[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-13581

Non-Argument Calendar

WILLIE B. SMITH, III,

Plaintiff-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN HOLMAN CORRECTIONAL FACILITY,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

D.C. Docket No. 2:19-cv-00927-ECM-SMD

October 21, 2021

Before WILSON, JORDAN, and JILL PRYOR, Circuit Judges.

WILSON, Circuit Judge:

Willie B. Smith III is a death-row inmate in the custody of the Alabama Department of Corrections (ADOC) at William C. Holman Correctional Facility (Holman). Mr. Smith sued the Commissioner of ADOC, Jefferson Dunn, and the Warden of Holman, Terry Raybon, (collectively, Defendants), for alleged violations of his rights under the Americans with Disabilities Act (ADA) in their enforcement and implementation of Alabama Code § 15-18-82.1(b). Section 15-18-82.1(b) provides death-row inmates with a 30-day window in which they can elect to be executed by nitrogen hypoxia in lieu of lethal injection.

Mr. Smith claims that Defendants violated his rights under the ADA when they gave death-row inmates an Election Form to opt in to this new method of execution but failed to provide Mr. Smith with a reasonable accommodation to ensure that he meaningfully understood the Election Form and the choice it provided him.

Mr. Smith filed a motion to preliminarily enjoin his execution by any method other than nitrogen hypoxia prior to the conclusion of his lawsuit. Mr. Smith also filed a motion for partial summary judgment as to one element of his ADA claim. The district

court denied both motions. In addition to appealing both of the district court's rulings, Mr. Smith moves this court for a stay of execution. We address each motion in turn.

I. Motion for Partial Summary Judgment

As an initial matter, this court has jurisdiction over the interlocutory appeal of the district court's denial of preliminary injunction under 28 U.S.C. § 1292(a), which permits an immediate appeal from an order granting or denying an injunction. *See id.* § 1292(a)(1). We have pendent jurisdiction to review the district court's denial of partial summary judgment because, if granted, Mr. Smith would have satisfied the third prong of the preliminary-injunction analysis. *Transcon. Gas Pipe Line Co. v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres, More or Less, Situated in Land Lot 1049*, 910 F.3d 1130, 1154 n.11 (11th Cir. 2018).

Even though an order on a motion for partial summary judgment is otherwise nonappealable, when coupled with the review of an order denying preliminary injunction, review of both orders is proper where the issues in each are "inextricably intertwined." *Jones v. Fransen*, 857 F.3d 843, 850 (11th Cir. 2017); *Hudson v. Hall,* 231 F.3d 1289, 1294 (11th Cir. 2000). Matters may be sufficiently intertwined when they implicate the same facts and the same law or if determination of the pendent issue is essential to the resolution of the issue over which appellate jurisdiction exists. *See Smith v. LePage*, 834 F.3d 1285, 1292 (11th Cir. 2016).

Mr. Smith's motion for partial summary judgment implicates many of the same facts and law that are relevant to the merits of his Title II ADA claim when considering his motion for a preliminary injunction. Review of the district court's denial of his motion for partial summary judgment, an otherwise nonappealable decision, is necessary to "ensure meaningful review" of the denial of preliminary injunction. *Hudson*, 231 F.3d at 1294. Because the issues in Mr. Smith's motion for partial summary judgment and motion for a preliminary injunction are so "inextricably intertwined," this court, in its discretion, exercises pendent jurisdiction to review the district court's denial of Mr. Smith's motion for partial summary judgment.

We review a district court's grant of partial summary judgment de novo. *Transcon. Gas Pipe Line Co.*, 910 F.3d at 1154. We apply the same standard as the district court, considering the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in that party's favor. *E.E.O.C. v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1342–43 (11th Cir. 2016).

Having established jurisdiction, we now turn to Mr. Smith's argument that the district court erred in denying his motion for partial summary judgment on the final prong of his ADA claim. To state a claim under Title II of the ADA, a plaintiff must prove:

> (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated

> against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of [his] disability.

Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1083 (11th Cir. 2007). Mr. Smith argues that Defendants admitted certain allegations in their Answer which establish that the third prong of his ADA claim is met as a matter of law.

Mr. Smith argues that Defendants' Answer fails to comply with Federal Rule of Civil Procedure 8(b) for admissions and denials of allegations. Mr. Smith contends that Defendants fail to specifically deny certain parts of the allegations in Paragraphs 33–36 of their Answer. Mr. Smith further argues that Defendants' failure to specifically deny certain parts of the allegations means that they have admitted them pursuant to Rule 8(b)(6). According to Mr. Smith, Defendants admitted the following material facts: (1) Mr. Smith's need for an accommodation was obvious; (2) ADOC knew about his need; (3) it was unlikely that Mr. Smith would have understood the Election Form without assistance; and (4) reasonable accommodations for Mr. Smith's disability include but are not limited to "use of simple language, a comprehension check, additional time, or assistive technology." Defendants respond that the Federal Rules of Civil Procedure do not require such an improper reading nor is litigation meant to be a game of "gotcha." We agree with Defendants.

The district court correctly found that Mr. Smith's argument does not prevail because it ignores the language of Rule 8(b)(3).

Rule 8(b)(4) requires that the party "admit the part that is true and deny the rest" when denying only part of an allegation. In turn, Rule 8(b)(6) states that if a responsive pleading is required and the allegation is not denied, then that allegation is deemed admitted. While Defendants did not specifically deny the allegations when answering Paragraphs 33–36, Rule 8(b)(3) allows a party to specifically admit allegations and then generally deny the rest. Defendants did exactly that by generally denying any allegation in Mr. Smith's complaint that was not expressly admitted.

Importantly, the strict reading of Rule 8 that Mr. Smith proposes would impermissibly prioritize the form of the pleadings over their substance. *See* Fed. R. Civ. P. 8(d), (e) (stating that "[n]o technical form is required" and "[p]leadings must be construed so as to do justice"); *see also Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 697 n.3 (11th Cir. 2019). Therefore, we find that the district court did not err in its denial of Mr. Smith's motion for partial summary judgment.

II. Motion for a Preliminary Injunction

We now turn to Mr. Smith's contention that the district court erred in denying his motion for a preliminary injunction. A moving party is entitled to injunctive relief only upon a showing that:

> (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the

> movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam). The third and fourth elements merge when, as here, the party opposing the preliminary injunction is the government. *See Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (per curiam) (explaining that "where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest"). A preliminary injunction is considered "an extraordinary and drastic remedy," and Mr. Smith bears "the burden of persuasion" to clearly establish each of these elements. *Siegel*, 234 F.3d at 1176 (internal quotation marks omitted).

As noted above, to establish that he is likely succeed on the merits of his underlying ADA claim, Mr. Smith was required to show:

> (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of [his] disability.

Bircoll, 480 F.3d at 1083. The district court found that Mr. Smith met the first requirement—that he is a qualified individual with a disability—but that he failed to meet the second and third requirements. The district court thus concluded that Mr. Smith was unlikely to succeed on the merits of his ADA claim.

