against their employers was also correct because, under proper application of well-settled canons of statutory interpretation, the plain text of Section 508 demonstrates Congressional intent to exclude federal employees from the class of individuals who could file civil actions under Section 508. Moreover, and contrary to Orozco's insistence otherwise, the District Court's decision does not create surplusage in the statute, does not impermissibly narrow the intended scope of Section 508, and does not create inconsistencies within the Rehabilitation Act. For these reasons and other discussed herein, this Court should affirm the District Court's decision.

STANDARD OF REVIEW

"A dismissal for failure to state a claim under Rule 12(b)(6) is reviewed *de novo*—meaning that this court applies the same decisional principles as the District Courts," *Pub. Citizen v. U.S. Dist. Court*, 486 F.3d 1342, 1345 (D.C. Cir. 2007), and "like the district court, accept[s] the factual allegations in the complaint as true," *Sierra Club & Valley Watch, Inc. v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011). Among its jurisdictional showings, a party suing the United States must establish that the government has unequivocally waived its immunity from suit and that he has satisfied all prerequisites to filing suit. *United States v. Sherwood*, 312 U.S. 584,

586 (1941). Waivers of sovereign immunity are strictly construed in favor of the United States. *Lane*, 518 U.S. at 192.

ARGUMENT

I. Congress Did Not Create a Private, Non-administrative Cause of Action Under Section 508 for a Federal Employee to Sue an Agency Acting in Its Role as an Employer.

A. Section 508's Enforcement Provision Incorporates Section 505(a)(2)'s Limitations; Thus, It Only Permits Suits Against Agencies Acting In Their Capacity as Federal Funding Providers

The rules of statutory interpretation are firmly established: the court begins "with the language of the statute," *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)), and "must first determine whether the statutory text is plain and unambiguous," *Carcieri v. Salazar*, 555 U.S. 379 (2009). Where, as here, "[a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete." (internal quotations omitted)); *Chambers v. District of Columbia*, 35 F.4th 870, 874-75 (D.C. Cir. 2022) (interpreting the antidiscrimination provision of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)).

By its plain language, Section 508(f)(3) guarantees that "[t]he remedies, procedures, and rights set forth in [sections 505(a)(2) and 505(b)] . . . shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph [Section 508(f)](1)." 29 U.S.C. § 794d(f)(3).[8] Section 505(a)(2), in turn, does two things: (i) it makes available the "remedies, procedures, and rights" contained in the remedial schemes of Title VI and section (e)(3) of Title VII; and (ii) it explicitly limits the availability of those remedies and rights to only be available to a "person aggrieved by an[] act or failure to act by any *recipient of Federal assistance or Federal provider* of such assistance." *See id.* § 794a(a)(2) (emphasis added).[9]

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[8] The full text of this subsection provides:

> Civil Actions. The remedies, procedures, and rights set forth in sections 794a(a)(2) and 794a(b) [i.e., sections 505(a)(2) and 505(b) of the Rehabilitation Act] shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph (1).

29 U.S.C. § 794d(f)(3).

[9] The language of Section 505(a) provides that:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 [Section 504] of this title.

29 U.S.C. § 794a(a)(2). Section 794a(b) concerns attorney's fees for prevailing parties other than the United States, and it has no relevance here.

The Supreme Court has interpreted the term "Federal provider", as used in Section 505(a)(2), to mean "federal funding agencies acting as such." *Lane*, 518 U.S. at 193. Similarly, when interpreting Congress's meaning by the phrase "recipient of Federal assistance," this Court has unequivocally held that this language does not include Federal agencies acting in their role as employers. *See Taylor v. Small*, 350 F.3d 1286, 1291 (D.C. Cir. 2003) (explaining that Section 504 does not on its face provide a cause of action to a federal employee to sue his employer because federal employment does not constitute a "program or activity receiving federal financial assistance or . . . [a] program or activity conducted by an[] Executive agency[.]").

Piecing this all together: the plain language of Section 508's "Civil actions" provision—i.e., Section 508(f)(3)—reveals that Congress intended to incorporate wholesale into Section 508's enforcement scheme the remedies and rights available under Section 505(a)(2). This wholesale, unequivocal incorporation of Section 505(a)(2) reflects Congress's intention to provide remedies and limitations on those remedies, including limiting under what circumstances a civil action can be filed under Section 508. That these limitations exclude a private, non-administrative right of action for a federal employee protected by other provisions of the statute to file suit challenging his employer's actions does not change the clear meaning of Section 508's enforcement mechanism.

