No. 22-1325

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL BACOTE., Jr.,
Plaintiff-Appellant,

v.

FEDERAL BUREAU OF PRISONS,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 17-cv-03111-RM-NRN
The Honorable Raymond P. Moore

Brief of *Amici Curiae* Disability Law Colorado, American Civil Liberties Union, American Civil Liberties Union of Colorado, The Arc of the United States, Bazelon Center for Mental Health Law, Civil Rights Education and Enforcement Center, Colorado Cross-Disability Coalition, Disability Rights Advocates, Disability Rights Education and Defense Fund, National Association of the Deaf, National Disability Rights Network, and the National Federation of the Blind in support of Plaintiff-Appellant.

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person – other than the *Amici Curiae*, their members, or their counsel – contributed money that was intended to fund preparing or submitting the brief.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

Disability Law Colorado ("DLC") is a nonprofit organization designated by the Governor of the state of Colorado as that state's federally-mandated Protection and Advocacy System. DLC works to protect the rights of people with disabilities in facilities – including correctional facilities – and in the community through direct advocacy, systemic litigation, and policy development. DLC works with individuals with all types of disabilities from birth through death on issues including, but not limited to, abuse, neglect, and discrimination in a variety of settings. DLC is part of a nation-wide system of Protection and Advocacy Systems.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit nonpartisan organization of more than 1.7 million members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Consistent with that mission, the ACLU established the National Prison Project in 1972 to protect and promote the civil and constitutional rights of

incarcerated people. The ACLU's Disability Rights Program works toward a society in which discrimination against people with disabilities no longer exists, where people with disabilities are valued, integrated members of the community, and where people with disabilities are no longer overrepresented in our nation's jails and prisons.

The American Civil Liberties Union Foundation of Colorado is one of the ACLU's statewide affiliates with over 42,000 members. As an organization that works to protect and defend the civil and constitutional rights of individuals in prison and under other forms of state supervision across the state of Colorado, the ACLU of Colorado, and their members have a strong interest in ensuring that the Rehabilitation Act and the Americans with Disabilities Act adequately protect incarcerated people in Colorado.

The Arc of the United States (The Arc), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("IDD"). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with IDD and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Bazelon Center for Mental Health Law is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act are central to the Center's litigation efforts.

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization based in Colorado whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to and receive equal treatment in the justice and carceral systems.

The Colorado Cross-Disability Coalition ("CCDC") is a nonprofit organization dedicated to promoting social justice for people and combining individual and systemic advocacy as effective agents for change that can benefit people of all ages with all types of disabilities. CCDC promotes self-reliance and full participation by people with disabilities through organizing, advocacy, education, legal initiatives, training and consulting, policy development, and legislation. CCDC is committed to increasing the power of people with disabilities to participate effectively in the larger community and in programs, services and

activities ranging from incarceration to reaching their full potential under far less segregated circumstances.

Disability Rights Advocates ("DRA") is a nonprofit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of Federal and California disability civil rights laws. DREDF is among the counsel for the plaintiff class in the ongoing litigation currently styled *Armstrong v. Newsom*, 94-CV-02307-CW (N.D. Cal), representing a class of California prisoners with disabilities.

The National Association of the Deaf ("NAD") was founded in 1880 by deaf leaders, and is the oldest national civil rights organization in the United States. The NAD has a mission of preserving, protecting, and promoting the civil, human, and linguistic rights of 48 million deaf and hard of hearing people in this country. The NAD engages in civil rights litigation on behalf of deaf and hard of hearing Americans, advocates for individuals and organizations in furthering its mission, and files *amicus* briefs in support of the rights of people with disabilities, including for prisoners with disabilities.

The National Disability Rights Network ("NDRN") is the nonprofit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies in each state, territory, and other jurisdictions, were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. Collectively, the P&A and CAP agencies are the largest provider of legally-based advocacy services to people with disabilities in the United States.

The National Federation of the Blind (NFB), the oldest and largest national organization of blind persons, is a nonprofit corporation headquartered in Baltimore, Maryland. It has affiliates in all 50 states, Washington, D.C., and Puerto

Rico. The NFB and its affiliates are recognized by the public, Congress, executive agencies of state and Federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The ultimate purpose of NFB is the complete integration of the blind into society on a basis of equality.

CONSENT

All parties have consented to the filing of this *amicus* brief.