Because "[t]he grant or denial of a preliminary injunction is a decision within the sound discretion of the district court," our "review of such a decision is very narrow." *Revette v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir. 1984) (per curiam). Accordingly, we will not reverse the district court's ruling "unless there is a clear abuse of discretion." *Id.* An abuse of discretion occurs when the district court makes factual findings that are clearly erroneous, follows improper procedures, or applies the incorrect legal standard. *See Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). In reviewing for an abuse of discretion, "we will not review the intrinsic merits of the case." *Revette*, 740 F.2d at 893 (internal quotation mark omitted). We have explained that this "limited review" is necessitated because the district court's ruling on a motion for a preliminary injunction "is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." *Id.* The weighing of these considerations is the province of the district court. *Id.*

Applying this standard, we affirm the denial of Mr. Smith's motion for a preliminary injunction. The district court identified and applied the correct legal standard in making its determination that Mr. Smith did not demonstrate a substantial likelihood of success on the merits of his ADA claim. In making its determination, the district court found that: (1) Mr. Smith is a qualified individual with a disability, (2) Mr. Smith failed to demonstrate that he lacked meaningful access to the ADOC's Election Form service, and (3) Mr. Smith did not request an accommodation from the ADOC or show that his need for an accommodation was so obvious and apparent that the ADOC should have known he required one.

The district court made these factual findings after reviewing over 14,000 pages of documentary evidence, reviewing the parties' briefs, and presiding over a seven-hour evidentiary hearing in which Mr. Smith called eight witnesses to testify, including both Defendants.[1] The district court supported each of its findings with citations to the record, and Mr. Smith has not shown that any of these factual findings rise to the level of being clearly erroneous. Nor does the record indicate that the district court followed improper procedures or applied the incorrect legal standards to its factual findings. The district court therefore did not abuse its discretion in finding that Mr. Smith failed to make "*a clear showing*" that he had a substantial likelihood of success on the merits of his ADA

[1] While Mr. Smith submitted a declaration with his motion for a stay of execution in this court, he did not submit a declaration or affidavit in the preliminary injunction proceedings in the district court.

claim. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). We thus affirm the district court's denial of Mr. Smith's motion for a preliminary injunction.[2]

III. Motion for a Stay of Execution

The standard governing a stay of execution mirrors that for a preliminary injunction: the movant must establish a substantial likelihood of success on the merits. *See Valle v. Singer*, 655 F.3d 1223, 1225 (11th Cir. 2011) (per curiam). For the reasons we have discussed above, Mr. Smith has failed to show a substantial likelihood of success on the merits of his ADA claim. Accordingly, his motion for a stay of execution is due to be denied without regard to the other prerequisites for the issuance of one. *Id.*

IV. Conclusion

The district court's orders denying partial summary judgment and denying a preliminary injunction are AFFIRMED. The motion for a stay of execution is DENIED.

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[2] The district court also held in the alternative that Mr. Smith's motion for a preliminary injunction was due to be denied because the equities are not in his favor. Because we affirm the district court's denial of Mr. Smith's motion for a preliminary injunction on the basis that he failed to meet his burden of establishing a substantial likelihood of success on the merits, we do not address this alternative holding.

JILL PRYOR, Circuit Judge, Concurring:

Alabama law authorizes prisoners sentenced to death to choose one of two forms of execution, death by lethal injection or by nitrogen hypoxia. By filing this lawsuit, Willie B. Smith III was seeking not to evade his execution, but only to have a say in the way he dies. The law requires me to join my colleagues in affirming the district court's denial of Mr. Smith's motions for a preliminary injunction and for partial summary judgment and denying his motion for a stay of execution. Although I am bound to apply the law and join the majority, I am confounded by the Alabama Department of Corrections' insistence that Mr. Smith be put to death immediately by lethal injection.

In 2018, the Alabama Legislature passed a statute giving death-row prisoners 30 days to elect death by nitrogen hypoxia. Mere days before the 30-day window closed, the Department ("ADOC") took it upon itself to distribute a three-sentence Election Form to death-row prisoners at the prison where Mr. Smith was confined. The Election Form included no explanation of the law, no description of execution by nitrogen hypoxia, and no notice that there was less than a week left to choose the nitrogen hypoxia option. Along with the Election Form, at least some of the prisoners received a verbal explanation about execution by nitrogen hypoxia and the 30-day deadline.

Mr. Smith—who the State of Alabama acknowledges has significantly subaverage intellectual functioning—insists he received the Election Form with no explanation. No explanation of

execution by nitrogen hypoxia, his statutory right to make an election about the method of his execution, how he could exercise that right, or the deadline for making the election. Evidence in the record supports Mr. Smith's contention that he did not understand the significance of the Election Form and that he was unaware he had only days to choose how he would be put to death. It disturbs me that ADOC, which took on the responsibility to inform prisoners about their right to elect death by nitrogen hypoxia within 30 days, did so in such a feckless way.

After the 30-day window closed, Mr. Smith tried to elect death by nitrogen hypoxia. Alabama rejected his choice. Mr. Smith sued under the ADA, and the State agreed to a trial date in June of 2022. Alabama also agreed that if Mr. Smith won his lawsuit, it would execute him by nitrogen hypoxia. Alabama has changed its position. Despite agreeing to a trial date well in the future, Alabama obtained a warrant for Mr. Smith's execution and asserts that Mr. Smith must die now, and by lethal injection.

Alabama's legislature gave death-row prisoners a choice in the manner of death. ADOC ostensibly intended to inform Mr. Smith of his right to choose death by nitrogen hypoxia. Mr. Smith intended to exercise that right, but because of his disability, he was unable to do so. ADOC has acknowledged that it could, if ordered to do it, give Mr. Smith another chance to make the election. Under these circumstances, I cannot silently acquiesce in the State's refusal to afford Mr. Smith this final dignity.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-13581-P

WILLIE B. SMITH, III,

Plaintiff - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN HOLMAN CORRECTIONAL FACILITY,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before: WILSON, JORDAN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Appellant's Motion for Stay of Execution Pending Appeal is **DENIED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE B. SMITH, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:19-CV-927-ECM
	)	[WO]
JEFFERSON S. DUNN, *et al.*,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on the Plaintiff's Motion for Preliminary Injunction, wherein he seeks to enjoin the Commissioner of the Alabama Department of Corrections ("ADOC"), Jefferson Dunn, and the Warden of Holman Correctional Facility, Terry Raybon ("Defendants"), from executing him by any method other than nitrogen hypoxia before the conclusion of the present litigation. The Plaintiff is currently scheduled to be executed via lethal injection on October 21, 2021.

On June 1, 2018, Alabama Act 2018-353 went into effect. This new law granted death-row inmates one opportunity to elect that their execution be carried out by a new method, nitrogen hypoxia, in lieu of Alabama's default method, lethal injection. The process was simple: any inmate who wanted to elect this new method of execution had only to notify their warden of that choice in writing before the expiration of the thirty-day

statutory deadline. Any writing from the inmate is sufficient under the statute. A failure to elect nitrogen hypoxia within the thirty-day period (June 1, 2018 through July 2, 2018) operated as a waiver of that method of execution. Other than the implicit duty of the warden to accept written elections from death-row inmates during the statutory election period, the statute imposed no duty on the Defendants.