Notably, the District Court's holding that Section 508 does not provide a private right of action for a federal employee to sue his employer is consistent with the conclusion of every other court that has decided the issue. *See, e.g.*, *Clark*, 2021 WL 2156500 (holding that Section 508 provides neither an express nor implied cause of action for federal employees to sue the government as employer); *D'Amore v. Small Bus. Admin.*, Civ. A. No. 21-1505, 2021 WL 6753481, at *3 (D.D.C. Sept. 16, 2021) (considering the "line of cases . . . holding that Section 508 does not provide a private cause of action" for "federal employees suing their respective federal employers" and concluding that Section 508 supplies a private cause of action "only if an agency is acting in its capacity as a federal funding agency"); *Gonzalez v. Perdue*, Civ. A. No. 18-0459, 2020 WL 1281237, at *8 (E.D. Va. Mar. 17, 2020) (holding that section 508 "does not provide a private cause of action for aggrieved federal employees"); *Latham v. Brownlee*, Civ. A. No. 03-0933, 2005 WL 578149, at *9 (W.D. Tex. Mar. 3, 2005) (holding Section 508 "cannot form the basis for a civil action" in Federal court because "the statute does not authorize a private, non-administrative right [of] action.").

B. The District Court's Interpretation of Section 508's Enforcement Provision Is Correct and Prevented Orozco's Impermissible Pursuit of a Judicially Enforced Private Remedy

Orozco asserts that the District Court's reading of the statute "[improperly] used [Section] 505 to limit against whom . . . civil actions may be brought—changing

it from 'federal departments and agencies' to providers and recipients of federal assistance[,]" which allegedly "rewrites the statutory target of Section 508." *See* App. Br. at 43. This argument is unsupported by the text of the statute. The "Civil actions" provision at Section 508(f)(3) does not include the phrase "federal departments and agencies" when referring to the availability of a civil action as a remedy. This is significant because, in the other subsections of Section 508(f), Congress made explicit reference to these entities. *See* 29 U.S.C. § 794d(f)(1)(A) (reflecting that in Section 508(f)(1)(A), entitled "Complaints," the statute explicitly permits "any individual with a disability" to "file a complaint alleging that a Federal department or agency" failed to comply with Section 508); *id.* at § 794d(f)(2) (reflecting that in Section 508(f)(2), entitled "Administrative complaints," the statute explicitly provides that complaints of this type must be "filed with the Federal department or agency" alleged to be in noncompliance). "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009); *see Nat'l Ass'n of Broad. v. FCC*, 569 F.3d 416, 421 (D.C. Cir. 2009) (applying "the general presumption that an omission is intentional where Congress has referred to something in one subsection").

Moreover, if, as Orozco claims, Congress intended to make a private civil action available against any Federal department or agency by any aggrieved individual regardless of what capacity the agency was serving in (e.g., employer, funding provider), then it could have done so. It would have been as simple as adding the phrase "Federal department or agency" onto the current provision, such as by stating that "[t]he remedies, procedures, and rights set forth in [Section 505(a)(2)] shall be the remedies, procedures, and rights available to any individual filing a complaint under paragraph (1)" *against a Federal department or agency*. Congress chose not to do this. Instead, it fully incorporated into Section 508(f)(3) the remedies, procedures, and rights of Section 505(a)(2), which have long been understood to limit the availability of certain rights and remedies in a manner that excludes federal employees from seeking relief against their employers.

Congress's wholehearted incorporation of Section 505(a)(2) into the "Civil Actions" subsection and the absence of a reference to "Federal department or agency" within that subsection is significant for another reason: "[w]here Congress 'adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.'" *Ass'n for Cmty. Affiliated Plans v. Dep't of Treasury*, 966 F.3d 782, 790 (D.C. Cir. 2020) (quoting *Lorillard v. Pons*, 434 U.S. 575, 58 (1978)). Thus, when enacting Section 508's enforcement provision

in 1998, Congress is presumed to have been aware of the Supreme Court's 1996 decision in *Lane* that limited Section 505(a)(2)'s stated remedies as only being available to "federal funding agencies acting as such," not federal departments and agencies acting in their role as an employer. *See Lane*, 518 U.S. at 193.