INTRODUCTION

The rights of people with disabilities "are and will continue to be in need of constant vigilance by [disabled][1] individuals to assure compliance." 124 Cong. Rec. 37507 (1978). *Amici* disability rights and civil rights organizations have long relied on the well-established private right of action created by Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794(a), to help sustain this vigilance. Because "[p]rivate enforcement of these . . . rights is an important and necessary aspect of assuring that these rights are vindicated," 124 Cong. Rec. 37507 (1978), *Amici* write to urge this Court to ensure that this private right of

[1] When originally enacted, Section 504 referred to the individuals it protected as "handicapped." More modern usage – and indeed Section 504 as it currently reads – refers instead to "individuals with disabilities" or "disabled people." This brief will adopt the latter terminology.

action be co-extensive with the breadth of Section 504 itself, that is, that it include claims against Executive agencies.

Section 504 initially prohibited recipients of Federal financial assistance from discriminating against people with disabilities and was "intended to apply to every phase of American life." 124 Cong. Rec. 13901 (1978). When it became clear that the statute as passed in 1973 did not extend to the activities of the Federal government itself, Congress amended Section 504 to prohibit disability discrimination "under any program or activity conducted by any Executive agency." *Id.*; *see* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, § 119, 92 Stat. 2955, 2982 (codified at 29 U.S.C. § 794(a)) ("1978 Amendments").

The Supreme Court has long recognized that the language used in Section 504 – that a specific protected class shall not be "subjected to discrimination" – creates a private right of action, *see, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 709 (1979), and just last year reconfirmed that Section 504 is enforceable through a private right of action, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1569 (2022).

Amici write to underscore the importance of effectuating Congressional intent to provide a private right of action under Section 504 to challenge disability discrimination by Executive agencies.

QUESTIONS ADDRESSED IN THIS BRIEF OF *AMICI CURIAE*

Amici address two questions:

1. Does Section 504 provide a private right of action for claims against Executive agencies?
2. Has the Federal government waived sovereign immunity with respect to claims for injunctive relief under Section 504?

FACTS

Amici incorporate by reference the Plaintiff-Appellant's recitation of the facts, and set forth the following summary as relevant to the issues addressed in this *amicus* brief.

Michael Bacote is a person with intellectual and mental health disabilities who has been in the custody of the United States Bureau of Prisons ("BOP") since 1998, the vast majority of that time in solitary confinement. In 2017, he filed suit against the BOP alleging, among other claims, that the BOP violated Section 504 by failing to accommodate his disabilities, preventing him from participating in a BOP program for people with serious mental illness.

The District Court dismissed Mr. Bacote's Section 504 claim, holding that there is no private right of action under that statute against Executive agencies and that the Federal government did not waive sovereign immunity with respect to claims under that statute. Order at 13-16, Appellant's App. ("App.") Vol. 6 at 1342-45.

The need for a private right of action to secure nondiscriminatory treatment from our Federal government goes far beyond Mr. Bacote's individual experiences. People with disabilities participate in myriad Federal programs. For example, almost 300 million people visited National Parks in 2021.[2] Census data for that year estimate that 12.6 percent of the civilian noninstitutionalized population had a disability,[3] suggesting that at least 37 million people with disabilities visited these parks in 2021. More than 579 million people – and thus likely 72 million disabled people – passed through Transportation Security

[2] *Visitation Numbers (U.S. National Park Service)*, U.S. National Park Service, https://www.nps.gov/aboutus/visitation-numbers.htm (last visited Jan. 17, 2023).

[3] American Community Survey, S1810 (2021): Disability Characteristics, U.S. Census Bureau, https://data.census.gov/table?text=s1810&tid=ACSST5Y2021.S1810 (last visited Jan. 17, 2023).

Administration ("TSA") checkpoints in 2021.[4] In 2016, when the BOP reported that it had 192,170 people in its custody,[5] the Bureau of Justice Statistics calculated that 28.8 percent of Federal prisoners had a disability.[6] This suggests that there were more than 55,000 Federal prisoners with disabilities.

These examples all come from cases – discussed in greater detail below – in which courts have held that disabled people may seek injunctive remedies for Executive agency discrimination under Section 504 and underscore the importance of this Court following suit to ensure – as Congress intended – that disabled participants in Federal programs can exercise the private right of action necessary to challenge discrimination. A contrary decision would close the courthouse doors to disabled people seeking to ensure access to National Parks, accessibly-formatted information from government agencies, effective communication in veterans and other healthcare facilities, and reasonable accommodations in Federal prisons.

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[4] *TSA checkpoint travel numbers (current year versus prior year(s)/same weekday)*, Transportation Security Administration, https://www.tsa.gov/travel/passenger-volumes (last visited Jan. 17, 2023) provides daily numbers; the undersigned downloaded those figures into Microsoft Excel to calculate the total number for 2022.

[5] *BOP: Population Statistics*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited Jan. 17, 2023).