Sometime between June 26 and June 28, but before the July 2, 2018 statutory deadline, the ADOC directed that an election form be distributed to death-row inmates at Holman Correctional Facility ("Holman"). This form, to be filled out by inmates who wanted to elect nitrogen hypoxia, offered a non-exclusive way for those inmates to submit their statutory writing to the warden. Some inmates used the form to elect nitrogen hypoxia. Some elected nitrogen hypoxia by a different writing. Many others made no election.

Plaintiff Willie B. Smith, III ("Smith" or "Plaintiff") is a death-row inmate in the custody of the ADOC at Holman. From June 1, 2018 to June 26, 2018, Smith made no efforts to elect nitrogen hypoxia. Though Smith thereafter received the election form, he alleges that due to his intellectual disabilities, he could not understand it. He asserts that his inability to understand the form prevented him from exercising his statutory right to elect nitrogen hypoxia as his method of execution.

On November 25, 2019, Smith filed a complaint pursuant to 42 U.S.C. § 1983 and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*. ("ADA"), against the Defendants in their official capacities. After an initial dismissal, Smith filed an amended complaint on January 29, 2021, in which he seeks declaratory and injunctive

relief. (Doc. 36). Smith alleges that the distribution of the election form between June 26 and June 28, 2018 constituted a public benefit to which he was denied meaningful access on account of his disability in violation of the ADA. Specifically, Smith asserts that because he did not understand the election form, he faces a more painful execution by lethal injection, a future injury redressable through injunctive relief.

This Court previously dismissed Smith's suit for lack of standing. (Doc. 148). On appeal, the Eleventh Circuit reversed, holding that Smith has standing to bring this suit, and accordingly, that this Court has jurisdiction to hear it. *Smith v. Comm'r, Ala. Dep't of Corrs.*, No. 21-13298-P (11th Cir. Oct. 15, 2021). This matter returns to this Court on an order to remand. Because the Court finds Smith has not demonstrated a sufficient likelihood of success on the merits of his underlying ADA claim, or that the equities weigh in his favor, his motion for preliminary injunction is due to be DENIED.

II. PROCEDURAL HISTORY AND BACKGROUND[1]

In summary, Smith's extensive litigation history is as follows.

A. Smith's Litigation History

In 1992, after a jury trial, Smith was convicted of "capital murder for the intentional killing of Sharma Ruth Johnson" during a robbery and kidnapping. *Smith v. State*, 838 So. 2d 413, 421 (Ala. Crim. App. 2002). The facts of Smith's underlying conviction were

[1] The Court takes judicial notice of Smith's underlying conviction and previous litigation. *See Smith v. Dunn*, 2017 WL 1150618 (N.D. Ala. Mar. 28, 2017), *aff'd sub nom. Smith v. Comm'r, Ala. Dep't of Corrs.*, 924 F.3d 1330 (11th Cir. 2019), *cert. denied*, *Smith v. Dunn*, 141 S. Ct. 188 (2020) (mem.); *see also Smith v. State*, 112 So. 3d 1108 (Ala. Crim. App. 2012), *cert. denied*, *Ex parte Smith*, 112 So. 3d 1152 (Ala. 2012) (mem.).

summarized by the United States District Court for the Northern District of Alabama in post-conviction proceedings:

> The evidence at trial showed that Smith and his girlfriend, Angelica Willis, approached Johnson in her car near an automated teller machine. Following Smith's instructions, Willis asked Johnson for directions to a restaurant. Then Smith, armed with a shotgun, walked up to Johnson's car and forced Johnson into the trunk. After driving to another location, Smith and Willis returned to the automated teller machine. There, they located Johnson's dropped bank debit card and directed Johnson, still in the car's trunk, to call out the card's access code. At Smith's direction, Willis withdrew $80 from Johnson's bank account. A bank video camera captured images of Smith while Willis withdrew money from the machine. After driving around the Birmingham area and picking up Smith's brother from a shopping mall, Smith drove Johnson's car to a cemetery. Smith told Willis that he would have to kill Johnson because she would report the crime to law enforcement. Willis overheard Johnson pleading for her life and promising not to tell the authorities about the kidnapping. Willis then heard a gunshot. Smith, his brother, and Willis abandoned the vehicle at North Roebuck School. Smith later returned to the car and set it on fire to destroy any fingerprints left on it.

Smith v. Dunn, 2017 WL 1150618, at *1–2 (N.D. Ala. Mar. 28, 2017) (citations omitted), *aff'd sub nom. Smith v. Comm'r, Ala. Dep't of Corrs.*, 924 F.3d 1330 (11th Cir. 2019). Upon a 10–2 jury vote in favor, the trial court imposed a sentence of death. (Doc. 48-2 at 2, 20).

Smith appealed his conviction and sentence, which were affirmed by the Alabama Court of Criminal Appeals. *Smith v. State*, 838 So. 2d 413 (Ala. Crim. App. 2002). Both the Alabama Supreme Court and the United States Supreme Court denied certiorari. *See id.* (noting the Alabama Supreme Court's denial of certiorari); *Smith v. Alabama*, 537 U.S. 1090 (2002) (mem.).

On August 1, 2003, Smith filed a Rule 32 petition, the denial of which was affirmed

on appeal. *Smith v. State*, 112 So. 3d 1108, 1113–14, 1152 (Ala. Crim. App. 2012). The Alabama Supreme Court denied certiorari. *Ex parte Smith*, 112 So. 3d 1152 (Ala. 2012). Smith did not pursue an appeal to the United States Supreme Court.

In March 2013, Smith filed a federal habeas corpus petition, pursuant to 28 U.S.C. § 2254, in the Northern District of Alabama. *Smith*, 2017 WL 1150618. On July 21, 2017, the district court denied the petition. *Id*. at *73. On May 22, 2019, the United States Court of Appeals for the Eleventh Circuit affirmed the denial. *Smith*, 924 F.3d at 1347. The United States Supreme Court denied certiorari on July 2, 2020, concluding Smith's direct and collateral appeals. *Smith v. Dunn*, 141 S. Ct. 188 (2020) (mem.).

However, as his collateral challenge proceeded in federal court, Smith filed additional suits against Alabama state officials.[2] He filed this action on November 25, 2019, alleging that execution by lethal injection violates his Eighth Amendment right to be free from cruel and unusual punishment, and alleging separately that the Defendants violated his rights under the ADA. (Doc. 1). After a dismissal for failure to state a claim, (doc. 25), Smith filed the operative complaint on January 29, 2021, (doc. 36). In response to another Rule 12(b)(6) motion, (doc. 37), the Court dismissed Smith's Eighth Amendment claim but allowed his ADA claim to proceed, (doc. 46).

