Oral Argument Not Yet Scheduled

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

21-5238

JAHINNSLERTH OROZCO,

Plaintiff-Appellant,

—v.—

MERRICK B. GARLAND, Attorney General of the United States, in his official capacity,

Defendant-Appellee.

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

BRIEF FOR PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellant Jahinnslerth Orozco certifies as follows:

A. Parties and Amici

The parties to this case are the Appellant, Jahinnslerth Orozco, and the Appellee, Merrick B. Garland, Attorney General of the United States, in his official capacity. At present, there are no *amici curiae* or intervenors in this case.

B. Rulings Under Review

The ruling that Appellant has noticed and appeals is the order of the U.S. District court for the District of Columbia filed on the 30th day of September, 2021, in *Orozco v. Garland*, No. 19-cv-3336 (EGS) (D.D.C. 2021). The appellant filed a notice of appeal on October 28, 2021.

C. Related Cases

To counsel's knowledge, there are no related cases.

DATED: March 2, 2022

Respectfully submitted,

/s/ Timothy Elder
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GLOSSARY

ADA	Americans with Disabilities Act
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EIT	Electronic and Information Technology
JA	Joint Appendix

GLOSSARY OF KEY STATUTES AND NAMES

Section	**Nickname**	**Title**	**29 U.S.C. §**
501	Federal EEO	Employment of individuals with disabilities	791
504	Program or Activity	Nondiscrimination under Federal grants and programs	794
505	Enforcer	Remedies and attorney fees	794a
508	EIT Access	Electronic and information technology	794d

STATEMENT OF JURISDICTION

Because this civil rights case arises under the laws of the United States, the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1343. The district court dismissed Appellant Jahinnslerth Orozco's action with prejudice on September 30, 2021, giving this Court jurisdiction over that final order or judgment pursuant to 28 U.S.C. § 1291. (Order at JA 035.) Appellant timely noted his appeal on October 28, 2021. (Notice of Appeal at JA 055-56); Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUE

Does Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, provide a private cause of action against a federal agency?

STATUTES AND REGULATIONS

In compliance with Circuit Rule 28(a)(5), relevant parts of key statutes and regulations pertinent to this brief are set forth in an addendum.

STATEMENT OF THE CASE

A. Statutory Background

Courts may be most familiar with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, predecessor to the famous

Americans with Disabilities Act of 1990: "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency … ."

But this case introduces a less-known provision of the Rehabilitation Act, making its first appearance on the federal appellate stage. Our main character, 29 U.S.C. § 794d, affectionately referred to as "Section 508" or just "508," opens with a call to the Executive branch: that in "developing, procuring, maintaining, or using electronic and information technology," federal departments and agencies "shall ensure" that "individuals with disabilities who are federal employees" and "individuals with disabilities who are members of the public seeking information or services from a federal department or agency" shall "have access to and use of information and data that is comparable to the access to and use of the information and data" of federal employees or members of the public without disabilities. 29

U.S.C. § 794d(a). Section 508 establishes as a baseline presumption that the equally accessible and usable data will be provided through the electronic and information technology (EIT) itself, but even where that would pose an undue burden to the federal department or agency, the department or agency must still provide information access to individuals with disabilities by "an alternative means of access that allows the individual to use the information and data." 29 U.S.C. § 794d(a)(1)(B).

508 redounds to two intended beneficiaries: (i) individuals with disabilities who are Federal employees; and (ii) individuals with disabilities who are members of the public. 508's construction speaks up when those two groups need different treatment. For example, clause (a)(6) states that when "the Federal Government provides access to the public to information or data through electronic and information technology" 508 excuses the government from "mak[ing] equipment owned by the Federal Government available for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public" or "purchas[ing] equipment for access and use by

individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public." 29 U.S.C. § 794d(a)(6)(A).

Conversely, 508 addresses a unique concern for employees and excuses agencies from "the installation of specific accessibility-related software or the attachment of a specific accessibility-related peripheral device at a workstation of a Federal employee who is not an individual with a disability." 29 U.S.C. § 794d(a)(6)(B).

Fearing that 508's call to the Executive branch might not be heard, Congress bestowed to 508 three enforcement powers in clause (f) to amplify 508's voice. First, (f)(1) offers a general tool for "any individual with a disability" to "file a complaint alleging that a Federal department or agency fails to comply with subsection (a)(1) [of this section] in providing electronic and information technology." Second, (f)(2) sought to deter unnecessary litigation by allowing "administrative complaints," "[c]omplaints filed under paragraph (1) to be "filed with the Federal department or agency alleged to be in noncompliance." And then instructed the "Federal department or agency receiving the complaint" to "apply the complaint procedures established to implement

section 794 of this title for resolving allegations of discrimination in a federally conducted program or activity."

Third, and most important to our story, 508 authorizes "[c]ivil actions" and makes "[t]he remedies, procedures, and rights set forth in sections 794a(a)(2) and 794a(b) of this title" the "remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph (1)."

Like most sections of a statute, 508 is also part of a larger statutory family, the Rehabilitation Act. As just noted, 508 borrows its enforcement of "The remedies, procedures, and rights" from 508's older sibling, Section 505 or 29 U.S.C. § 794a, aptly named "Remedies and attorney fees," and referred to as the enforcer of the Rehabilitation Act family. Rather than inventing a new enforcement scheme, Congress attempted to preserve the lineage of a civil rights legacy by endowing 505 with the powers already recognized in Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq.*, which had been enacted in 1964 as the much older cousin of the Rehabilitation Act siblings.

Section 505 has three distinct enforcement features. First, § 794a(a)(1) adopts its older cousin's "remedies, procedures, and rights"

and makes those remedies, rights, and procedures available "with respect to any complaint under section 791 [Section 501] of this title, to any [disabled] employee or applicant for employment … ." Second, § 794a(a)(2) again adopts its older cousin's "remedies, procedures, and rights" and makes those remedies, procedures and rights available to "any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance." Third, 794a(b) simply states that "any action or proceeding to enforce or charge a violation of a provision of this subchapter" empowers "the court" to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

As just mentioned in describing § 794a(a)(1), there is a third member of the Rehabilitation Act family at Section 501, 29 U.S.C. § 791, that is often relied on by federal employees experiencing intentional animus and other ills of employment discrimination. Section 501(f) is understood as the federal EEO member of the family. 501 involves complaints "alleging nonaffirmative action employment discrimination under this section" and applies the standards "under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 *et*

seq.) and the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment."[2]

Some Rehabilitation Act family history may be helpful. Before the youngest section, 508, was passed in 1986[3] and strengthened in 1998[4] into its present form, siblings Section 504 and Section 501 had long provided rights and remedies protecting against employment discrimination, as well as discrimination in programs and activities conducted by both federal agencies and recipients of federal financial assistance. Those existing statutory protections against discrimination included an obligation to provide reasonable accommodations for federal employees with disabilities and for qualified individuals with disabilities participating in programs and activities receiving federal financial assistance or being conducted by Executive agencies.

But Congress believed there was room for more. Recognizing the importance of independent access to electronic information technology for

[2] Public Law 102-569 (Oct. 12, 1992), 106 Stat. 4424. Note that this was originally at 29 U.S.C. § 791(g) but was later moved to (f) in 2014.
[3] Pub. L. 99-506 (Oct. 21, 1986), 100 Stat. 1830.
[4] Pub. L. 105-220 (Aug. 7, 1998), 112 Stat. 1203.

persons with disabilities without needing to resort to reasonable accommodations such as qualified readers, Congress enacted 508 in 1986 to commission the development of standards to ensure such access. However, Section 508 had not yet received its enforcement powers at that time. Then, in 1998, Congress amended 508 to provide a comprehensive means of enforcement, borrowing from the older siblings.