[6] Laura M. Maruschak *et al*., Bureau of Just. Stat., *Survey of Prison Inmates, 2016: Disabilities Reported by Prisoners* 4 tbl. 3 (2021).

SUMMARY OF ARGUMENT

The District Court conflated two distinct questions: whether a private right of action exists to enforce Section 504 against Executive agencies; and whether the Federal government has waived sovereign immunity for injunctive claims under that statute. That court answered both questions incorrectly.

Section 504 provides a private right of action against Executive agencies. That statute states, in relevant part, "[n]o *otherwise qualified individual with a disability* . . . 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 conducted by any Executive agency . . .." 29 U.S.C. § 794(a) (emphasis added). The emphasized phrases are precisely the "rights-creating" language that the Supreme Court has repeatedly recognized support an implied private right of action. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) (holding that it was "beyond dispute" that materially identical language in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), created an implied private right of action); *Cannon*, 441 U.S. at 689-90 and n.13 (holding that materially identical language in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX")). Just last year, the Supreme Court confirmed that "it is 'beyond dispute that private individuals may

sue' to enforce'" Section 504. *Cummings*, 142 S. Ct. at 1569 (internal citation omitted).

The Federal government has waived sovereign immunity with respect to claims for non-monetary relief. 5 U.S.C. § 702. While this waiver is set forth in the Administrative Procedure Act ("APA"), it is not limited to suits brought under that statute. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225 (10th Cir. 2005), *overruled on other grounds Jones v. Bock*, 549 U.S. 199 (2007) (holding that section 702 waived sovereign immunity for injunctive claims under the Eighth Amendment). "The APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Id.*

ARGUMENT

I. Section 504 of the Rehabilitation Act Provides a Private Right of Action for Injunctive Relief Against Executive Agencies.

A. The Statutory Text of Section 504 Provides a Private Right of Action Against Executive Agencies.

Starting in 1979 with its decision in *Cannon*, 441 U.S. 677, the Supreme Court has consistently held that the anti-discrimination language of Section 504 creates a private right of action. Section 504 mandates, in relevant part, that:

> *No otherwise qualified individual with a disability* . . . 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 conducted by any Executive agency* . . ..

29 U.S.C. § 794(a) (emphasis added). Section 504 was originally enacted in 1973, and "was patterned after, and is almost identical to, the anti-discrimination language of" Title VI and Title IX, prohibiting race and gender discrimination, respectively, by Federal funding recipients. S. Rep. No. 93-1297, at 21 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6373, 6390.

In *Cannon*, the Court held that the language of Title IX – *"[n]o person . . . shall*, on the basis of sex, be excluded from participation in, be denied the benefits of, or *be subjected to discrimination* under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a) (emphasis added) – created a private right of action to sue a university that accepted Federal funding. *Cannon*, 441 U.S. at 703. That emphasized language – which Section 504 shares with Title IX – satisfied all four factors in *Cort v. Ash*, 422 U.S. 66 (1975), the Court's touchstone decision on implication of private rights of action. *Cannon*, 441 U.S. at 689-709. In analyzing the first of these factors – "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member," *id.* at 689 – the *Cannon* Court held that the "right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action," *id.* at 690 n.13.