[2] Beyond the instant case, Smith filed: *Smith v. Dunn,* 2:20-cv-1026-RAH (M.D. Ala. Dec. 14, 2020) (asserting First Amendment and Religious Land Use and Institutionalized Person Act of 2000, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA"), claims regarding Smith's right to have a spiritual advisor present during his execution); *Smith v. Dunn*, 2:21-cv-2021-RAH (M.D. Ala. Feb. 2, 2021) (challenging safety procedures added to the execution protocol in response to the COVID-19 pandemic); and *Smith v. Dunn*, 03-CV-2021-900139.00 (Circuit Ct. Mont. Cnty. Ala. Feb. 4, 2021) (challenging COVID-19 safety precautions as violative of state law).

While this case proceeded, but upon completion of Smith's post-conviction appeals, the Alabama Attorney General moved the Alabama Supreme Court to set Smith's execution date. (Doc. 17). On December 1, 2020, the Alabama Supreme Court set his execution date for February 11, 2021. (*Id.*). On February 4, 2021, Smith moved this Court to stay that execution. (Doc. 42). On February 9, 2021, the Court declined to do so. (Doc. 49).

Smith appealed to the Eleventh Circuit which, on February 10, 2021, granted a stay until February 16, 2021. *Smith v. Comm'r, Ala. Dep't of Corrs.*, No. 21-10413-P (11th Cir. Feb. 10, 2021). Defendants asked the Supreme Court to vacate the Eleventh Circuit's stay, a request it granted on February 11, 2021. *Dunn v. Smith*, 141 S. Ct. 1290 (2021) (mem.). However, since the Supreme Court declined to vacate a stay in a separate § 1983 action, *Dunn v. Smith*, 141 S. Ct. 725 (2021) (mem.) (denying an application for vacatur of a stay of execution in Smith's RLUIPA case), Smith's death warrant expired at midnight on February 12, 2021, and he was not executed. (*See* Doc. 74 at 6).

B. Background

Smith's instant suit orbits Alabama's decision to implement nitrogen hypoxia as a method of execution. Lethal injection is Alabama's default execution method. ALA. CODE § 15-18-82.1(a). However, in March 2018, Alabama added nitrogen hypoxia as an alternative, effective June 1, 2018. *See* 2018 Ala. Laws Act 2018-353; ALA. CODE § 15-18-82.1(b). Alabama affords death-row inmates "one opportunity to elect that his or her death sentence be executed by . . . nitrogen hypoxia." ALA. CODE § 15-18-82.1(b). If an inmate's certificate of judgment from the Alabama Supreme Court affirming a sentence of death

was "issued before June 1, 2018, the election must be made and delivered to the warden [of the correctional facility in which the inmate is held] within 30 days of that date." *Id.* § 15-18-82.1(b)(2). Therefore, any inmate already on death row on June 1, 2018, had until the end of July 2, 2018, to opt into nitrogen hypoxia.[3] Any election of nitrogen hypoxia is "waived unless it is personally made by the person in writing" within that allotted opt-in window. *Id.* The statute does not specify the type or manner of writing required to elect, nor does it impose upon the ADOC any affirmative obligation to inform inmates of their opportunity to do so.

On June 26, 2018, attorneys from the Federal Defenders for the Middle District of Alabama (hereinafter "Federal Defenders") met with their death-row clients at Holman to discuss the opt-in. (Doc. 36, paras. 19–20). The Federal Defenders informed their clients of the change in the law, answered questions about nitrogen hypoxia, and distributed a form they prepared to provide any client who wanted to opt into nitrogen hypoxia with a convenient way to do so. (*Id.*).[4] This "Election Form" reads:

> ELECTION TO BE EXECUTED BY NITROGEN HYPOXIA
>
> Pursuant to Act No. 2018-353, if I am to be executed, I elect that it be by nitrogen hypoxia rather than by lethal injection.
>
> This election is not intended to affect the status of any challenge(s) (current or future) to my conviction(s) or sentence(s), nor waive my right

[3] Alabama law states that the "[t]ime within which any act is provided by law to be done must be computed by excluding the first day and including the last. However, if the last day is Sunday, . . . the last day also must be excluded, and the next succeeding secular or working day shall be counted as the last day within which the act may be done." ALA. CODE § 1-1-4. Excluding June 1, 2018, the day the statutory period began to run, thirty days is through July 1, 2018. July 1, 2018 was a Sunday, and so cannot be counted as the last day. Thus, under Alabama rules of construction, the statutory period to opt in for nitrogen hypoxia was from June 1, 2018, through July 2, 2018.

[4] Though Smith is currently represented by the Federal Defenders' office, he was not at that time. (Doc. 36, para. 20; Doc. 58, para. 20).

to challenge the constitutionality of any protocol adopted for carrying out execution by nitrogen hypoxia.

Dated this _____ day of June, 2018.

_____ _____

Name/Inmate Number Signature

(Doc. 44-9). After this meeting, several clients of the Federal Defenders opted into nitrogen hypoxia. (Doc. 44-7 at 3; Doc. 118-20).

Sometime after the Federal Defenders met with their clients on June 26—but before the July 2 opt-in deadline for those already sentenced—Holman's Warden, Cynthia Stewart, on direction from someone above her at the ADOC, had Correctional Captain Jeff Emberton ("Emberton") distribute a copy of the Federal Defenders' Election Form and an envelope to all death-row inmates. (Doc. 139 at 25–26, 46–49). As he handed out the form, Emberton told inmates that the law had changed and that if they wanted to elect a nitrogen hypoxia execution, they needed to fill out the form and seal it in the envelope provided. (*Id.* at 48–49; Doc. 118-28 at 24–30). He returned later to collect the envelopes. (Doc. 139 at 48–49). Almost fifty inmates, many not represented by the Federal Defenders, opted into nitrogen hypoxia during this period. (Doc. 44-7 at 3). Not every inmate who did so utilized the form provided. (Doc. 139 at 183).

C. Smith's ADA Claim

Smith did not opt into execution by nitrogen hypoxia. As the certificate of judgment on his conviction issued prior to June 1, 2018, (doc. 48-2 at 20) (sentencing Smith on July 17, 1992, to death by electrocution), he could opt into nitrogen hypoxia in writing any time

before or on July 2, 2018. ALA. CODE § 15-18-82.1(b). It is undisputed that Smith did not elect, nor attempt to elect, nitrogen hypoxia during this window.

Smith claims he was unable to do so because he could not understand the form Emberton distributed. (Doc. 36, paras. 35–37). Smith asserts that with an IQ between 64 and 72, (*id.*, para. 33), he "suffers from extreme deficits in encoding new information such that the information would need to be repeated and rehearsed many times for him to encode that same information on a level comparable to his peers." (*Id.*, para. 29). It is this deficit, he alleges, that prevented him from enjoying the form's benefits and left him unable to opt into nitrogen hypoxia during the statutory period. (*Id.*, paras. 35–37).