Like most large families, the sibling sections of the Rehabilitation Act have complex and overlapping relationships, with two relevant similarities to keep in mind regarding enforcement. First, clause (d) of Section 504's "employment discrimination" provision has a striking resemblance to the 501 federal EEO standards. Both import the "standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12201–12204 and § 12210), as such sections relate to employment."

Second, further complicating matters, 508's clause (f) shares two, but not all three, of Section 505's family enforcer features, not inheriting the first enforcement feature found in § 794a(a)(1). 508 only

received the second and third "remedies, procedures, and rights set forth in sections 794a(a)(2) and 794a(b) of this title" for the "remedies, procedures, and rights available to any individual with a disability."

In addition, to promote family peace, Congress affirmed in clause (g) of 508 that introducing this newest member to the Rehabilitation Act family would not detract from the inherent individual value of each of the other older sections: "This section shall not be construed to limit any right, remedy, or procedure otherwise available under any provision of Federal law (including sections 791 through 794a of this title) that provides greater or equal protection for the rights of individuals with disabilities."

Finally, let's review a quick table just to keep our statutory relations straight:

Section	**Nickname**	**Title**	**29 U.S.C. §**
501	Federal EEO	Employment of individuals with disabilities	791
504	Program or Activity	Nondiscrimination under Federal grants and programs	794
505	Enforcer	Remedies and attorney fees	794a
508	EIT Access	Electronic and information technology	794d

B. Factual and Procedural Background

Analogies aside, statutes are not persons. Congress wrote 508 to benefit real people, including both federal employees and members of the public. In this case, Appellant Jahinnslerth Orozco ("Mr. Orozco"), is one such blind federal employee of the Federal Bureau of Investigations ("FBI"), a division of the Department of Justice headed by Appellee Attorney General Merrick B. Garland (the "government"). Mr. Orozco has been working as an Intelligence Analyst for the FBI since July 15, 2012. (*See* Am. Compl. JA 009 ¶ 12.) As a blind computer user, Mr. Orozco uses screen access software that converts digital information into synthesized speech to independently do his work. (*See id.* JA 009 ¶ 11.) Mr. Orozco alleges that a handful of software systems used by the FBI are inaccessible to blind federal employees who need to use that technology in their jobs. (*See id.* JA 010 ¶ 26.)

Consequently, Mr. Orozco filed an administrative complaint with the FBI on April 29, 2019 to advocate for himself and his fellow disabled colleagues. (*Id.* JA 009-10 ¶ 16.) He filed that complaint according to the Department of Justice's applicable regulations for handling complaints under Section 508, which is the same administrative process that is

used when challenging discriminatory programs or activities under Section 504. (*Id.* (citing 28 C.F.R. § 39.170)); *see also* 28 C.F.R. § 39.101 (noting that 28 C.F.R. Part 39 effectuates Section 504); 29 U.S.C. § 794d(f)(2) (requiring agencies to process Section 508 complaints according to procedures for complaints about discriminatory programs and activities under Section 504). Because federal employees have a second option to file EEO complaints of discrimination under 501, Mr. Orozco distinguished that he was complaining of Section 508 EIT access violations, not Section 501 federal EEO discrimination violations, and that his complaint should thus be processed under the program or activity procedures of Section 504, not employment discrimination procedures under Section 501, which ultimately end up before the Equal Employment Opportunity Commission ("EEOC") and involve a different substantive legal standard. (Letter re: Section 508 Compl. Ex. A at JA 029-031). Mr. Orozco sent a courtesy copy of his complaint to the Accessibility Program Office of the Office of the Chief Information Officer ("OCIO") Director, who Mr. Orozco understood to be responsible for investigating issues about agency technology. (Decl. of Albert Elia in

Supp. of Pl.'s Memo. in Opp. to Def.'s Mot. to Dismiss ("Elia Decl.") at JA 026 ¶¶ 5-6, 10.)

Mr. Orozco received a Notice of Acceptance of his complaint on May 9, 2019. (*id.* at JA 026 ¶ 8.) However, that letter indicated that the FBI was processing his complaint under Section 501 federal EEO procedures, not the Section 504 procedures he had requested. (*See* Elia Decl. Ex. B at JA 033-035) (noting that Mr. Orozco could request a hearing before an EEOC administrative judge after October 26, 2019); *compare* 28 C.F.R. § 39.103 and 39.170(h)-(i) (noting that Section 504 complainants may request a hearing before the Complaint Adjudication Officer appointed by the Assistant Attorney General for Civil Rights) *with* 29 C.F.R. 1614.108(h) (noting that requests for hearings under Section 501 are directed to the EEOC).

Out of an abundance of caution and concern, Mr. Orozco re-sent his complaint to the OCIO both by fax and email that day with a reminder about the different laws, hoping for the proper remedy by OCIO despite indicators of an improper processing by the agency. (Elia Decl. at JA 026 ¶ 7).

Unfortunately, Mr. Orozco's concerns were realized. On August 7, 2019, the FBI dismissed Mr. Orozco's complaint for "failure to state a claim of discrimination within the federal sector EEO process." (Letter re Compl. No. FBI-2019-00201 at JA 020.) The letter concluded that "this final agency decision is being sent pursuant to 29 C.F.R. § 1614.110," confirming again that the FBI had processed the complaint as a Section 501 EEO complaint, not a Section 508 EIT access complaint or a Section 504 program or activity complaint. (*Id.* at JA 020); *see also* 29 C.F.R. §§ 1614.101(b) and 103 (noting that 29 C.F.R. Part 1614 addresses employment discrimination under Section 501). After receiving that dismissal, Mr. Orozco received no indication that OCIO or anyone else at DOJ performed any proper investigation of his Section 508 complaint. (*Id.* at JA 019-24; Elia Decl. at JA 027 ¶ 12-13).

Mr. Orozco timely brought a civil action in the district court (Civil Cover Sheet at JA 006), amended that action once, and throughout asserting a single claim under Section 508 alleging that the FBI failed to comply with the accessibility standards of Section 508 and prevented blind employees from effectively and independently accessing critical systems required for employment (Am. Compl. at JA 007 ¶ 1, 014-15 ¶¶

63-72). Mr. Orozco asserts that the FBI has procured, maintained, and is using software systems that he, as a blind employee, cannot access in the manner found by his nondisabled colleagues. (*See id.* at JA 007 ¶¶ 1-2, 11.) He seeks only injunctive and declaratory relief as well as attorney's fees and other costs of suit. (*See id.* at JA 015-16.)

The government moved for dismissal, arguing that Mr. Orozco, as a federal employee, has no cause of action under Section 508, and additionally that because the Department of Justice had erroneously processed his complaint under Section 501, he had failed to administratively exhaust. (*See* Mot. to Dismiss at JA 018; Mem. Op. at JA 042, 045, 047.)

Notwithstanding Appellant's opposition, the district court granted Appellee's motion to dismiss. (Order at JA 036.) The district court found that federal employees like Mr. Orozco have no express cause of action under Section 508 because "the remedies contained in Section 505 [that are incorporated by 508] are not available to persons aggrieved by the FBI acting in its capacity as an employer" (Mem. Op. at JA 048), but "only against recipients and [federal agencies acting as] providers of federal assistance" (*id.* at JA 049). It also found that Section 508 does

not provide an implied cause of action to Mr. Orozco because "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." (*Id.* at JA 052.)

SUMMARY OF ARGUMENT

The plain text of Section 508 identifies two separate categories of "individuals with disabilities" who must have comparable access to data an information through EIT—individuals with disabilities "who are federal employees" and individuals with disabilities "who are members of the public seeking information or services." 29 U.S.C. § 794d. Section 508 specifies the limited situations when the rights of these two groups vary, as reflected in §794d(a)(6). But the enforcement of "remedies, procedures, and rights" is not one of the situations where those groups are treated differently; to the contrary, it refers to them uniformly as "individuals with disabilities" and grants all such "individuals" the right to bring "[c]ivil actions" in the manner authorized by Section 505. 29 U.S.C. § 794d(f)(3).