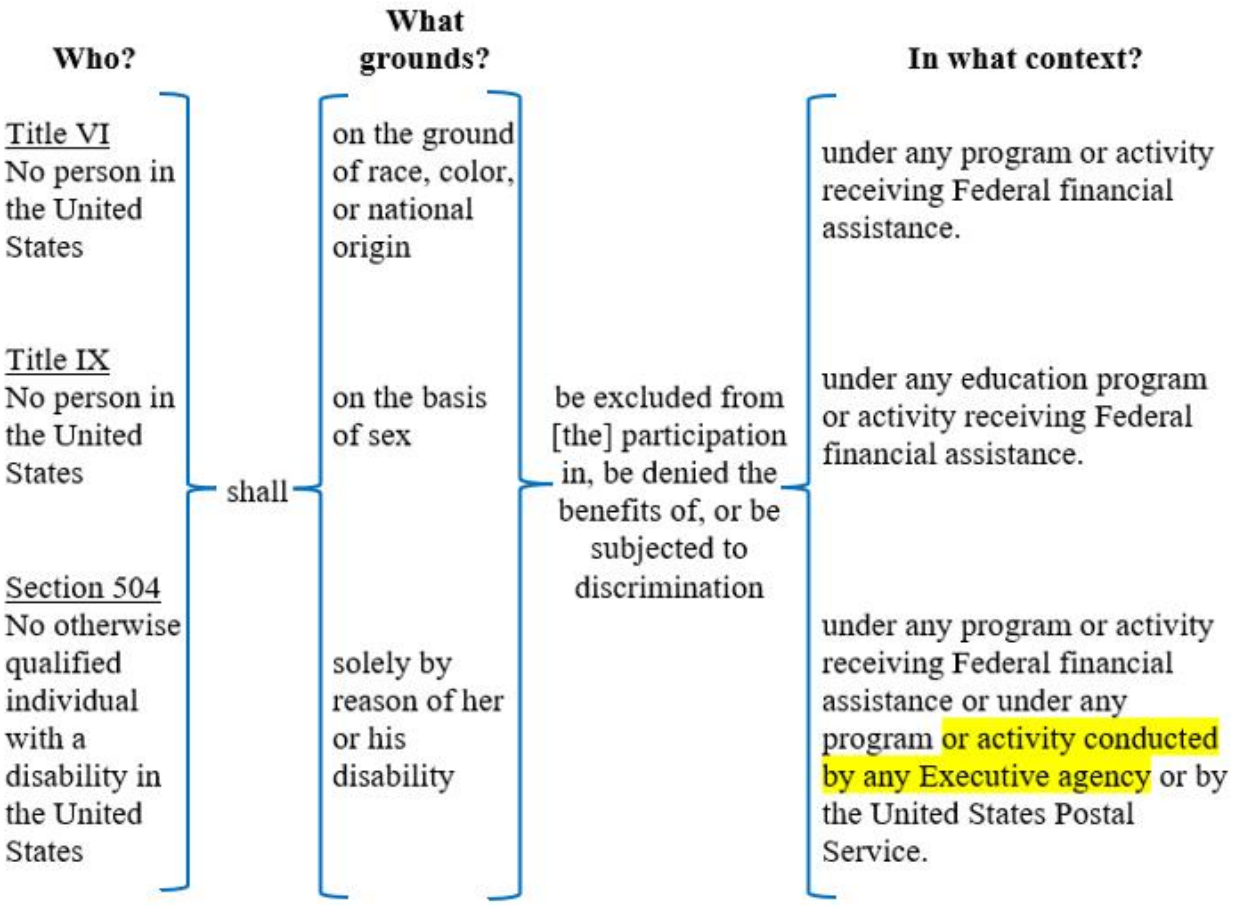
The Supreme Court reinforced *Cannon*'s central holding – and thus the appropriateness of a private right of action under Section 504 – in *Alexander*. It "must be taken as given," the Court held, that "private individuals may sue to enforce § 601 of Title VI." *Id.*, 532 U.S. at 279 (citing *Cannon*, 441 U.S. at 694). The Court noted that "'rights-creating' language" such as that in section 601 of Title VI, was "critical to the Court's analysis in *Cannon*." *Alexander*, 532 U.S. at 288.[7] Again, Section 504 – by design – contains precisely the rights-creating language that *Cannon* and *Alexander* held creates a private right of action.

With this history in mind, the 2022 holding in *Cummings* that "it is 'beyond dispute that private individuals may sue to enforce'" Section 504, 142 S. Ct. at 1569, comes as no surprise.

Cannon, *Alexander*, and *Cummings* are clear: A statute mandating that a protected class may not be subjected to discrimination in specified contexts creates a private right of action on behalf of individuals in that protected class challenging discrimination in those contexts. All three of these cases were decided after the 1978 Amendments added Executive agencies to Section 504's rights-creating

[7] The *Alexander* decision contrasted section 601's rights-creating with section 602 of Title VI, which did not contain such language, and held that there was no private right of action to enforce regulations promulgated under the latter provision. *Id.* at 293.

language; none suggests any grounds to exclude from any private right of action any part of the specified context in which discrimination is prohibited. Section 504's rights-creating language includes a private right of action against Executive agencies.



B. The Legislative History of Section 504 Demonstrates that that Statute Provides a Private Right of Action Against Executive Agencies.

In deciding whether a statute provides a private right of action, "the judicial task [is] … 'limited solely to determining whether Congress intended to create the private right of action asserted.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017) (internal citations omitted). The legislative history of the 1978 Amendments – which added Executive agencies to Section 504 – and of that statute's later reauthorizations demonstrates conclusively that Congress intended Section 504 to provide a private right of action against Executive agencies.

1. The Legislative History of the 1978 Amendments Explicitly Recognized a Private Right of Action.

"There can be no doubt that the 1978 amendments to section 504 provided a private right of action for victims of discrimination by the Federal Government." Senator Jeffords who, as a Representative, had been a primary author of the 1978 amendments, made this statement during the debates on reauthorization of the Rehabilitation Act in 1992. 138 Cong. Rec. 31521 (1992). It is "clear from the language of the 1978 amendments, the associated legislative history, and the subsequent pronouncements of the Members of Congress principally involved with those amendments, [that] it was the intention of Congress to create a private right of action and the courts should so interpret the statute." *Id*.