Orozco also argues that the District Court's reading of the statute as only allowing private civil actions when an agency is acting in its capacity as a provider of federal assistance "rewrites the statutory target of Section 508" because the Enforcement provision includes the language "any individual with a disability." Orozco asserts that this language means any individual aggrieved by an alleged violation of Section 508 should be permitted to file a civil action. *See* App. Br. at 23, 28-29. At bottom, this argument appears to be founded on the faulty premise that when Congress has created a statute establishing legal obligations for federal entities, a court should assume that Congress also intended to create a private right of action for any individual aggrieved by any alleged violation of that statute.

Contrary to this contention, it has long been recognized that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979). Similarly, that Congress would enact a statute creating obligations for Federal agencies without providing a private right of action for all aggrieved by alleged violations of the statute is not a new phenomenon nor is

it unique to the Section 508 context. *See*, *e.g.*, *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 871 (D.C. Cir. 2014) (holding that no private right of action existed in the Indian Lands Open Dump Cleanup Act of 1994, 25 U.S.C. §§ 3901-3908, because "[t]he statute creates agency obligations, but it does not focus on the rights of protected parties."). Any ambiguity in the creation of a waiver of sovereign immunity for an action by a federal employee must be construed not to find a private judicial remedy. The statute states the overall goal of having feasible accessibility standards used in development, procurement, and use of electronic and information technology and, in requiring biennial reports to Congress, 29 U.S.C. § 794d(d)(2), the statute includes legislative oversight among the enforcement tools.[10] This is logical because of the obvious link between budget requests and procurement or design costs for information technology.

C. The District Court's Statutory Interpretation Does Not Create Surplusage

1. The Header "Civil actions" Is Not Surplusage Under the District Court's Interpretation of the Statute

Orozco argues that accepting the District Court's reading of the statute would give no meaning to the words "civil actions" in Section 508(f)(3)'s heading and, thus, would violate the canon against surplusage, which cautions against interpreting

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[10] It appears as of the filing of this brief that the Department of Justice has not submitted the reports called for by Section 508 for approximately ten years and that several members of Congress recently inquired about the reports' absence.

words or provisions within a statute as meaningless or redundant. *See* App. Br. at 41-42. This argument is meritless. First, as the District Court explained, its interpretation gives term "civil actions" effect by acknowledging Congress's intention to create a private right to file a civil action—i.e., a lawsuit—under Section 508 against Federal agencies and departments in some circumstances not applicable here. (JA 48-49: Memo. Op.)

Indeed, Orozco's brief concedes that the District Court's reading provides a private cause of action to a disabled person aggrieved by an alleged violation of Section 508 that occurred in connection with the Federal agency or department acting in its capacity as a Federal funding source. *See* App. Brief at 42 (acknowledging the District Court's holding that "person[s] aggrieved by any act or failure to act" committed by a recipient of federal assistance or federal provider of such assistance has a private right of action under Section 508 while "persons aggrieved by the Government acting in its capacity as an employer" do not). Given this concession, Orozco's assertion that the heading is surplusage must be rejected. Indeed, Orozco cites no legal authority for his apparent contention that a court must classify a term or phrase as "surplusage" if the term or phrase does not apply equally to all who might be impacted by the subject addressed by the statute.

Second, even assuming for the sake of argument that, under the District Court's holding, the heading "Civil actions" is rendered as surplusage—which it is

not—this would still not warrant reversal of the District Court's decision. The mere fact that an interpretation results in surplusage "is not controlling" because the "preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) ("The canon against surplusage is not an absolute rule"). Additionally, although the canon against surplusage "is a helpful rule when interpreting ambiguous text, it does not apply when the text's meaning is plain." *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1068 (D.C. Cir. 2018); *see Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) (declining to read a statute contrary to its plain meaning simply to avoid surplusage). As discussed above, the text of Section 508(f)(3) is plain and unambiguous in its unequivocal and full incorporation of Section 505(a)(2)'s remedies and rights, including its limitation on the circumstances under which claims can be brought in a civil action against an entity for alleged violation of Section 508's electronic and information technology-related requirements.