The district court inappropriately relied on this Court's holding in *Taylor v. Small*, 350 F.3d 1286 (D.C. Cir. 2003), and relegated

employees with disabilities to proceeding only under the federal EEO section of Section 501, effectively eliminating any independent enforceable obligations under 508 for those "individual[s] with disabilities" who are federal employees. Federal employees with disabilities already had Section 501 rights and remedies before Section 508 was passed in 1986 and strengthened in 1998; returning them to a pre-1998 landscape ignores Congress's intent in passing and amending Section 508. It also ignores the significant differences between the Section 501 regulatory scheme based on, and in contrast with, 508. Finally, the district court's interpretation separates federal employees with disabilities from members of the public with disabilities, in violation of the unitary enforcement scheme established in clause (f)(3) of Section 508.

Moreover, the district court's implication that 508 may be enforced only against providers of federal assistance acting in their capacity as a funding source contradicts the legal definition of "federal financial assistance" for both federal employees and members of the public because the legal definition of federal assistance excludes government procurement, which is explicitly covered by 508. Further, the district

court's reading, if taken to a logical conclusion, reduces all 508 enforcement to a nullity because the other actions besides procuring covered in 508, developing, maintaining, or using EIT, are internal functions of a federal department or agency, and do not involve providing funds to external recipients. Congress intended that 508 administrative complaints be brought against federal departments procuring or using technology, not recipients of federal financial assistance or providers of federal financial assistance operating in their capacity as a funding source. Congress's intent is no less clear for civil actions in clause (f)(3), which refers back to clause (f)(1) for "complaints" and "allegations" against those same federal departments and agencies. The district court erred by reconstructing Congress's use of a statutory cross-reference to Section 505 to govern the rights and remedies that individuals with disabilities have under 508, and instead misread 505 to limit who those civil actions may be brought against—changing it from "federal departments and agencies" to "providers and recipients of federal assistance."

To the extent that, like Mr. Orozco, an individual's 508 claims are only for equitable relief and fees, they are also provided for under an

implied cause of action, similar to the implied rights held to exist under Section 504 to challenge a "program or activity" conducted by any "Executive agency or by the United States Postal Service" under 29 U.S.C. § 794.

This Court is asked to answer a simple legal question: does Section 508, authorize, either explicitly or implicitly, a private cause of action for Appellant, a blind person, to challenge a federal agency's procurement or use of inaccessible electronic information technology? The statutory text, structure and history dictate "yes." This Court should reverse the district court's decision and remand for further proceedings.

STANDARD OF REVIEW

On appeal, the court reviews dismissals for failure to state a claim under Fed. R. Civ. P 12(b)(6) *de novo*, accepting Appellant's factual allegations as true and drawing all reasonable inferences in his favor. *Workagegnehu v. Wash. Metro. Area Transit Auth.*, 980 F.3d 874, 876 (D.C. Cir. 2020) (citing *Momenian v. Davidson*, 878 F.3d 381, 387 (D.C. Cir. 2017)); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (a Rule 12(b)(6) motion "tests the legal sufficiency of a complaint.").

ARGUMENT

A. Section 508 furnishes an express private right of action authorizing Mr. Orozco's suit.

We start "with the text and structure of the statute" and then incorporate legislative history for additional support. *Lee v. U.S. Agency for Int'l Dev.*, 859 F.3d 74, 77-78 (D.C. Cir. 2017) (reviewing statutory text and relevant legislative history)

Section 508's enforcement provisions explicitly state that "**any individual with a disability** may file a complaint alleging that a Federal department or agency fails to comply." 29 U.S.C. § 794d(f)(1)(A) (emphasis added). Such complaints are filed with the noncompliant agency as an "[a]dministrative complaint," after which the receiving agency must "apply the complaint procedures established to implement [Section 504] … for resolving allegations of discrimination in a federally conducted program or activity," whether the complaint is filed by an employee of that agency or by a member of the general public "seeking information or services" from that agency. 29 U.S.C. § 794d(a)(1), (f)(2).

With two degrees of statutory cross references, (1) from Section 508 to Section 505 and then (2) from Section 505 to Title VI of the Civil Rights Act, 42 U.S.C. §§ 2000d *et seq.*, Congress adopted an existing

enforcement framework to extend coverage to new rights and obligations under Section 508. In link one, Section 508 expressly applies to "each Federal department or agency, including the United States Postal Service" and provides "individuals with disabilities" a "civil action" with "the remedies, procedures, and rights" available under Section 505 for Section 504 "program or activity" claims. 29 U.S.C. §§ 794d(a)(1)(A) and (f)(3). In the second link, Section 505 provides the "he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 … and in subsection (e)(3) of [Title VII] of such Act … 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 504]." 29 U.S.C. § 794a(a)(2).

Initially, Title VI of the Civil Rights Act only explicitly applied to recipients of federal assistance, and not as obviously to the federal agencies that were supposed to ensure those recipients complied with their obligations. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial

assistance."). Historically, Federal agencies were only made subject to Title VI requirements through findings of an implied cause of action. *See, e.g., Little Earth of United Tribes, Inc. v United States Dep't of Hous. & Urban Dev.*, 584 F.Supp. 1292, 1297 (D. Minn. 1983) (collecting Title VI cases against federal agencies). When Congress amended the Rehabilitation Act in 1978,[5] it provided the rights and remedies of Title VI, but explicitly and intentionally expanded their application to include federal-agency defendants. *See* Section 505, 29 U.S.C. § 794a(a)(2) (providing Title VI rights and remedies against "any recipient of Federal assistance" as well as against any "Federal provider of such assistance" under Section 504); Section 504, 29 U.S.C. § 794(a) (covering programs and activities "receiving Federal financial assistance" as well as those "conducted by any Executive agency or by the United States Postal Service"); 124 Cong.Rec. 13,901 (1978) (statement of Rep. Jeffords) (eliminates federal government's exemption); *id.* at 38,549 (statement of Rep. Brademas) (requires federal compliance); *id.* at 38,551 (statement of Rep. Jeffords) (eliminates federal government's exemption); *id.* at 38,552 (statement of Rep. Sarasin) (extends coverage to federal government).

[5] Pub. L. 95–602 (Nov. 6, 1978), 92 Stat. 2982

Congress took a similar approach when expanding the Rehabilitation Act to reach equal access to electronic information technology (EIT) in the modern technology-dependent age. In the same way that the text of 505 explicitly expanded the applicability of Title VI's rights and remedies to include federal providers of financial assistance under Section 504, Section 508 explicitly both expanded the rights and remedies of Section 505 to cover federal agencies as procurers, developers, maintainers, and users of EIT, and expanded the classes of persons afforded those rights to include "any individual with a disability," whether a federal employee or a member of the public. *See* Section 508, 29 U.S.C. §§ 794d(f)(1)(A) and (f)(3) (affording rights and remedies to "any individual with a disability … alleging that a Federal department or agency fails to comply with [requirements applicable to both federal employees and members of the public] in providing [EIT]").

B. The district court erred in distinguishing between 508 civil actions brought by federal employees and actions brought by members of the public.

The district court found 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." (Mem. Op. at JA 049.). In so finding, it primarily relied upon this Court's opinion in *Taylor v. Small*, which held that Section 504 "does not provide federal employees an alternative route for relief under the Rehabilitation Act" for employment discrimination claims against the government. 350 F.3d at 1291. The district court also determined that its "reading does not render the term 'Civil Actions' surplusage." (Mem. Op. at JA 040.) For the reasons discussed *infra*, the district court erred both in its application of *Taylor*, and in the implications of its reading which would, if correct, render language in Section 508's enforcement provision surplusage or substantively re-write its intended construction.

1. Taylor does not support treating federal employees' Section 508 accessibility claims identically to federal employees' employment discrimination claims.