Section 504 was one of the earliest Federal laws to attempt to ensure equal treatment of people with disabilities. When first enacted, it prohibited disability discrimination by recipients of Federal funding. Pub. L. 93-112, Title V, § 504, 87 Stat. 355, 394 (1973). The Rehabilitation Act was amended in 1978, extending Section 504's coverage to prohibit Executive agencies from discriminating against disabled people. 1978 Amendments, § 119. The legislative history of these 1978 Amendments makes clear that Congress intended that Section 504 provide a private right of action and believed that right to be central to the goals and enforcement of the statute.

For example, Senator Stafford – one of the sponsors of the Senate bill – explained that the rights of people with disabilities "are and will continue to be in need of constant vigilance by [disabled] individuals to assure compliance. Private enforcement of these . . . rights is an important and necessary aspect of assuring that these rights are vindicated . . .." 124 Cong. Rec. 37507 (1978). Senator Bayh noted that, "[w]hen title VI was first enacted in 1964, Congress intended to create a private right of action for aggrieved individuals." 124 Cong. Rec. 30349 (1978). He went on to explain that it was "the continuing intention of Congress that private actions be allowed under" Title VI, Title IX, and Section 504. *Id.*

That is, the Congress that added Executive agencies to Section 504 also made clear that that provision created a private right of action.

It was important to the *Cannon* Court that Title IX was enacted against a backdrop of consistent court interpretation that the parallel language in Title VI provided a private right of action based on the principle that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." *Id.*, 441 U.S. at 696-97. This principle has even more force with respect to the Rehabilitation Act, which was passed in 1973 and then amended in 1978 to add Executive agencies – both against that same backdrop.

2. The Legislative History of the 1992 Amendments Demonstrates Conclusively that Congress Intended to Create a Private Right of Action Against Executive Agencies.

The Rehabilitation Act was reauthorized or amended in 1986, 1988, and 1992,[8] all against a backdrop that – by then – included *Cannon* itself. This ratified the existence of a private right of action under Section 504. *Cummings*, 142 S. Ct. at 1569.

As Sen. Harkin explained, in the debates on the 1992 Amendments, "[t]he intent of Congress was obvious in 1978 and remains obvious today – Congress intends that there is a private right of action against the Federal Government under section 504 of the Rehabilitation Act." 138 Cong. Rec. 31523 (1992). Senator

[8] Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1807; Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28; and Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 ("1992 Amendments").

Jeffords explained that the 1978 Amendments that added Executive agencies to Section 504 created a private right of action against those agencies; indeed "[t]he language of the 1978 amendments is sufficient on its face to confer such a private right of action." 138 Cong. Rec. 31521 (1992). He was emphatic that denying such a private right of action would be "a disgrace" and "the height of hypocrisy, expecting private entities to bear a burden that the Federal Government itself is unwilling to carry." *Id.*

In deciding whether a statute provides a private right of action, "the judicial task [is] … 'limited solely to determining whether Congress intended to create the private right of action asserted.'" *Ziglar*, 137 S. Ct. at 1855–56 (internal citations omitted). "Statutory intent on this . . . point is determinative." *Alexander*, 532 U.S. at 286. The legislative history of the 1978 and 1992 Amendments to the Rehabilitation Act provides robust and conclusive evidence of Congress's intent to create and then preserve a private right of action to enforce Section 504 against Executive agencies.

C. Caselaw Consistently Affirms a Private Right of Action Under Section 504 Against Executive Agencies.

The Third and Ninth Circuits and a consistent series of decisions from lower courts recognize that Section 504 provides a private right of action against Executive agencies – in a number of cases, specifically against Defendant-

Appellee BOP. *J.L. v Social Sec. Admin.*, 971 F.2d 260, 264 (9th Cir 1992) ("Congress unequivocally expressed its intent [in section 504] to provide [disabled] victims of government discrimination a private right of action . . .."), *overruled on other grounds Lane v. Peña*, 518 U.S. 187, 191, 200 (1996); *Doe v. Attorney Gen. of the U.S.*, 941 F.2d 780, 787 (9th Cir. 1991) (holding that Section 504 provided an implied right of action against Executive agencies), *overruled on other grounds*, *Lane*, 518 U.S. at 191, 200;[9] *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979) (holding that Section 504 provided a private right of action against both the Federal and private defendants); *Nat'l Ass'n of the Deaf v. Trump*, 486 F. Supp. 3d 45, 53-57 (D.D.C. 2020) (holding that Deaf television viewers had a private right of action under Section 504 to challenge the president's failure to provide sign language interpreters for COVID briefings); *Yeh v. U.S. Bureau of Prisons*, No. 3:18-cv-943, 2019 WL 3564697 at *3 (M.D. Pa. Aug. 6, 2019) (holding that Deaf prisoner had a private right of action for injunctive relief