Because Smith asserts he could not receive the benefit of the form without a reasonable accommodation, he brings a claim against the Defendants under Title II of the ADA. (*Id.*, paras. 62–67). Title II bars discrimination by reason of disability from the "benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Title II supports claims under three theories of discrimination: intentional discrimination, disparate treatment, or a failure to make reasonable accommodations. *See Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1212 n.6 (11th Cir. 2008); *see also Friedson v. Shoar*, 479 F. Supp. 3d 1255, 1263 n.6 (M.D. Fla. 2020) (citing the same). To succeed on a Title II claim under a failure to reasonably accommodate theory, a plaintiff must demonstrate that (1) he is a qualified individual with a disability; (2) he lacked meaningful access to the benefits of a public entity's services, programs, or activities by reason of his disability; and (3) the public entity failed, despite a request, to provide a reasonable accommodation for

his disability. *Todd v. Carstarphen*, 236 F. Supp. 3d 1311, 1327–28 (N.D. Ga. 2017) (citing *Nadler v. Harvey*, 2007 WL 2404705, at *5 (11th Cir. Aug 24, 2007)).

Smith alleges that in handing out the form, the ADOC established a public program or service, the benefits of which he was excluded from due to his intellectual disability. (Doc. 36, paras. 29–38). Though it is undisputed that Smith can read, (doc. 139 at 248), he argues he could not understand the form and thus could not take advantage of its benefits. (Doc. 36, paras. 35–37). Instead of simply handing the form out and expecting its return by inmates who wished to elect nitrogen hypoxia, Smith alleges that the ADOC needed to provide him additional, reasonable accommodations to be certain he understood the form and its implications. (*Id.*, para. 36). He asserts that the ADOC could have read the form to him, given him more time to understand it, answered questions about it, or facilitated extended contact with his attorney to discuss it. (*Id.*; Doc. 139 at 192–93).

Smith seeks two kinds of relief. The first is declaratory: he asks the Court to "declar[e] Defendants to be in violation of the ADA for failing to develop and implement reasonable accommodations concerning the nitrogen hypoxia opt-in for disabled death-sentenced prisoners." (Doc. 36 at 14). The second is equitable: he asks the Court to order Defendants to implement a reasonable accommodation for the opt-in, and to enjoin the State from executing him "by lethal injection to permit him time to avail himself of the reasonable accommodations developed and implemented as to the nitrogen hypoxia opt-in." (*Id.* at 15).

On July 6, 2021, while discovery was ongoing in this case, the Alabama Attorney General once again moved the Alabama Supreme Court to set Smith's execution date.

(Doc. 70). Smith filed the pending Motion for Preliminary Injunction on July 14, 2021, asking the Court to enjoin Alabama, by and through its agents, Defendants Dunn and Raybon, from executing him by any method other than nitrogen hypoxia while his ADA claim remains pending. (Doc. 74).[5] The Court turns now to Smith's motion.

III. DISCUSSION

Smith is entitled to a preliminary injunction only if he demonstrates that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the threatened injury outweighs the harm the injunction would cause the other litigant; and (4) if issued, the injunction would not be adverse to the public interest. *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1271 (11th Cir. 2014). However, "when the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest," and so the third and fourth elements are the same. *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Nken v. Holder* 556 U.S. 418, 426 (2009)).

A preliminary injunction is an "extraordinary and drastic remedy not to be granted unless the movant clearly established the burden of persuasion for each prong of the analysis." *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1329 (11th Cir. 2014) (quotations and citation omitted). Smith, as the movant, must satisfy his burden on all four

[5] After Smith filed his motion, but before the Court ruled on it, the Alabama Supreme Court granted the State's renewed motion to set Smith's execution date. (Doc. 132). Smith is currently set for execution on October 21, 2021.

requirements "by a clear showing." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

a. *Substantial Likelihood of Success on the Merits*

The Court now turns to whether Smith demonstrates a "substantial likelihood of success on the merits" of his underlying ADA claim. *Carillon Imps., Ltd. v. Frank Pesce Int'l Grp. Ltd.*, 112 F.3d 1125, 1126 (11th Cir. 1997). Smith alleges that the Defendants violated Title II of the ADA by failing to reasonably accommodate his intellectual disability in the distribution and use of the Election Form. As a result, Smith alleges, he was unable to exercise his statutory rights and elect nitrogen hypoxia as his preferred method of execution. As noted above, under a reasonable accommodation theory, Smith must show that "(1) [he] is a qualified individual with a disability, (2) [he] is unable, because of [his] disability, to meaningfully access a public benefit to which [he] is entitled, and (3) the public entity failed, despite [his] request, to provide a reasonable accommodation for [his] disability." *Todd*, 236 F. Supp. 3d at 1327 ; *see also Nadler*, 2007 WL 2404705, at *5 ("If establishing discrimination by failure to make reasonable accommodation, a plaintiff must merely show that (1) he was disabled, (2) he was otherwise qualified, and (3) a reasonable accommodation was not provided.");[6] *Redding v. Nova Se. Univ., Inc.*, 165 F. Supp. 3d 1274, 1299 (S.D. Fla. 2016) (stating that the Rehabilitation Act—and thus the ADA—"requires only those accommodations that are

[6] While the Court recognizes that *Nadler v. Harvey* is an unpublished opinion, and thus non-precedential, the Court finds its analysis to be persuasive.

necessary to ameliorate a disability's effect of preventing meaningful access to the benefits of, or participation in, the program at issue").

Smith argues he has satisfied his burden and shown by clear evidence that he has a substantial likelihood to succeed on all three elements. The Court addresses each in turn.

i. ***Qualified Individual with a Disability***

To sustain an ADA claim, Smith must first demonstrate that he is a qualified individual with a disability cognizable under the statute. The ADA defines "disability" as a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Such activities include "speaking, breathing, learning, reading, concentrating, thinking, communication, and working." *Id.* § 12102(2)(A). The term "disability" is construed broadly. *Id.* § 12102(4)(A).

While Smith's disability is contested, the record indicates that he is indeed disabled under the broad construction of the ADA. Previous IQ testing found Smith's IQ to be between 64 and 72 (Doc. 44-3 at 1; Doc. 44-4 at 1). Though he can read "at an 8.6 grade level, [spell] at an 11.5 grade point level, and [do] math computations at a 6.3 grade level[,]" (Doc. 44-4 at 1), scores that demonstrate a relatively good degree of literacy, he nevertheless was found to "[have] difficulty encoding new information" and that "[material] would need to be repeated and rehearsed many times for him to get to a comparable level." (Doc. 44-5 at 20).

The Defendants note that Smith's own expert concluded that he was not intellectually disabled under the standard set out in *Atkins v. Virginia*, 536 U.S. 306 (2002), (doc. 88-16 at 15), and that many other experts did not reach a conclusion on the issue, (*id.*

at 15–16). Beyond that, the ADOC recommended that Smith enroll in GED courses, and he completed the eleventh grade. (Doc. 44-2 at 4). However, the ADOC also concedes that Smith was found to have difficulties in "the community use, health and safety, self-direction, social skills, and leisure skills categories," as well as "an indication that [Smith] has trouble learning new material." (Doc. 88-16 at 16).