2. The District Court's Reading of the Statute Neither Contracts the Reach of the Rehabilitation Act Nor Creates Contradictions Within It

Orozco argues that the District Court's reading of Section 508(f) "eviscerates the scope of activities" toward which Section 508's enforcement provision is aimed—i.e., "developing, procuring, maintaining, or using electronic and information technology," *see* App. Br. at 43, but this argument ignores important

facts. According to Orozco, because the regulatory definition of "federal financial assistance" explicitly excludes procurement contracts with federal agencies, reading the "Civil actions" provision of Section 508(f) as creating a private right of action only when the agency was acting as a provider of federal funding assistance "would not just dramatically rewrite [Section] 508—it would make it all but unenforceable by anyone." *See* App. Br. at 43-45. Orozco's argument fails to acknowledge that, although the phrase "Federal financial assistance" has the same meaning in Section 504 and Section 508, the two sections use the phrase for different purposes and, thus, have a different effect.

Section 504 prohibits disability discrimination by "any program or activity conducted by any Executive agency" and "any program or activity receiving Federal financial assistance," *see* 29 U.S.C. § 794(a), and its implementing regulations consistently define "Federal financial assistance" as "any grant, loan, contract (other than a procurement contract . . .)" or any other arrangement by which "the agency provides or otherwise makes available assistance" in one of the forms enumerated in the regulation (e.g., funds, services for Federal personnel), *see, e.g.,* 28 C.F.R. § 41.3(e) (defining "Federal financial assistance" in Department of Justice's regulations implementing Section 504); 45 C.F.R. § 84.3(h) (defining "Federal financial assistance" in Department of Health and Human Services' regulation implementing Section 504). Thus, Congress uses the phrase "Federal financial

assistance" within Section 504 to define what entities are subject to the statute. *See Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-06 (1986) ("Congress limited the scope of § 504 to those who actually 'receive' federal financial assistance because it sought to impose § 504 coverage as a form of contractual cost of the recipient's agreement to accept the federal funds.").

In contrast—and contrary to Orozco's assertions otherwise—incorporation of the phrase and meaning of Federal financial assistance into the "Enforcement" provision at Section 508(f)(3) does not in any way define or narrow the entities and conduct that fall within the reach of the statute. This is because the scope of the statute is defined in Section 508(a), entitled "Requirements for Federal departments and agencies," not in Section 508(f)(3). *See* 29 U.S.C. § 794d(a) (reflecting Section 508's placement of an affirmative obligation on Federal departments and agencies that "[w]hen developing, procuring, maintaining, or using electronic and information technology", they ensure comparable "access to and use of information and data" for disabled persons unless doing so would create an "undue burden").

Nothing in Section 508(f)(3) or the District Court's interpretation of that provision excludes Federal departments and agencies—i.e., the "targets"—of Section 508 from being obligated to comply with Section 508's accessibility requirements. Nor does Congress' incorporation of the Federal financial assistance language of Title VI (42 U.S.C. § 2000d) into Section 508(f)(3) diminish or

otherwise impact the right of an individual with a disability—including a Federal employee—to file an administrative complaint under Section 508(f)(2) with the Federal department or agency concerning its alleged failure to procure or develop or use technology that provides comparable access to and use of electronic information and data consistent with the standards approved by the Access Board. Instead, the District Court's reading of Section 508(f)(3)'s incorporation of Section 505(a)(2)'s Federal financial assistance language does little more than give effect to Congress's intended limitation on the circumstances under which an aggrieved individual can assert a private, non-administrative cause of action against a Federal agency to obtain relief for alleged violations of Section 508. Put another way, Section 508(f)'s incorporation of the "Federal financial assistance" language simply articulates which individuals can bring a non-administrative, private civil action against Section 508's "targets" and in what capacity the "targets" must be acting for a private cause of action to exist.[11]

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[11] This Court should also be unpersuaded by Orozco's arguments regarding the exclusion of procurement contracts from the scope of "federal financial assistance" because the argument fails to consider why procurement contracts are excluded from the definition. Recipients of federal financial assistance are obligated to comply with antidiscrimination provisions like Section 504 as consideration—i.e., something bargained for and received by a promisor from a promisee—for the acceptance of the federal funds. *See Paralyzed Veterans*, 477 U.S. at 605–06 ("By limiting coverage to recipients, Congress imposes the obligations of § 504 upon those who are in a position to accept or reject those [anti-discrimination] obligations as a part of the decision whether or not to 'receive' federal funds."). In contrast,

continued….