[9] Both *J.L.* and *Doe* held that the private right of action provided by Section 504 against Executive agencies included both injunctive and damages remedies. As will be discussed in greater detail below, the Supreme Court later ruled that damages remedies were barred by sovereign immunity. *Lane*, 518 U.S. at 200. The *Lane* Court explicitly did not reach the plaintiff's claims for injunctive relief, *id.* at 196, *see also infra* Section II, so it did not overrule *J.L.* or *Doe* to the extent they recognized a private right of action *for injunctive relief*. *See, e.g.*, *Davis v. Astrue*, 2011 WL 3651064 at *3 (N.D. Cal. Aug. 18, 2011) (acknowledging that *Doe* was overruled in part by *Lane* but continuing to apply *Doe*'s holding that Section 504 creates a private right of action against Executive agencies).

under Section 504 against the BOP); *Washington v. Fed. Bureau of Prisons*, No. 5:16-cv-03913-BHH-KDW, 2019 WL 2125246 at *8 (D. S.C. Jan. 3, 2019) (same holding with respect to the claims of a blind prisoner); *McRaniels v. U.S. Dep't of Veterans Affairs*, 15-cv-802-WMC, 2017 WL 2259622 at *4 (W.D. Wisc. May 19, 2017) (Deaf wife of veterans hospital patient had a private right of action for injunctive relief under Section 504); *Gray v. Golden Gate Nat'l Recreational Area*, No. 08-cv-00722-EDL, 2012 WL 13140460 at *7-8 (N.D. Cal. July 3, 2012) (holding that *J.L.* and *Doe* continued be good law with respect to a private right of action for injunctive relief under Section 504; people with mobility disabilities had such a claim against the National Park Service); *Davis v. Astrue*, Nos. 06-cv-6108-EMC, 09-cv-0980-EMC, 2011 WL 3651064 at *2-5 (N.D. Cal. Aug. 18, 2011) (same holding with respect to claims of people with mental health or developmental disabilities against the Social Security Administration for effective communication).

The two cases cited by the BOP before the District Court are not to the contrary, as both explicitly address claims against agencies *as regulators* not, as here, as direct perpetrators of discrimination. The decision in *De Dandrade v. United States Department of Homeland Security*, 367 F. Supp. 3d 174 (S.D.N.Y. 2019), *cited in* Def's Reply in Supp. of Mot. to Dismiss at 13, App. Vol. 2 at 394, was subsequently affirmed by the Second Circuit in *Moya v. United States*

Department of Homeland Security, 975 F.3d 120 (2d Cir. 2020). In that case, legal permanent residents challenged the naturalization process as discriminatory. *Id.* at 124. The Second Circuit held that Section 504 did not "create an express right of action allowing private parties to sue agencies for *discriminatory regulations* . . .. Nor does the statute reflect Congress's intent to imply a private right of action against *executive agencies as regulators*." *Id.* at 128 (emphasis added). *Moya* is not binding on this Court; its holding is also not relevant as explicitly limited by the Second Circuit.

The BOP also relied on *Cousins v. Secretary of the United States Department of Transportation*, 880 F.2d 603 (1st Cir. 1989), *cited in* Def's Reply in Supp. of Mot. to Dismiss at 13, App. Vol. 2 at 394, which is not only limited to "the government *as regulator*," *id.* at 605 (emphasis in original), but was explicitly repudiated by Congress in the legislative history of the 1992 Amendments. Senator Jeffords expressed the view that "recent court decisions denying private right of action to victims of discrimination by the Federal Government under section 504 of the Rehabilitation Act are in direct conflict with the congressional intent," citing *Cousins.* 138 Cong. Rec. 31520 (1992).

D. The Federal Government Has Explicitly Taken the Position that Section 504 Creates a Private Right of Action Against Executive Agencies.

When it is advantageous to its litigating position, the Federal government has taken the position that Section 504 provides a private right of action against Executive agencies. This occurs most often when a disabled plaintiff attempts to challenge Federal government disability discrimination by bringing a claim directly under the APA. That statute is limited to circumstances in which "there is no other adequate remedy in a court." 5 U.S.C. § 704. Seeking to avoid APA liability, the Federal government has taken the position that Section 504 provides an adequate remedy in a court.