The bar to be considered "disabled" per the ADA is not a high one. *See, e.g.*, *Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.3d 1264, 1268 & n.2 (11th Cir. 2014) (explaining that Congress instructed that "the establishment of coverage under the ADA should not be overly complex nor difficult" (quoting H.R. REP. NO. 110-730, at 9 (2008))). Given the broad construction the ADA demands in finding a "disability," Smith is likely to win on this point. Though he may not be mentally impaired enough to qualify as "mentally disabled," Smith's difficulty in encoding new information sufficiently affects his major life activities to place him under the ambit of the ADA.

However, to succeed on his ADA claim, Smith must also demonstrate that he is a qualified individual under the statute. The ADA defines a "qualified individual" as one who "with or without reasonable modifications to rules, policies or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

42 U.S.C. § 12131(2). To be a qualified individual, Smith must demonstrate that the prison was offering a program or service that he was eligible to participate in.[7]

The parties have long disagreed on whether a program or service was offered. Smith maintains that Warden Stewart established a "policy, protocol, and program whereby corrections staff were instructed to distribute the Election Forms . . . to all death row prisoners." (Doc. 36, para. 22). The Defendants "disagree that passing out the form constituted a public benefit under the ADA," (doc. 88-16 at 27), but rather that it was merely a "courtesy at the end of the election period," (*id.* at 28), one not directed by the statute.

The Defendants' framing of what constitutes a program or service under the ADA is too narrow. As courts across the country have long emphasized, "[t]he ADA, as a remedial statute, must be broadly construed to effectuate its purpose." *Soto v. City of Newark*, 72 F. Supp. 2d 489, 493 (D.N.J. 1999) (citations omitted); *see also Niece v. Fitzner*, 922 F. Supp. 1208, 1217 (E.D. Mich. 1996) (explaining that, "to give effect to the ADA's purpose of eliminating discrimination . . . most courts have given a broad reading to the term 'service'" (citations omitted)). Activities as diverse as planning municipal

[7] Prisons are "public entities," which the statute defines as "any department, agency, . . . or other instrumentality of a State . . . or local government." 42 U.S.C. § 12131(1)(B); *see also Yeskey*, 524 U.S. 206 (holding that state prisons are "public entit[ies]" under Title II of the ADA).

weddings,[8] facilitating prisoner access to phone calls,[9] or holding county quorum meetings[10] have all be found to be "services" under the ADA.

Department of Justice regulations, promulgated pursuant to the ADA, are similarly expansive.[11] The Department instructs that Title II and its own regulations apply "to all services, programs, and activities provided or made available by public entities." 28 C.F.R. § 35.102(a). At least one court interpreted this "broad language [as] intended to 'appl[y] to *anything a public entity* does.'" *Yeskey v. Penn. Dep't of Corrs.*, 118 F.3d 168, 171 (3d Cir. 1997) (second alteration in original) (emphasis added) (quotation and citations omitted).

The Court declines to construe the ADA as narrowly as the Defendants encourage. The record makes clear the non-trivial nature of the ADOC's undertaking. Emberton took over a hundred copies of this form, with over a hundred envelopes, and gave every inmate on death row one of each. (Doc. 139 at 48). He explained to each inmate that the law had changed and that they now had a new choice of execution method. (Doc. 74-1 at 122). He was directed to do this by Holman's warden, who herself was directed by someone above

[8] *Soto*, 72 F. Supp. 2d at 494.

[9] *Niece*, 922 F. Supp. at 1218–19.

[10] *Layton v. Elder*, 143 F.3d 469, 472–73 (8th Cir. 1998).

[11] Title II of the ADA directs the Attorney General to "promulgate regulations in an accessible format that implement [that Title]." 42 U.S.C. § 12134.

her in the chain of command. (Doc. 139 at 14).[12] The record clearly establishes that this was just the sort of "service" or "program" the ADA, in its broad sweep, includes.

However, even if the Court finds a "service" was offered, Smith must still demonstrate that he was eligible to participate. *See* 42 U.S.C. § 12131(2) (defining a qualified individual as one who "meets the essential eligibility requirements for the receipt of services"). The somewhat nebulous nature of how this service has been defined makes it difficult to determine its "essential eligibility requirements." The parties do not address what the eligibility requirements of the service were, or if Smith was eligible to participate under those requirements. They debate only how Smith could have *enjoyed the benefits* of the "service," not whether he was eligible to do so.

The record is more informative. Emberton handed out a form to *every inmate on death-row*. (Doc. 139 at 48). Nothing in the record indicates he first tried to discern if a particular inmate wanted to opt into nitrogen hypoxia and handed them a form only if they did. His only criterion, and thus the only apparent eligibility requirement for this service, is whether an inmate was on death-row at the time of the form's distribution. If they were, they got a form.

Smith, as a death-row inmate during the form's distribution, was clearly eligible to receive one. It is uncontested that he did so. If the ADOC's provided service is defined as

[12] Though the Defendants have long maintained that Warden Stewart "took it upon herself" (doc. 126-2 at 63:1–6) to direct the distribution of the forms, her testimony later established that position to be false. (Doc. 69). The Court addressed the Defendants' counsel's representations to the contrary in a separate order on September 24, 2021. (Doc. 147). Though he alludes to it in his brief, Smith does not establish that granting his requested injunction would be an appropriate sanction for that conduct.

the distribution of the nitrogen hypoxia Election Form to all death-row inmates, Smith was eligible to participate, and so is a qualified individual with a disability under the ADA.

ii. *Lack of Meaningful Access due to Disability*

Though the Court agrees Smith can likely show he is a qualified individual with a disability under the ADA, Smith must still demonstrate that he lacked meaningful access to the benefits of the service for which he was eligible. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) ("[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers."); *see also Mason v. Corr. Med. Servs., Inc.*, 559 F.3d 880, 888 (8th Cir. 2009) (explaining that to bring a valid Title II claim, a plaintiff "must specify a benefit to which he was denied meaningful access based on his disability").

"However, mere difficulty in accessing a benefit is not, by itself, a violation of the ADA." *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1216 (N.D. Ala. 2020). Indeed, "equal access is not the standard under the law." *Medina v. City of Cape Coral*, 72 F. Supp. 3d 1274, 1280 (M.D. Fla. 2014); *see also A.M. ex rel. J.M. v. NYC Dep't of Educ.*, 840 F. Supp. 2d 660, 680 (E.D.N.Y. 2012) ("'Meaningful access' . . . does not mean 'equal access' or preferential treatment.").