II. Appellant Misconstrues the Underpinnings and Scope of the District Court's Decision And, Consequently, Overstates the Implications of the Decision

A. The District Court Did Not Misapply *Taylor v. Small*

Orozco spills significant ink making the meritless argument that the District Court erred when it "primarily relied upon this Court's opinion in *Taylor v. Small*" to hold that "Section 505 (which guides 'Civil Actions' under Section 508) does provide for civil actions, but only against recipients and providers of federal assistance," and not against a federal agency "acting in its capacity as an employer[.]" *See* App. Br. at 32, 33-40. Orozco drastically overstates the District Court's reliance on *Taylor*. The District Court's decision refers only once to *Taylor*, noting that this Court found that Section 504 of the Rehabilitation Act "does not on its face apply to federal employees," and does not provide a "route for relief [for federal employees] under the Rehabilitation Act." (JA 45: Memo. Op. (citing and

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procurement contracts reflect circumstances where the federal government makes payments for financial obligations incurred as a market participant. *See Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987). In such instances, the goods and services are the consideration provided for the federal funds. Additionally, were procurement contracts included in the definition of federal financial assistance, it would unreasonably and dramatically expand the reach of Section 504 (and similar provisions containing the "federal financial assistance" language) to the private sector. *See, e.g., Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1060 (2d Cir. 1990) (dismissing employment action against private company (Xerox) where employee alleged federal antidiscrimination statutes applied because Xerox's receipt of Army procurement contracts rendered the company a "program or activity receiving federal financial assistance").

quoting *Taylor*, 350 F.3d at 1291)). This statement by the District Court was made in reference to an argument in Orozco's District Court briefing that indicated Orozco acknowledged the limitations of Section 504's available remedies. (*Id.*)

Despite Orozco's insistence that the District Court based its ruling on *Taylor's* reading of Section 504, the record clearly reflects that the District Court relied on the language of Section 508 and Section 505(a)(2), including the Supreme Court's interpretation of the latter in *Lane*. (JA 47-49: Memo. Op.) Notably, Orozco does not provide any coherent basis for this Court to reject the District Court's reliance on *Lane*'s definition of "Federal provider of assistance" as not referring to Federal agencies acting in their role as employers. To the contrary, in his argument advocating for this Court to find an implied right of action, Orozco cites to *Lane* to establish the propriety of creating an equitable, implied cause of action. *See* App. Br. at 49. In short, there is no indication that the District Court relied on analysis performed by this Court in *Taylor* when reaching its ultimate determination that Section 508(f)(3)'s creation of a right to a private civil action is subject to Section 505(a)(2)'s limitation to a "person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance."

B. The District Court Did Not Hold that Federal Employees Alleging Section 508 Violations Are Required to Bring Such Actions Under Section 501 of the Rehabilitation Act

Orozco argues that the District Court erred in holding that Federal employees must use Section 501 of the Rehabilitation Act to assert claims against their employer alleging noncompliance with Section 508, *see* App. Br. at 24-25, 34-35; however, nowhere in the District Court's decision does it make such a holding. The District Court's decision was limited to the issue of whether Section 508 created a private, non-administrative right of action for Orozco to sue the FBI (his employer) for alleged violations of Section 508 occurring in the context of the FBI's role as an employer providing technology for its employee. The decision did not venture to pronounce which statutory provision—if any—permits a federal employee to file suit against his employer for alleged violations of Section 508. (*See generally* JA 36-54: Memo. Op.) In response to this narrow question, the District Court held only that Section 508 did not provide a private right of action against a Federal department or agency acting in its role as an employer because, based on the language of Section 505(a)(2), such remedies were only available to a "person aggrieved by an[] act or failure to act by a[] recipient of Federal assistance or Federal provider of such assistance [.]" (*See generally id.* at 46-50.) Accordingly, this Court should reject Orozco's assertions that the District Court's decision should be reversed due to an allegedly erroneous holding regarding Section 501.