For example, in its Motion to Dismiss in *Palamaryuk v. Duke*, the Federal government argued that the plaintiff did not have a claim under the APA because he had "an adequate remedy at law: he can challenge the government's actions under the Rehabilitation Act." Defs' Mot. to Dismiss at 5-6, *Palamaryuk v. Duke*, No. 2:17-cv-00441-MJP-JPD, ECF No. 21 (W.D. Wash Nov. 7, 2017). Similarly, in *United Spinal Association v. Saul*, the government argued that "section 504 of the Rehabilitation Act . . . affords an 'adequate' remedy to redress" the plaintiff's disability discrimination claims against the Social Security Administration. Mem. in Supp. of Def's Mot. to Dismiss or, in the alternative, for Summ. J. at 26, *United Spinal Ass'n v. Saul*, No. 1:20-cv-02236-TSC (D.D.C. Dec. 7, 2020), ECF No. 18-

1; *cf* Mem. of P. & A. in Supp. of U.S. Mot. to Dismiss, *Strolberg v. Akal Security*, No. 03-cv-0004-S-DOC, 2003 WL 25669486 (D. Idaho Mar. 17, 2003) (arguing against claims under the Americans with Disabilities Act and state law under the heading, "The Proper Cause of Action for the Plaintiffs' Complaints Against the Federal Government Is Section 504 of the Rehabilitation Act of 1973").

II. The Federal Government has Waived Sovereign Immunity for Claims for Injunctive Relief under Section 504.

A. Section 702 of the Administrative Procedure Act Waives Sovereign Immunity for Claims for Injunctive Relief.

Section 702 of the Administrative Procedure Act waives the sovereign immunity of the Federal government for claims seeking "relief other than money damages." 5 U.S.C. § 702 ("Section 702"). That section provides that

> [a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . ..

Id. The legislative history of this provision stated that it "would eliminate the defense of sovereign immunity as to any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency." H.R. Rep. No. 94-1656, at 3, *as reprinted in* 1976 U.S.C.C.A.N. 6121, 6123.

This Circuit has long recognized that Section 702's waiver includes both claims brought under the APA itself and claims brought under other statutes and the Constitution. In *Simmat*, for example, a prisoner in custody of the BOP filed suit against that agency alleging that deficient dental care violated his rights under the Eighth Amendment. In a thorough examination of the basis for injunctive claims against the Federal government, this Court concluded that Section 702 had waived sovereign immunity "in most suits for nonmonetary relief," and that "[t]his waiver is not limited to suits under the Administrative Procedure Act." 413 F.3d at 1233. Rather, Section 702's "'waiver of sovereign immunity applies to any suit whether under the APA or not.'" *Id.* (internal citations omitted); *see also Maehr v. United States Dep't of State*, 5 F.4th 1100, 1106-07 (10th Cir. 2021) (quoting *Simmat*); *Rivera v. Internal Revenue Svc.*, 708 F. App'x 508, 511 n.2 (10th Cir. 2017) ("The waiver of sovereign immunity provided in APA § 702 encompasses both claims for nonmonetary relief asserted under the APA and claims asserted against federal agencies under other, non-APA authority.").

This APA waiver applies to injunctive claims brought under Section 504. The Office of Legal Counsel of the United States Department of Justice, in opining that sovereign immunity was not waived for damages, confirmed that "it is reasonable to read the cause of action and attorneys' fees provisions [in, among other statutes, the Rehabilitation Act] as allowing actions against the United States

for injunctive relief pursuant to the waiver of sovereign immunity for such relief contained in the Administrative Procedure Act." Authority of USDA to Award Monetary Relief for Discrimination, 18 U.S. Op. O.L.C. 52, 66, 1994 WL 813567 at **10 (1994).

A number of courts have explicitly invoked this waiver in cases against the BOP. In *Hawk v. Federal Bureau of Prisons*, for example, the court held that a Deaf plaintiff could pursue equitable relief against the BOP for failure to accommodate under Section 504 based on the waiver of sovereign immunity in Section 702 of the APA. No. 1:18-cv-1768, 2019 WL 4439705, at *7-8 (M.D. Pa. Aug. 30, 2019), *report and recommendation adopted*, 2019 WL 4439883 (M.D. Pa. Sept. 16, 2019); *see also Brown v. District of Columbia*, No. 1:17-cv-00348-RDM-GMH, 2018 WL 774902, at *7 (D.D.C. Jan. 24, 2018), *report and recommendation adopted as modified*, 324 F. Supp. 3d 154 (D.D.C. 2018) (holding that Section 702 waives sovereign immunity for injunctive claims against the BOP brought under Section 504); *Howard v. Bureau of Prisons*, No. 3:05-cv-1372, 2008 WL 318387 at *9 (M.D. Pa. Feb. 4, 2008) (same).