The opinion in *Taylor* analyzed the similarity between employment discrimination provisions in Section 504 and employment discrimination provisions in Section 501. The *Taylor* court used three explicit factors and one additional implicit factor in its analysis. The court explicitly reasoned that:

1. "Section 504 does not on its face apply to federal employees;"

2. federal employees "are not participants in or beneficiaries of a 'program or activity conducted by any Executive agency;'" and
3. "because the Congress addressed discrimination against Government employees ... in § 501, it is highly unlikely the Congress meant to address the subject again in § 504." *Taylor*, 350 F.3d at 1291.

The Court's holding in *Taylor* was also implicitly based on the fact that the specific claims at issue were claims cognizable under Section 501. *See Id.* (noting that appellant "had set forth all the elements of a claim under § 501" in her Section 504 claim).

All of those factors from *Taylor* reverse when reviewing the relationship between Section 508 and its sibling sections.

First, unlike the employment discrimination clause of Section 504, 29 U.S.C. § 794(d), Section 508 does explicitly apply to federal employees, in addition to members of the general public. *See* 29 U.S.C. §§ 794d(a)(1)(A)(i) and (ii). Appellee's own guidance to federal agencies acknowledges this. *See* Civil Rights Div., U.S. Dep't of Justice, "Information Regarding Section 508 of the Rehabilitation Act" (Feb. 18, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2009/02/18/

oldinfo.pdf [https://web.archive.org/web/20170302125402/https:/www.justice.gov/sites/default/files/crt/legacy/2009/02/18/oldinfo.pdf] ("If a Federal agency procures electronic and information technology after August 7, 2000, that does not comply with the standards developed by the Access Board, it is subject to administrative complaints and **private lawsuits** by employees and members of the public." (emphasis added)).

Second, by Section 508's own language, both federal employees and members of the general public are beneficiaries of the "[d]evelopment, procurement, maintenance, or use of electronic and information technology" by "each Federal department or agency, including the United States Postal Service." 29 U.S.C. § 794d(a)(1)(A). Mr. Orozco, as a blind federal employee, is someone "for whose particular benefit the statute was enacted." (Mem. Op. at JA 052 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)).

Third, with respect to substantive employment rights (as distinct from procedural rights), 508 does not resemble 501 as much as Sections 501 and 504 resemble one another. The substantive resemblance between the employment discrimination clause of 504[6] and the

[6] 29 U.S.C. § 794(d)

employment discrimination clause of 501[7] observed in *Taylor* is indeed stark. Section 501 (for federal employees) and 504 (for employees of recipients of federal assistance) both apply the identical requirements and standards of the Americans with Disabilities Act ("ADA"). *Compare* 29 U.S.C. § 791(f) (importing ADA Title I standards for claims of employment discrimination by federal agencies under Section 501); 29 C.F.R. § 1614.203(b) (same); *Solomon v. Vilsack*, 763 F.3d 1, 5 (D.C. Cir. 2014) (same), *with* 29 U.S.C. § 794(d) (importing ADA Title I standards for claims of employment discrimination by recipients of federal financial assistance under Section 504); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1260 n.2 (D.C. Cir. 2008) (noting that "courts have tended to construe section 504 in pari materia with Title II of the ADA" outside of the employment context).

These substantive employment provisions of the ADA, as incorporated by the Rehabilitation Act, require employers to provide "reasonable accommodations" for a qualified employee's disability. 42 U.S.C. § 12112(b)(5)(A) (reasonable accommodations by employers);

[7] 29 U.S.C. § 791(f)

Solomon, 763 F.3d at 9 (same). Employers,[8] including federal employers under 501, have "the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for [them] to provide," so long as the chosen accommodation is effective. 29 C.F.R. Pt. 1630, App. § 1630.9; *see also* 29 U.S.C. § 794a(a)(1) ("a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.").

On the other hand, 508 explicitly goes beyond the substance of 501 and its reasonable accommodations remedy to address the unique subject of, and claims related to, the accessibility of EIT for federal employees with disabilities: "Development, procurement, maintenance, or use of electronic and information technology" by federal departments and agencies. 508 applies specific, stringent requirements and regulatory standards from the U.S. Access Board in that context that go

[8] Prior to 1998 when it amended Section 508 to provide civil actions, there was no consensus that Section 504 was closed to federal employees. *See Taylor*, 350 F.3d at 1291 (collecting cases).

beyond what is addressed under Section 501 for federal employment discrimination under the U.S. EEOC's regulations.

A comparable substantive distinction also exists for members of the public. Federal agencies must make "reasonable modifications" to policies, practices. and procedures where necessary to ensure meaningful access to their programs and activities by persons with disabilities. 28 C.F.R. § 35.130(b)(7)(i) (reasonable modifications by public entities); *Paulson*, 525 F.3d at 1267 (discussing "meaningful access" requirement). Members of the public with disabilities can bring seemingly similar claims both under 508 for EIT access and under 504 for discrimination in a program or activity conducted by an Executive agency. However, even if those claims involve common facts, the merits of those claims would be analyzed under separate legal standards.

508 offers members of the public the independent "access to and use of information and data" according to the regulatory standards of the U.S. Access Board. *See* 29 U.S.C. § 794d. However, under Section 504, a member of the public seeking access to a federally conducted "program or activity" would be subject to the entirely different concept of "reasonable modifications" with its accompanying agency discretion:

a federal agency may choose the least burdensome modification available that ensures meaningful access to its programs and activities. *See Paulson*, 525 F.3d at 1271 (Agency head "has discretion to choose from a range of" options, as "section 504 requires only that the least burdensome [modification] not be unduly burdensome.").

508 offers more. In contrast to the substantive rights under either 501 or 504, 508 specifically mandates that, for both employees or members of the public, all EIT procured, used, maintained or developed by federal agencies be fully compliant with standards to ensure that persons with disabilities have access to and use of information and data that is comparable to the access to and use of information and data by persons without disabilities. 29 U.S.C. § 794d(a)(1)(A). 508 does not permit federal agencies, in the context of technology for employees, to choose a less expensive means of providing access to and use of information and data, nor does it permit them, outside of the employment context, to choose a less-burdensome means of providing meaningful access to and use of information and data for the public, unless compliance with Section 508 standards would be an undue burden on the agency. 29 U.S.C. § 794d(a)(1)(B).

Congress placed a specific, enforceable requirement on a federal department or agency's procurement, use, maintenance or development of technology, whether that technology is used by employees, or members of the public, or both. Congress did not intend for the merits of these specific technology access claims to be litigated under the more general discrimination standards of Sections 501 or 504, respectively. Instead, Congress opted to amend Section 508 to provide a cause of action that allows both federal employees and members of the general public with disabilities to have their technology-related 508 claims against Federal departments and agencies resolved according to the specific regulations promulgated by the Access Board, but to follow the same enforcement paths of other general anti-discrimination cases.

Beyond the differences between the *substantive* rights available under 508 and 501, *procedural* differences also exist. 508 procedurally resembles its 504 sibling but has little in common with the 501 federal EEO procedure offered by the EEOC. When Congress added enforcement provisions to 508 in 1998, it imported the existing civil action procedural rights and remedies applicable to federal agencies as providers of federal financial assistance under Section 504 for both

federal employees and members of the public, but it deliberately chose not to import the procedural rights and remedies available to federal employees proceeding under Section 501. *Compare* 29 U.S.C. § 794a(a)(1) *with* 29 U.S.C. § 794d(f)(3). That interpretation is supported by the administrative complaint procedures for Section 508, which require agencies to process complaints using the procedures "for resolving allegations of discrimination in a federally conducted program or activity" under Section 504, whether such a complaint is filed by a federal employee or a member of the public. 29 U.S.C. § 794d(f)(2); *see also, e.g.*, 29 C.F.R. § 1615.170(b) (specifying that complaints by EEOC employees alleging EEOC violations of section 508 are processed according to Section 504 procedures, not Section 501 procedures).[9]

Under this close textual reading of the related statutes, there is no tension between requiring federal employees to bring general employment discrimination claims against their employing agencies exclusively under Section 501, but allowing those same employees to bring other specific claims that are cognizable under Section 508, just

[9] The Equal Employment Opportunity Commission (EEOC) is the federal agency authorized to promulgate regulations interpreting Section 501.

as members of the public may generally bring claims regarding meaningful access to agency programs and activities under Section 504, but bring other specific claims for EIT access under Section 508. Even the government's own statements support this interpretation. (*See* Letter re Compl. No. FBI-2019-00201 at JA 019-22.) (refusing EEO jurisdiction for Appellant's original administrative complaint because the Section 501 process is not applicable to Section 508 complaints).)