The Eleventh Circuit has held a claimant had meaningful access to a public service even if their disability made that access more difficult than it would otherwise be. For example, in *Bircoll v. Miami-Dade County*, the court held that a plaintiff described as "profoundly deaf" nevertheless had meaningful access to a public entity's activities even though interpreters were denied, and perfect understanding escaped him. 480 F.3d 1072,

1075, 1085–89 (11th Cir. 2007). After he was subjected to a traffic stop, the plaintiff was unable to effectively communicate with the officer attempting to administer field sobriety tests. *Id.* at 1076–78. Though he requested an interpreter, or that someone be called "to help [him] out with" communicating, neither request was honored. *Id.* at 1077. He brought a claim under Title II, alleging that he was denied "effective communication with the police" since no one accommodated his hearing impairment. *Id.* at 1085. The court held that the plaintiff did not lack meaningful access, noting that though communication was not "perfect," the plaintiff acknowledged that he "usually understands fifty percent of what is said" and "understood that he was being asked to perform field sobriety tests." *Id.* at 1087.

Similarly, in *Ganstine v. Secretary, Florida Department of Corrections*, the Circuit held that an inmate who used a wheelchair was not denied meaningful access to prison services. 502 F. App'x 905, 910 (11th Cir. 2012) (per curiam). Though the inmate claimed he "was unable to access certain areas of the prison," he nevertheless admitted that "inmate orderlies were available 'most of the time' to push his wheelchair wherever he needed to go." *Id.* (citation omitted). Though "most of the time" is clearly not all of the time, the court held that "a reasonable jury could not have concluded that the [prison] denied [the inmate] access because of his disability." *Id.*

By comparison, in *Shotz v. Cates*, two plaintiffs brought a Title II suit against a county, claiming that "the wheelchair ramps and bathrooms at the [county's] courthouses impeded their ability to attend trials." 256 F.3d 1077, 1080 (11th Cir. 2001). Even though the plaintiffs managed to attend a trial at the courthouse, the court nevertheless upheld their

claim, explaining that "[i]f the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is 'readily accessible.'" *Id.* (quoting 29 C.F.R. § 35.150(a)).

The line between meaningful access and lack thereof is a difficult line to draw, and the parties make no attempt to place Smith on either side. Indeed, the parties do not even concretely identify what the service's benefit was, a necessary step to any coherent discussion on whether Smith was denied that benefit. While there is general agreement that the form made an election easier, Smith also argues that the form offered access to ALA. CODE § 15-18-82.1 such that it represented Alabama's implementation of the statute, and that the form contained a reservation of rights beyond any offered by the statute. (Doc. 139 at 182, 184). He additionally argues that the form provided notice to inmates that they now had a new choice of method of execution. (*Id.* at 192).

Smith argues that he was denied meaningful access to the form because he did not understand it. As an initial matter, it is notable that Smith has yet to provide direct evidence, either through testimony or affidavit, that he was in fact unable to understand the form. Nothing in the record, contemporaneous or otherwise, speaks to how Smith understood the form, how he interacted with it, or what he gleaned from its text when it was distributed. Though Smith asserts in his complaint, and repeatedly argues through counsel, that he was unable to understand, and so could not utilize, the form, the record contains no testimonial evidence from Smith to support that assertion. Instead, Smith submitted an affidavit wherein he speaks only to his failure to pass the GED—he does not address his inability to understand the form. (Doc. 119-23). After over two years of

litigation, Smith still has not demonstrated to the Court what about the form he could not understand.

In that absence, the Court is forced to divine the record. Read generously, the record seems to support Smith's overall assertion that he did not understand the form in two ways—both heavy on inference and light on evidence. The first is simply that Smith did not utilize the form, and so the Court could infer he did not use it because he did not clearly understand it, and thus was denied, by reason of his disability, its benefits. The Court finds that inference unconvincing. Simply that Smith did not utilize the form equally supports the inference that he *chose* not to do so as it does that he could not to do so because he could not understand it. Indeed, not every inmate who received the form opted into nitrogen hypoxia—receiving and understanding the form did not inexorably lead to an inmate choosing nitrogen hypoxia. Without evidence tipping the scale in either direction, the Court is left to speculate as to what Smith understood and how that understanding affected his action or inaction. The Court declines to fill in those gaps.

However, the record provides sounder support for a different inference: that because the form has been evaluated to require a reading level beyond Smith's measured capabilities, he could not, in fact, understand it. (*See* Doc. 74 at 25–26). In support, Smith submits a report by Dr. Kathleen R. Fahey. (Doc. 145-1). Dr. Fahey evaluates the form to be "at the 11th grade level" and notes that it "far exceeds Mr. Smith's ability to read and comprehend it." (*Id.* at 6). She further evaluates Smith's literacy ability to fall between the second and fourth grades. (*Id.*). Other experts have evaluated Smith's reading ability to roughly correspond to an eighth-grade level. (Doc. 44-4 at 1). No matter his true ability,

both evaluations far below the eleventh-grade level Dr. Fahey finds the form required, or the college-senior level that Smith asserts in his complaint. (Doc. 36, para. 35). This evidence is largely unrebutted—the Defendants deny that the form's required reading level was so high, (doc. 58, para. 35), but produce no evidence of their own to indicate what reading level they believe the form to instead require.

However, despite those inferences, the record also contains support for the proposition that Smith did receive information about the form sufficient to satisfy the ADOC's obligation to provide him meaningful access. When the form was distributed, Emberton explained its purpose, and notified every inmate that because the law had changed, they now had a new choice of execution method. (Doc. 74-1 at 122). Even if Smith could not understand the form, Emberton's explanation appears to make clear what the form was for and how it was to be utilized.

Smith asserts that Emberton's explanation of the legal change and the form's purpose "falls far short of what an adequate ADA accommodation would be for a person with cognitive disabilities." (Doc. 74 at 15). Smith does not explain why or explain what Emberton should have informed inmates about their choice. Nor does Smith allege, or provide evidence to support, that he could not understand Emberton's explanation, or that he never heard it.

The crux of this assertion, though, is fundamentally misguided. It is immaterial whether Emberton's explanation was sufficient to endow inmates with an understanding of the form, their new choice, or the greater implications of execution by nitrogen hypoxia. What matters is how Smith's understanding and access to the program differs from those

qualified inmates who lacked disabilities. Without making clear what explanation he sought, Smith fails to identify anything in the record indicating that Emberton's explanation bestowed Smith's preferred level of understanding upon *any* inmate. Smith does not demonstrate that the ADOC explained the implications, be they legal[13] or factual,[14] of the form or this choice to anyone—indeed, the statute imposed upon it no obligation to do so. Neither the form's text nor Emberton's explanation defines nitrogen hypoxia or provides any information on what is required by ALA. CODE § 15-18-82.1. Emberton explained only that the law had changed and that inmates now had a new choice of execution method, and Smith produces no evidence that he did not receive, or did not understand, that information. While it is true that Emberton testified he could not provide *further* information about the form beyond his initial explanation, (doc. 74-1 at 119–20), he could not do so to anyone. Smith was not entitled to a more comprehensive explanation than his fellow inmates received. *See A.M. ex rel. J.M.*, 840 F. Supp. 2d at 680 ("'Meaningful access' . . . does not mean . . . preferential treatment.").