III. The District Court Correctly Determined that Section 508 Does Not Contain an Implied Private Right of Action for a Federal Employee to <u>Sue His Employer.</u>

Orozco bears a heavy burden to establish an implied cause of action under Section 508 and the District Court correctly held that Orozco failed to meet that burden. To determine whether Congress intended to create an implied cause of action, a court may consider the following four factors set forth by the Supreme Court:

> (1) whether the plaintiff is one of the class for whose benefit the statute was enacted; (2) whether some indication exists of legislative intent, explicit or implicit, either to create or to deny a private remedy; (3) whether implying a private right of action is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law, such that it would be inappropriate for the court to infer a cause of action based solely on federal law.

Tax Analysts v. IRS, 214 F.3d 179, 185 (D.C. Cir. 2000) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). Significantly, the factors are not entitled to equal weight and "[t]he central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross*, 442 U.S. at 575.

Even assuming for the sake of argument that Orozco could satisfy the first and third *Cort* factors—i.e., he is within the class for whose benefit Section 508 was enacted and inferring a private cause of action is not inconsistent with the underlying purposes of the legislative scheme—his argument for recognition of an implied right of action was still correctly rejected by the District Court because he cannot satisfy

the second *Cort* factor's requirement to show legislative intent to create an implied action.

Orozco argues that, because he only seeks equitable relief and attorney's fees, the Supreme Court's holding in *Lane* and the legislative history of Section 508 support the existence of an implied right of action. App. Br. at 40 (citing *Nat'l Ass'n of the Deaf v. Trump*, 486 F. Supp. 3d 45, 51-57 (D.D.C. 2020), and *Cannon*, 441 U.S. at 709). Orozco does not elaborate on why he believes that *Lane* and Section 508's legislative history establish that an implied right of action exists in this case, but a review of the authorities cited by Orozco and other relevant case law does not support Orozco's assertions.

While courts have found that an implied right of action exists for individuals aggrieved by certain violations of the discrimination-related statutes referred to in Orozco's brief—i.e., Section 504 of the Rehabilitation Act, Section 601 of Title VI, and Section 901 of Title IX of the Education Amendments Act—those finding do not support the existence of an implied right of action in this case. In determining whether a statute implies a private right of action, "[t]he guiding principle . . . is legislative intent," *El Paso Nat. Gas*, 750 F.3d at 889, and this analysis "begins with the text and structure of the statute," *Lee v. U.S. Agency for Int'l Dev.*, 859 F.3d 74, 77-78 (D.C. Cir. 2017). "[C]ourts may not create [a cause of action], no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Int'l*

Union, Sec., Police & Fire Professionals of Am. v. Faye, 828 F.3d 969, 972 (D.C. Cir. 2016) (citing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

In each of the three statutes referenced by Orozco, Congress included language mandating that "[n]o person . . . shall . . . be subjected to discrimination . . ." that violates the terms of the statute, and it is this language that each court relied on as its primary basis for holding that the statue reflected clear Congressional intent to create a private right of action. *See Sandoval*, 532 U.S. at 278–79 (finding implied private right of action under Section 601 of Title VI, 42 U.S.C. § 2000d, based primarily on the statute's language that "*[n]o person* in the United States *shall . . . be subjected to discrimination* under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin (emphasis added)); *Cannon*, 441 U.S. at 709 (finding implied private right of action under Section 901 of Title IX, 20 U.S.C. § 1681(a), based primarily on the statute's language that "*[n]o person* in the United States *shall,* on the basis of sex, . . . *be subjected to discrimination* under any education program or activity receiving Federal financial assistance" (emphasis added)); *Nat'l Ass'n of the Deaf,* 486 F. Supp. 3d at 53-54 (finding implied private right of action under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), based primarily on the statute's language that "*[n]o otherwise qualified individual* with a disability in the United States . . .

shall . . . be subjected to discrimination . . . under any program or activity conducted by any Executive agency[.]" (emphasis added)).