For all of these reasons, the district court erred in finding that, because *Taylor* prevents federal employees from bringing employment-discrimination claims under Section 504, it should follow that federal employees may not bring civil actions for unlawful procurement under 508 against an agency procuring technology, which happens to also be their employer.

2. The Court's interpretation that civil actions are available only against providers of federal assistance rewrites Section 508, creates surplusage, and results in inconsistent statutory meanings.

By the plain meaning of its heading, Section 508's "civil action" subsection demonstrates that, in addition to administrative complaints, Congress intended Section 508 to be enforced by "lawsuits." Section 508, 29 U.S.C. §§ 794d(f)(3) (civil actions) and (f)(2) (administrative

complaints); *see also* Merriam-Webster Dictionary (11th ed. 2003) (defining a "civil action" as a "lawsuit about a person's rights"). In reading Section 508, as with any law "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). "It is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Statutory terms should not be "treat[ed] … as surplusage in any setting." *Id.*

The district court suggested that any tension over surplusage could be set aside because § 794a(2) does provide for civil actions, but only for "person[s] aggrieved by any act or failure to act" committed by a recipient of federal assistance or federal provider of such assistance, and not on behalf of "persons aggrieved by the Government acting in its capacity as an employer." (Mem. Op. at JA 049.) As an initial matter, that reading rewrites the statutory target of Section 508. While Section

508 is phrased in terms of "federal agencies and departments" generally, the district court limited the scope of its civil actions provision, saying it can only be enforced against federal agencies when they are providing or receiving federal financial assistance. (Mem. Op. at JA 047-48 (citing *Clark v. Vilsack*, Civ. Action No. 19-394 (JEB), 2021 WL 2156500, at *4 (D.D.C. May. 27, 2021)).) Rather than reading Section 505 as governing the *enforcement* rights and remedies that individuals with disabilities have under 508, which is the purpose of the cross-reference in 508's "enforcement" clause at § 794d(f)(3), the district court instead used 505 to limit against whom those civil actions may be brought—changing it from "federal departments and agencies" to providers and recipients of federal assistance. That extreme misconstruction of statutory cross-references impermissibly warps the statute Congress wrote.

Not only does the district court's reading rewrite the explicit statutory target entities of Section 508 enforcement (from federal departments and agencies to providers and recipients of federal assistance), it also eviscerates the scope of activities ("developing, procuring, maintaining, or using electronic and information

technology") conducted by those entities towards which Section 508 enforcement is aimed. With respect to "procuring" under Section 508, as specified in § 794d(a), the district court's reading directly contradicts the regulatory definition of "federal financial assistance" and consistent exclusion of "procurement contracts" by courts when interpreting that definition. 28 C.F.R. § 41.3(e); 45 C.F.R. § 84.3(h); *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1382, 1383 (10th Cir. 1990) (Section 504 excludes procurement contracts from "federal financial assistance); *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1209 (9th Cir. 1984) (same, citing 45 C.F.R. § 84.3(h)); *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275, 277 (6th Cir. 1996) (same, citing 28 C.F.R. § 41.3(e)); *White v. Bank of Am., N.A.*, 200 F.Supp.3d 237, 246 (D. D.C. 2016) (same); *Venkatraman v. Rei Systems, Inc.*, 417 F.3d 418, 421 (4th Cir. 2005) (procurement contracts excluded from "federal financial assistance" under Title VI); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1060 (2d Cir. 1990) (same).

Section 508 is primarily a statute about federal EIT procurement, which is typically a prerequisite for maintenance or use. Making 508 enforceable only against providers and recipients of federal assistance,

when "federal assistance" has always excluded the primary procurement activity that Section 508 addresses (*i.e.,* procurement), would not just dramatically rewrite 508—it would make it all but unenforceable by anyone. Rendering an enforcement provision all but unenforceable is the definition of surplusage. Despite its assertions to the contrary, the district court's reasoning still creates surplusage for members of the public by disallowing civil actions to enforce against procurement of inaccessible EIT, even without to civil actions by federal employees.

Moreover, if the district court's reasoning is taken at face value, it could be read to make the entire enforcement provision a complete nullity. In addition to procurement, 508's other three specified activities listed in § 794d(a), "developing," "maintaining, or using" EIT, are not logically consistent with the role of a "provider of federal assistance." Agencies are providers of federal assistance when they operate as funding sources to external recipients. *See Lane v. Pena*, 518 U.S. 187, 193 (1996) (considering section 505's use of the term "Federal provider" and reading it to mean "federal funding agencies acting as such" in the context of sovereign immunity.). They are not providers of federal

assistance when they act as employers of persons who develop, maintain, or use EIT. *See Taylor*, 350 F.3d at 1291 (holding that federal employees "are not participants in or beneficiaries of 'a program or activity' receiving federal assistance or conducted by a federal agency under Section 504). The district court's reading thus excludes not just EIT procurement but also any direct EIT development, maintenance, or use by federal agencies.

In sum, the district court read 508's enforcement provisions as a funnel to drastically curtail 508's substantive rights, rather than as a means of procedurally vindicating them. That is an absurd and counterintuitive reading that would frustrate the intent of this civil rights statute.

Rather than re-writing the statute, or rendering enforcement through civil action as surplusage, whether with respect only to procurement or to any of the other activities covered by Section 508, a more appropriate common-sense reading is available: Congress simply borrowed the procedural rights and remedies applicable to providers of financial assistance under Section 505 and extended them to substantive claims against federal departments and agencies under

508. That reading promotes a more consistent procedural enforcement scheme for the federal agencies obligated under Section 508 to ensure the accessibility of EIT and extends the same enforcement rights and remedies to all individual beneficiaries named in Section 508, including federal employees and members of the public. Such a reading is similar to understanding Section 505's comparable extension of Title VI rights and remedies to the federal providers of financial assistance that were not included in Title VI, as discussed *supra*.

In the alternative, to preserve and square the district court's logic with statutory interpretation and the will of Congress, Section 508 could be read to extend Section 505's narrow definition of "financial assistance" to cover "developing, procuring, maintaining, or using" EIT, at least for the purpose of enforcing Section 508. The district court's suggestion that Section 508 provides civil actions only against recipients and federal providers of financial assistance acting in their funding capacity suggests such a reading. However, such a reading still necessitates including federal employees as Congress explicitly extended enforcement rights and remedies under 508 to "any individual with a disability filing a complaint." 29 U.S.C. § 794d(f)(3). Congress did

so in a newly enacted provision of a section that clearly contemplated inclusion of federal employees with disabilities. 29 U.S.C. § 794d(a)(1)(A)(i). And Congress also indicated within 508 where and how it wanted federal employees and members of the public to be treated differently but gave no such indication for civil actions. *Compare* 29 U.S.C. § 794d(a)(6) (differentiating obligations for different classes of beneficiaries) *with* 29 U.S.C. § 794d(f)(3) (using "any individual with a disability" without differentiation between classes of beneficiaries).