Neither the District Court nor the BOP, in its motion to dismiss, addressed the injunctive waiver in Section 702. The District Court noted correctly both that the Supreme Court had held that sovereign immunity was not waived for damages claims under Section 504, and that that Court had not addressed the question

whether there was such a waiver for Section 504 injunctive claims. App. Vol. 6 at 1342-44 (discussing *Lane*, 518 U.S. 187). The balance of the District Court's decision on the justiciability of Mr. Bacote's Section 504 claim addressed the question whether there was a private right of action under that statute against the Federal government. *Id.* at 1344-45. Without further analysis, however, the District Court concluded that it found no waiver of sovereign immunity. *Id.* at 1345.

B. The Supreme Court's Decision in Lane v. Peña Addressed Only Damages Claims, Explicitly Permitting Injunctive Claims to go Forward.

In *Lane v. Peña*, the Supreme Court addressed the question "whether Congress has waived the Federal Government's immunity against monetary damages awards" under Section 504. 518 U.S. at 191. Having thus explicitly circumscribed the question before the Court – and then holding that there was no such waiver for damages claims, *id.* at 192 – the Court made clear that it was not reaching the question whether the government had waived sovereign immunity for injunctive claims, noting that "the Government [did] not contest the propriety of … injunctive relief" under that statute, *id.* at 196.

In light of *Lane*'s expressly limited holding, it is not surprising that numerous courts have held that that case did not apply to injunctive claims under Section 504 and that such claims may go forward against Executive agencies. For example, in *Brown v. Cantrell*, a case against the BOP brought in the District of

Colorado, the court recognized that "the Supreme Court's reasoning in *Lane* 'supports the view that injunctive relief is available against the sovereign.'" No. 11-cv-00200-PAB-MEH, 2012 WL 3264292 at *6 (D. Colo. Feb. 9, 2012) (quoting *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51, 57-58 (D. D.C. 2006)). That court concluded that the plaintiff's "request for injunctive relief . . . pursuant to § 504 of the Rehabilitation Act [was] not barred by the doctrine of sovereign immunity." *Id.*; *see also, e.g.*, *Ramos v. Raritan Valley Habitat for Humanity*, No. 3:16-cv-1938-BRM-LHG, 2019 WL 4316575 at *6 (D. N.J. Sept. 12, 2019) (holding that *Lane* did not foreclose claims for injunctive relief under Section 504 against Executive agencies); *Hopper v. Bureau of Prisons*, No. 5:18-cv-01223-MGL-KDW, 2018 WL 3750553 at *1 (D. S.C. July 5, 2018) (same); *SAI v. Smith*, No. 16-cv-01024, 2018 WL 534305 at *10 (N.D. Cal. Jan. 24, 2018) (holding that *Lane* did not foreclose injunctive claims by disabled traveler challenging discriminatory treatment by the TSA).

Lane is thus no barrier to the explicit and well-recognized waiver of claims for injunctive relief set forth in Section 702. The Federal government has waived sovereign immunity with respect to claims for injunctive relief under Section 504.

CONCLUSION

The text of Section 504 creates a private right of action that includes claims against Executive agencies, and the Federal government has explicitly waived sovereign immunity for non-monetary claims. *Amici* respectfully request that this Court reverse the decision of the District Court on these grounds to ensure that the millions of disabled people who participate in Federal programs and activities have access to our Federal judicial system to ensure nondiscriminatory treatment.

Respectfully submitted,

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Certificate Regarding Length of Brief and Typeface

The undersigned counsel provides the following certifications required by the Federal Rules of Appellate Procedure and/or the Tenth Circuit Rules:

1. As required by Rule 32(g) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains at most 6,400 words.

2. I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14 point type.

/s/ Amy Farr Robertson
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January 24, 2023

Certificate Regarding Digital Submission

I hereby certify that, with respect to the foregoing:

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/s/ Amy Farr Robertson
Amy Farr Robertson
January 24, 2023

Certificate of Service

I certify that, on January 24, 2023, a true and correct copy of the foregoing Brief of *Amici Curiae* Disability Law Colorado, American Civil Liberties Union, American Civil Liberties Union of Colorado, The Arc of the United States, Bazelon Center for Mental Health Law, Civil Rights Education and Enforcement Center, Colorado Cross-Disability Coalition, Disability Rights Advocates, Disability Rights Education and Defense Fund, National Association of the Deaf, National Disability Rights Network, and the National Federation of the Blind in support of Plaintiff-Appellant was filed using the Court's electronic filing system which will generate notice and service on:

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