In contrast, the language that appears in Section 508 is distinctly different. "Where a statute does not include . . . explicit 'right– or duty-creating language,' [the Supreme Court] rarely impute[s] to Congress an intent to create a private right of action." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quoting *Cannon,* 441 U.S. at 690, n.13 (listing provisions)); *see Sandoval,* 532 U.S. at 288 (existence or absence of rights-creating language is critical to the Court's inquiry). Rather than containing rights-creating language, Section 508 speaks in terms of agency obligations to conform to accessibility standards for information technology that are set by the Access Board. *See* 29 U.S.C. § 794d(a)(1) (reflecting Congress's creation of an affirmative obligation for Federal departments and agencies to ensure comparable "access to and use of information and data" for disabled persons "[w]hen developing, procuring, maintaining, or using electronic and information technology" unless doing so places an "undue burden" on the agency).

Where, as here, the statute in question primarily creates agency obligations and does not focus on the rights of protected parties, a Court should not find that a private right of action can be implied in the statute. *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'");

El Paso Nat. Gas, 750 F.3d at 871 (holding that no private right of action could be implied because "[t]he statute creates agency obligations, but it does not focus on the rights of protected parties."); *see also Godwin v. Sec'y of Hous. & Urban Dev.*, 356 F.3d 310, 312 (D.C. Cir. 2004) ("It is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the federal government, [as] there is hardly ever any need for Congress to do so" given that agency action can normally be reviewed by a district court pursuant to its federal question jurisdiction." (alteration in original)).

In short, Orozco has not pointed to statutory text, legislative history, or other evidence that credibly suggests that, in addition to Congress's express creation of a cause of action under Section 508 against a federal agency acting as a Federal assistance provider, Congress also intended to imply creation of a cause of action against a federal agency acting as employer. Orozco "ha[d] the burden to show some evidence of congressional intent to create a remedy in addition to that expressly provided[,]" *Gov't of Guam v. Am. President Lines*, 28 F.3d 142, 147 (D.C. Cir. 1994), and his failure to do so is fatal to his attempt to rely on an implied cause of action in this case.

IV. Orozco Failed to Provide Any Basis for the District Court Not to Dismiss His Claim

To affirm the District Court's dismissal, this Court need not decide whether a federal employee can assert a cause of action based on an alleged violation of Section 508 by seeking relief via another statutory provision. As previously discussed, the District Court's dismissal of Orozco's claim was not premised on a determination that Section 501 provided an adequate remedy and avenue to pursue the claim alleged by Orozco, and Orozco never requested consideration of the claims under Section 501. *See Schmidt v. United* States, 749 F.3d 1064, 1069-70 (D.C. Cir. 2014) (district court does not err by failing to consider potential amendments to pleading where no proper motion is filed under Rule 15 of the Federal Rules of Civil Procedure). Further, there was no basis for the District Court to preserve Orozco's claim by choosing to "construe" the claim as one brought pursuant to the APA. Even after both of the FBI's motions to dismiss noted that Orozco had not asserted a claim under the APA, Orozco did not attempt to assert (even on an alternative basis) that he was seeking to compel agency action unlawfully withheld or unreasonably delayed pursuant to 5 U.S.C. § 706(1), or that he was seeking judicial review of "agency action made reviewable by statute" or final agency action "for which there is no other adequate remedy in a court" pursuant to 5 U.S.C. § 704.

To the contrary, Orozco expressly disclaimed assertion of a claim under the APA as a legal avenue for seeking relief. (*See* R. 14 at 1 (asserting that Orozco

intended to "demonstrate . . . that this action is properly brought, as pled, pursuant to the specific provisions of Section 508, without requiring recourse to the [APA]"); *id.* at 14 ("Plaintiff's claims are properly addressed under Section 508" and he is "not require[d] . . . to proceed under the APA. *He seeks redress for discrimination, not for the failure to respond to his complaint*." (emphasis added)). Considering these circumstances and the District Court's proper legal determination that Section 508 did not create the private right of action for Orozco, the District Court was left with no option but to dismiss Orozco's claim. *See Schmidt*, 749 F.3d at 1070.

CONCLUSION

This Court should affirm the District Court's judgment dismissing claims brought by a federal employee (Orozco) who exclusively sought relief under Section 508 of the Rehabilitation Act against his federal-agency employer.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,717 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July 2022, the foregoing has been served upon the Appellant's counsel by this Court's Electronic Case Filing ("ECF") system. Appellant's counsel has entered an appearance and is a registered user of ECF.

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