For all of the preceding reasons, excluding federal employees from Section 508's civil actions enforcement provision under any reading still impermissibly changes the meaning of "any individual with a disability" to be "any individual with a disability except federal employees." And this would cause the same phrase used throughout the same statute to have inconsistent meanings, a result to be avoided. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). Such a narrow view would create the absurd result where inaccessible technology affecting both members of the public and federal employees, such as the FBI's website at FBI.gov, could be challenged by members of the public, but not by

federal employees, despite the statutory text conferring the same mandate on agencies with respect to EIT for both classes of individuals.

C. In the alternative, Mr. Orozco may proceed under Section 508 pursuant to an implied cause of action for equitable relief.

Mr. Orozco need not rely on an implied cause of action, as Section 508 provides an express right of action to pursue his claims. *See* supra § A. In the alternative, however, the Supreme Court's holding in *Lane v. Pena*, 518 U.S. 187, 190-97 (1996), and the legislative history of Section 508 all establish that insofar as Mr. Orozco's claims are only for equitable relief and fees, they are also covered under an implied right of action, just as such claims are when brought pursuant to Section 504. *See Nat'l Ass'n of the Deaf ("NAD") v. Trump*, 486 F. Supp. 3d 45, 51-57 (D.D.C. 2020) (holding that the "rights-creating language" of Section 504 created a private right of action). *See also Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (recognizing that the "rights-creating language" of Section 601 of Title VI of Civil Rights Act of 1964 created a private right of action); *Cannon v. U. of Chicago*, 441 U.S. 677, 709 (1979) (holding that "rights-creating language" established a private right of action under Title IX of the Education Amendments of 1972).

In determining whether an implied cause of action exists, "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative.'" *Int'l Union, Sec., Police & Fire Prof'ls of Am. v. Faye*, 828 F.3d 969, 972 (D.C. Cir. 2016) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Under *Redington*, 442 U.S. at 575-76, courts look to three factors to establish such intent: (1) consider the language and focus of the statute to determine whether it creates a federal right in favor of the Appellant because he is someone for whose particular benefit the statute was enacted; (2) consider the legislative history to determine whether Congress gave any implicit or explicit indication of its intent to create or deny a private judicial remedy; and (3) consider the statute's underlying purpose to determine whether it would be consistent with the legislative scheme to imply such a remedy. "[I]n assessing whether Congress intended an expressly provided remedy to be the only remedy, the central analysis is directed at discovering legislative intent by means of the language of the statute, the statutory structure, or some other source." *Tax Analysts v. Internal Revenue*

Serv., 214 F.3d 179, 186 (D.C. Cir. 2000) (quoting *Gov't of Guam v. Am. President Lines*, 28 F.3d 142, 145 (D.C. Cir. 1994) (internal quotation marks omitted)).

Because Mr. Orozco is an individual with a disability whose claim would enforce the civil rights of individuals with disabilities protected by Section 508, there can be no question that application of the first *Redington* factor squarely favors recognizing an implied right of action. *See* 29 U.S.C. § 705(20)(G) (defining individuals with disabilities for purposes of the Rehabilitation Act) and 29 U.S.C. §§ 794d(a)(1)(A)(i) and (ii) (establishing law as for the benefit of individuals with disabilities who are federal employees or members of the general public).

With respect to the second *Redington* factor, while the Congressional record is silent as to the reason for adding the "Civil Action" title and provision to Section 508, the statutory text clearly indicates Congressional intent to create a cause of action. Congress's specific use of "civil actions" in the "enforcement" subsections clearly demonstrates its intent for judicial enforcement by a civil action (*i.e.*, a private right of action), as a remedy. Congress's use of "any individual

with a disability," in the "civil action" provision, while distinguishing between different classes of such individuals elsewhere in the text (*see* 29 U.S.C. § 794d(a)(6)), demonstrates its intent to make judicial remedies available to both categories of individuals with disabilities enumerated in the statute. Its cross-referencing of the remedial provisions of Section 505—the section that creates an express cause of action for Section 504 that works hand-in-glove with Section 504's implied cause of action against federal agencies—bolsters that intent. "When Congress reenacts statutory language that has been given a consistent judicial construction, [courts] often adhere to that construction in interpreting the reenacted statutory language." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) (citing, *e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993); *Pierce v. Underwood*, 487 U.S. 552, 567 (1988); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)). Congress added the provision for "civil actions" to Section 508, 29 U.S.C. § 794d(f)(3), as part of the Rehabilitation Act Amendments of 1998, Public Law 105-220 (Aug. 7, 1998), subsequent to the Supreme Court's 1996 opinion in *Lane*, 518 U.S. at 190-97. In *Lane*, the Court had held that Congress did not waive

sovereign immunity for monetary awards against executive agencies under Section 504, as compared to permissible claims for equitable relief and attorney's fees. *Id.* *Lane* reaffirmed that Section 504 was broadly enforceable against federal agencies, even while articulating limitations on the relief available through Section 505. *See id.* at 192-93 (distinguishing between implied rights and remedies for discrimination in programs and activities under Section 504, and express rights and remedies for violations of Section 504 by federal providers of financial assistance under Section 505). Congress's cross-referencing of the express enforcement provisions of Section 505 so recently after the Supreme Court's ruling in *Lane*, coupled with Section 508's specific statutory reference to civil actions, supports the conclusion that in amending Section 508 in 1998, Congress intended to create a private cause of action to enforce the statutory obligations of federal agencies and departments and intended to have that cause of action extend to all classes of beneficiary individuals.

Finally, the statutory structure supports finding that the legislative scheme intended a private cause of action for all classes of beneficiary individuals. The purpose of Section 508 is to ensure

comparable access to EIT for individuals with disabilities, which is a statutorily created individual right. Congress created an enforcement scheme in Section 508(f) that includes administrative remedies (29 U.S.C. § 794d(f)(2)) and judicial remedies in the form of civil actions (29 U.S.C. § 794d(f)(3)). Both the administrative and judicial remedies cross-reference and import the respective remedies of Section 504. *Id.* Section 504 provides both express and implied judicial remedies through its rights-creating language. *See* Section 505, 29 U.S.C. § 794a(a)(2) (express); Section 504 29 U.S.C. § 794(a) (implied); *NAD*, 486 F. Supp. at 51-57 (discussing the "rights-creating language" of Section 504).

Congress was clear: it intended Section 508 judicial remedies to be as broad as those for Section 504, as it could not more precisely have imported the full panoply of judicial remedies authorized, expressly or implicitly, by Section 504.

For these reasons, in the event this court finds that Section 505(a)(2), as imported by Section 508(f)(3), remains limited to federal agencies as providers of federal financial assistance, notwithstanding Appellant's surplusage argument *supra* in section B(2), it should find

that the statutory text and structure demonstrate Congressional intent to provide a private cause of action for all classes of beneficiary individuals with disabilities to enforce Section 508's statutory rights against the federal agencies and departments obligated to ensure those rights.

1. The district court erred in failing to recognize the implied right of action.

The district court applied the three *Redington* factors. It even noted that factor one was in Appellant's favor because "Mr. Orozco, as a blind federal employee, is someone for whose particular benefit the statute was enacted." (Mem. Op. at JA 052.) The district court's minimal analysis of the second and third factors found that the comprehensive remedial scheme (factor 3) indicated a lack of Congressional intent (factor 2) to imply a cause of action. (Mem. Op. at JA 052 (following a sister court in so concluding (citing *Clark*, 19-394, 2021 WL 2156500, at *4).)

However, as argued *supra*, a more thorough analysis shows that the statutory text and structure demonstrate Congressional intent to imply a cause of action for all classes of beneficiary individuals to enforce the rights conferred by Section 508 against the only entities

(federal agencies and departments) who are responsible for violations of those rights.

CONCLUSION

For all of these reasons, the Court should reverse the lower court's decision and remand this case for further proceedings.

DATED: March 2, 2022

Respectfully submitted,

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DATED: March 2, 2022

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CERTIFICATE OF SERVICE

I certify that on March 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM
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RELEVANT PARTS OF STATUTES

29 U.S.C. § 791 – "Section 501" (Employment of individuals with disabilities)

(a) **Interagency Committee on Employees who are Individuals with Disabilities; establishment; membership; co- chairmen; availability of other Committee resources; purpose and functions**

There is established within the Federal Government an Interagency Committee on Employees who are Individuals with Disabilities (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Equal Employment Opportunity Commission (hereafter in this section referred to as the "Commission"), the Director of the Office of Personnel Management, the Secretary of Veterans Affairs, the Secretary of Labor, the Secretary of Education, and the Secretary of Health and Human Services. Either the Director of the Office of Personnel Management and the Chairman of the Commission shall serve as co-chairpersons of the Committee or the Director or Chairman shall serve as the sole chairperson of the Committee, as the Director and Chairman jointly determine, from time to time, to be appropriate. The resources of the President's Disability Employment Partnership Board and the President's Committee for People with Intellectual Disabilities shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of individuals with disabilities, and to review, on a periodic

basis, in cooperation with the Commission, the adequacy of hiring, placement, and advancement practices with respect to individuals with disabilities, by each department, agency, and instrumentality in the executive branch of Government and the Smithsonian Institution, and to insure that the special needs of such individuals are being met; and (2) to consult with the Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

(b) **Federal agencies; affirmative action program plans**

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate

hiring, placement, and advancement opportunities for individuals with disabilities.

(c) **State agencies; rehabilitated individuals, employment**

The Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for individuals with disabilities, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

(d) **Report to Congressional committees**

The Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of individuals with disabilities by each department, agency, and instrumentality and the Smithsonian Institution and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Commission under subsections (b) and (c) of this section.

(e) **Federal work experience without pay; non-Federal status**

An individual who, as a part of an individualized plan for employment under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

(f) **Standards used in determining violation of section**

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, 1 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794 – "Section 504" (Nondiscrimination under Federal grants and programs)

(a) **Promulgation of rules and regulations**

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under 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. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and

Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) **"Program or activity" defined**

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of career and technical education, or other

school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of

any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) **Significant structural alterations by small providers**

Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) **Standards used in determining violation of section**

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794a – "Section 505" (Remedies and attorney fees)

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee

or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) 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 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. § 794d – "Section 508" (Electronic and information technology)

(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.

(2) **Electronic and information technology standards**

(A) **In general**

Not later than 18 months after August 7, 1998, the Architectural and Transportation Barriers Compliance Board (referred to in this section as the "Access Board"), after consultation with the Secretary of Education, the Administrator of General Services, the Secretary of Commerce, the Chairman of the Federal Communications Commission, the

Secretary of Defense, and the head of any other Federal department or agency that the Access Board determines to be appropriate, including consultation on relevant research findings, and after consultation with the electronic and information technology industry and appropriate public or nonprofit agencies or organizations, including organizations representing individuals with disabilities, shall issue and publish standards setting forth--

(i) for purposes of this section, a definition of electronic and information technology that is consistent with the definition of information technology specified in section 11101(6) of Title 40; and

(ii) the technical and functional performance criteria necessary to implement the requirements set forth in paragraph (1). (B) Review and amendment

The Access Board shall periodically review and, as appropriate, amend the standards required under subparagraph (A) to reflect technological advances or changes in electronic and information technology.

(3) **Incorporation of standards**

Not later than 6 months after the Access Board publishes the standards required under paragraph (2), the Federal Acquisition Regulatory Council shall revise the Federal Acquisition Regulation and each Federal department or agency shall revise the Federal procurement policies and directives under the control of the department or agency to incorporate those standards. Not later than 6 months after the Access Board revises any standards required under paragraph (2), the Council shall revise the Federal Acquisition Regulation and each appropriate Federal department or agency shall revise the procurement policies and directives, as necessary, to incorporate the revisions.

(4) **Acquisition planning**

In the event that a Federal department or agency determines that compliance with the standards issued by the Access Board under paragraph (2) relating to procurement imposes an undue burden, the documentation by the department or agency supporting the procurement shall explain why compliance creates an undue burden.

(5) **Exemption for national security systems**

This section shall not apply to national security systems, as that term is defined in section 11103(a) of Title 40.

(6) **Construction**

(A) **Equipment**

In a case in which the Federal Government provides access to the public to information or data through electronic and information technology, nothing in this section shall be construed to require a Federal department or agency—

(i) to make equipment owned by the Federal Government available for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public; or

(ii) to purchase equipment for access and use by individuals with disabilities covered by paragraph (1) at a location other than that where the electronic and information technology is provided to the public.

(B) **Software and peripheral devices**

Except as required to comply with standards issued by the Access Board under paragraph (2), nothing in paragraph (1) requires the installation of specific accessibility-related software or the attachment of

a specific accessibility-related peripheral device at a workstation of a Federal employee who is not an individual with a disability.

(b) **Technical assistance**

The Administrator of General Services and the Access Board shall provide technical assistance to individuals and Federal departments and agencies concerning the requirements of this section.

(c) **Agency evaluations**

Not later than 6 months after August 7, 1998, the head of each Federal department or agency shall evaluate the extent to which the electronic and information technology of the department or agency is accessible to and usable by individuals with disabilities described in subsection (a)(1), compared to the access to and use of the technology by individuals described in such subsection who are not individuals with disabilities, and submit a report containing the evaluation to the Attorney General.

(d) **Reports**

(1) **Interim report**

Not later than 18 months after August 7, 1998, the Attorney General shall prepare and submit to the President a report containing information on and recommendations regarding the extent to which the electronic and information technology of the Federal Government is accessible to and usable by individuals with disabilities described in subsection (a)(1).

(2) **Biennial reports**

Not later than 3 years after August 7, 1998, and every 2 years thereafter, the Attorney General shall prepare and submit to the President and Congress a report containing information on and recommendations

regarding the state of Federal department and agency compliance with the requirements of this section, including actions regarding individual complaints under subsection (f).

(e) **Cooperation**

Each head of a Federal department or agency (including the Access Board, the Equal Employment Opportunity Commission, and the General Services Administration) shall provide to the Attorney General such information as the Attorney General determines is necessary to conduct the evaluations under subsection (c) and prepare the reports under subsection (d).

(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 (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 (a)(2).

(2) **Administrative complaints**

Complaints filed under paragraph (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 794 of this title for resolving allegations of discrimination in a federally conducted program or activity.

(3) **Civil actions**

The remedies, procedures, and rights set forth in sections 794a(a)(2) and 794a(b) of this title shall be the remedies, procedures, and rights available to any individual with a disability filing a complaint under paragraph (1).

(g) **Application to other Federal laws**

This section shall not be construed to limit any right, remedy, or procedure otherwise available under any provision of Federal law (including sections 791 through 794a of this title) that provides greater or equal protection for the rights of individuals with disabilities than this section.

42 U.S.C. § 2000d – "Title VI" – "§ 601" (Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin)

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000e – "Title VII" (Definitions)

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual

companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system

board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

RELEVANT PARTS OF REGULATIONS

28 C.F.R. § 35.130 (General prohibitions against discrimination)

…

(b)(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

…

28 C.F.R. § 39.101 (Purpose)

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the U.S. Postal Service.

28 C.F.R. § 39.103 (Definitions)

For purposes of this part, the term—

Agency means the Department of Justice.

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice.

…

Complaint Adjudication Officer means the Complaint Adjudication Officer appointed by the Assistant Attorney General for Civil Rights.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf.

…

Official or Responsible Official means the Director of Equal Employment Opportunity for the Department of Justice or his or her designee.

…

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub.L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub.L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub.L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

28 C.F.R. § 39.170 (Compliance procedures)

(a) Applicability. Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) Employment complaints. The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsible Official. The Responsible Official shall coordinate implementation of this section.

(d) Filing a complaint—

(1) Who may file.

(i) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself or by his or her authorized representative file a complaint with the Official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR part 542.

(2) Confidentiality. The Official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) When to file. Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed

on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

(4) How to file. Complaints may be delivered or mailed to the Attorney General, the Responsible Official, or agency officials. Complaints should be sent to the Director for Equal Employment Opportunity, U.S. Department of Justice, 10th and Pennsylvania Avenue, NW., Room 1232, Washington, DC 20530. If any agency official other than the Official receives a complaint, he or she shall forward the complaint to the Official immediately.

…

(f) Acceptance of complaint.

(1) The Official shall accept a complete complaint that is filed in accordance with paragraph (d) of this section and over which the agency has jurisdiction. The Official shall notify the complainant and the respondent of receipt and acceptance of the complaint.

(2) If the Official receives a complaint that is not complete, he or she shall notify the complainant, within 30 days of receipt of the incomplete complaint, that additional information is needed. If the complainant fails to complete the complaint within 30 days of receipt of this notice, the Official shall dismiss the complaint without prejudice.

(3) If the Official receives a complaint over which the agency does not have jurisdiction, the Official shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(g) Investigation/conciliation.

(1) Within 180 days of the receipt of a complete complaint, the Official shall complete the investigation of the complaint, attempt informal

resolution, and, if no informal resolution is achieved, issue a letter of findings.

(2) The Official may require agency employees to cooperate in the investigation and attempted resolution of complaints. Employees who are required by the Official to participate in any investigation under this section shall do so as part of their official duties and during the course of regular duty hours.

(3) The Official shall furnish the complainant and the respondent a copy of the investigative report promptly after receiving it from the investigator and provide the complainant and respondent with an opportunity for informal resolution of the complaint.

(4) If a complaint is resolved informally, the terms of the agreement shall be reduced to writing and made part of the complaint file, with a copy of the agreement provided to the complainant and respondent. The written agreement may include a finding on the issue of discrimination and shall describe any corrective action to which the complainant and respondent have agreed.

(h) Letter of findings. If an informal resolution of the complaint is not reached, the Official shall, within 180 days of receipt of the complete complaint, notify the complainant and the respondent of the results of the investigation in a letter sent by certified mail, return receipt requested, containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right of the complainant and respondent to appeal to the Complaint Adjudication Officer; and (4) A notice of the right of the complainant and respondent to request a hearing.

(i) Filing an appeal.

(1) Notice of appeal to the Complaint Adjudication Officer, with or without a request for hearing, shall be filed by the complainant or the respondent with the Responsible Official within 30 days of receipt from the Official of the letter required by paragraph (h) of this section.

(2) If a timely appeal without a request for hearing is filed by a party, any other party may file a written request for hearing within the time limit specified in paragraph (i)(1) of this section or within 10 days of the date on which the first timely appeal without a request for hearing was filed, whichever is later.

(3) If no party requests a hearing, the Responsible Official shall promptly transmit the notice of appeal and investigative record to the Complaint Adjudication Officer.

(4) If neither party files an appeal within the time prescribed in paragraph (i)(1) of this section, the Responsible Official shall certify that the letter of findings is the final agency decision on the complaint at the expiration of that time.

(j) Acceptance of appeal. The Responsible Official shall accept and process any timely appeal. A party may appeal to the Complaint Adjudication Officer from a decision of the Official that an appeal is untimely. This appeal shall be filed within 15 days of receipt of the decision from the Official.

…

(l) Decision.

(1) The Complaint Adjudication Officer shall make the decision of the agency based on information in the investigative record and, if a hearing is held, on the hearing record. The decision shall be made within 60

days of receipt of the transmittal of the notice of appeal and investigative record pursuant to § 39.170(i)(3) or after the period for filing exceptions ends, whichever is applicable. If the Complaint Adjudication Officer determines that he or she needs additional information from any party, he or she shall request the information and provide the other party or parties an opportunity to respond to that information. The Complaint Adjudication Officer shall have 60 days from receipt of the additional information to render the decision on the appeal. The Complaint Adjudication Officer shall transmit his or her decision by letter to the parties. The decision shall set forth the findings, remedial action required, and reasons for the decision. If the decision is based on a hearing record, the Complaint Adjudication Officer shall consider the recommended decision of the administrative law judge and render a final decision based on the entire record. The Complaint Adjudication Officer may also remand the hearing record to the administrative law judge for a fuller development of the record.

(2) Any respondent required to take action under the terms of the decision of the agency shall do so promptly. The Official may require periodic compliance reports specifying—

(i) The manner in which compliance with the provisions of the decision has been achieved; (ii) The reasons any action required by the final decision has not yet been taken; and

(iii) The steps being taken to ensure full compliance.

The Complaint Adjudication Officer may retain responsibility for resolving disagreements that arise between the parties over interpretation of the final agency decision, or for specific adjudicatory decisions arising out of implementation.

28 C.F.R. § 41.3 (Definitions.)

As used in this regulation, the term:

…

(e) Federal financial assistance means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

…

29 C.F.R. § 1614.101 (General policy)

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or genetic information and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act (ADEA) (29

U.S.C. 621 et seq.), the Equal Pay Act (29 U.S.C. 206(d)), the Rehabilitation Act (29 U.S.C. 791 et seq.), or the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. 2000ff et seq.) or for participating in any stage of administrative or judicial proceedings under those statutes.

29 C.F.R. § 1614.103 (Complaints of discrimination covered by this part.)

(a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of disability), the Equal Pay Act (sex- based wage discrimination), or GINA (discrimination on the basis of genetic information) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.

(b) This part applies to:

…

(2) Executive agencies as defined in 5 U.S.C. 105;

…

(c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

…

29 C.F.R. § 1614.108 (Investigation of complaints)

…

(f) Within 180 days from the filing of the complaint, or where a complaint was amended, within the earlier of 180 days after the last amendment to the complaint or 360 days after the filing of the original complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing and decision from an administrative judge or may request an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed.

…

(h) Where the complainant has received the notice required in paragraph (f) of this section or at any time after 180 days have elapsed from the filing of the complaint, the complainant may request a hearing by submitting a written request for a hearing directly to the EEOC office indicated in the agency's acknowledgment letter. The complainant shall send a copy of the request for a hearing to the agency EEO office. Within 15 days of receipt of the request for a hearing, the agency shall provide a copy of the complaint file to EEOC and, if not previously provided, to the complainant.

29 C.F.R. § 1614.110 (Final action by agencies)

(a) Final action by an agency following a decision by an administrative judge. When an administrative judge has issued a decision under §

1614.109(b), (g) or (i), the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with § 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

(b) Final action by an agency in all other circumstances. When an agency dismisses an entire complaint under § 1614.107, receives a request for an immediate final decision or does not receive a reply to the notice issued under § 1614.108(f), the agency shall take final action by issuing a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30–day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. The final action shall contain notice of the

right to appeal the final action to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the final action.

29 C.F.R. § 1614.203 (Rehabilitation Act)

…

(b) Nondiscrimination. Federal agencies shall not discriminate on the basis of disability in regard to the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. The standards used to determine whether Section 501 has been violated in a complaint alleging employment discrimination under this part shall be the standards applied under the ADA.

…

29 C.F.R. § 1615.170 (Compliance procedures)

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of disability in programs or activities conducted by the Commission in violation of section 504. This section also applies to all complaints alleging a violation of the agency's responsibility to procure electronic and information technology under section 508 whether filed by members of the public or EEOC employees or applicants.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by EEOC in 29 CFR part 1614 pursuant to section 501 of the

Rehabilitation Act of 1973 (29 U.S.C. 791). With regard to employee claims concerning agency procurements made in violation of section 508, the procedures set out in paragraphs (d) through (m) of this section shall be used.

(c) Responsibility for implementation and operation of this section shall be vested in the Director, Office of Equal Opportunity (Director of OEO).

…

45 C.F.R. § 84.3 (Definitions)

As used in this part, the term:

…

(h) Federal financial assistance means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

…