[13] If Smith's contention is that Emberton should have explained the legal implications of the form and the election, Smith has not demonstrated that was possible. Emberton is not a lawyer—he cannot provide legal explanations or advice, especially to inmates already represented by counsel. Indeed, Smith, like many death-row inmates, was represented by counsel during the statutory period. (*See* Doc. 88-16 at 8–9). Smith not only could, but did, contact his attorney during the opt-in period. (Doc. 88-23). During the month of June, Smith spoke to his attorney for a total time of more than twenty-four minutes. (*Id.*). From June 26 to June 28 alone, Smith spoke to his attorney for 516 seconds across three calls. (*Id.*). The Court is unaware of what Smith and his attorney discussed during those calls, but the fact of the communications evidences that Smith had the opportunity to discuss the form and the opt-in with legal counsel.

[14] It is not clear anyone could explain to inmates the factual implications of this choice to inmates without prognostication. The State of Alabama had not yet finalized a nitrogen hypoxia protocol, and the future implications of an inmate opting for that method—be they timing, protocol, procedure, or whatever else—amounted to little more than speculation.

The Court now turns to Smith's more general contention that the form was the ADOC's official implementation of the statute, and so its benefit was merely the choice of execution method. Even if the Court assumes without finding that Smith is correct, and that this form's benefit *was* to provide inmates with a choice of execution method, Smith produces no evidence that he lacked meaningful access to that benefit. Smith's statutory right to elect nitrogen hypoxia vested on June 1, 2018, the day ALA. CODE § 15-18-82.1 became effective. That right continued, unimpeded, until July 2, 2018, the day the statutory period expired. During that time, Smith held the power to choose his execution method by submitting to the warden any writing he wished, a fact conceded by his counsel. (Doc. 139 at 183–84) (agreeing that something like a handwritten opt-in "would be possible under the statute"). That this form was distributed during the final few days of that period did not impede or supplant Smith's contemporaneous right to elect under the statute during the entire month of June. Nothing in the record indicates that Smith believed that this form was the only way to effectuate his opt-in, nor is there any evidence or allegation that the form served as a barrier to Smith's concomitant statutory right to opt into nitrogen hypoxia by any writing. He had, like every other inmate on death row, "any number of other ways to" elect nitrogen hypoxia and Smith has not shown that he "has meaningfully explored these options or that they [were] unavailable to [him]." *Todd*, 236 F. Supp. 3d at 1330.

Even if Smith could not understand the form, its benefit—a new choice of execution method—remained open to him. Smith's counsel admits that "[t]here are a couple of inmates whose attorneys . . . submitted a different form." (Doc. 139 at 183). Indeed, Smith could have simply flipped the form over and written "I elect nitrogen hypoxia" across the

back. He could have used any sheet of paper and writing utensil available to him. This form did not create Smith's right to choose nitrogen hypoxia, and that Smith did not use this form did not extinguish or even impede his statutory right to do so.

The Court finds that Smith fails to demonstrate, on this record, that he is substantially likely to succeed on this prong. That Smith produces little direct evidence that shows he was held from the form's benefits—no matter what they were—is a large gap in his case. Though Smith has had months to submit an affidavit or other explanation of what he understood and when, he has yet to do so. Indeed, when the parties jointly requested that this Court delay Smith's deposition from September 2, 2021, to October 11, 2021, (doc. 121), the Court ordered a status conference to discuss whether to reschedule the hearing on the motion for preliminary injunction until after Smith's deposition, (doc. 122). At that conference, both parties responded that there was no reason for delay, that Smith's testimony was not necessary, and that the Court had all the evidence before it needed to rule on the motion for preliminary injunction. (Doc. 127). Absent direct testimony from Smith himself, the Court is left instead with the allegations in the complaint, inference, and circumstance. It finds none of these sufficient to satisfy Smith's burden.

iii. *Lack of Provided Reasonable Accommodation*

Though the Court finds that Smith does not show he lacked meaningful access to the ADOC's service, even if he did, Smith must still establish that he was denied a reasonable accommodation. If Smith's disability prevented him from receiving the form's benefit, the ADOC is required to "provide reasonable accommodations to ensure that [he]

is permitted access to the same benefits and services as others." *Arenas v. Ga. Dep't of Corr.*, 2020 WL 1849362, at *11 (S.D. Ga. Apr. 13, 2020). However, no duty to provide such accommodations is triggered before a claimant makes a specific demand for one. *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999). The claimant himself must explain what it is he requires—public entities are not required to "guess at what accommodation they should provide." *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999); *see also Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995) (noting the "ADA does not require clairvoyance"). It is undisputed that Smith did not make any such request of the ADOC.[15] Absent a request, Smith can only succeed if his disability, limitations, and need for an accommodation were "open, obvious, and apparent." *Arenas*, 2020 WL 1849362, at *12; *see also Nattiel v. Fla. Dep't of Corr.*, 2017 WL 5774143, at *1 (N.D. Fla. Nov. 28, 2017) (explaining a plaintiff does not have to request an accommodation if "the defendant otherwise had knowledge of an individual's disability and needs but took no action").

Smith argues that the Defendants could have accommodated his intellectual disabilities through "use of simple language, a comprehension check, additional time, . . . assistive technology," (doc. 36, para. 36), or a "secure, lengthy legal phone call" with his attorney, (doc. 139 at 193). However, since he never requested any accommodation, his need for his suggested accommodations must have been obvious.

[15] Smith, in his brief, does say that the Defendants violated the ADA by "denying his request for an accommodation." (Doc. 74 at 5). This appears to be a mistake, as later Smith argues not that he made such a request, but rather that the need for one was obvious and a request for one futile. (*Id.* at 21–26). As the Defendants rightfully note, there "is nothing in the record to suggest that [Smith] ever made a request for" an accommodation during the relevant statutory period. (Doc. 88-16 at 31).

Smith does not adequately demonstrate that it was. Contrary to any claim that his mental disability and his need for an accommodation were "obvious," the record abounds with evidence that Smith spent his time reading, writing, or in the prison library, and with examples of disclosures and forms Smith knowingly signed.

Smith builds his argument on two key assertions. The first is that the ADOC was aware that his IQ was somewhere in the range of 65–75, and so knew him to be in the "borderline range between mild [intellectual disability] and low average intelligence." (Doc. 74 at 22) (quoting Doc. 48-2 at 32).[16] While this may be true, Smith does not explain how an inability to read or understand this form necessarily follows from having an IQ in that range. Other testing instead demonstrated that he could "read[] at an 8.6 grade level, spell[] at an 11.5 grade point level, and do[] math computations at a 6.3 grade level." (Doc. 44-4 at 1).[17] While Smith argues that the form required "nearly a four year college degree to fully understand," (doc. 74 at 26 n. 89), it does not appear *obvious* that he could not do so without evidence that the Defendants were aware of the form's difficulty.

Smith's second key assertion is that the ADOC was on notice that he was disabled from the day he arrived. (Doc. 74 at 21–22). The ADOC noted on Smith's intake report that "[p]ersonally, I feel he didn't understand why the interview was being held. Although I did explain." (Doc. 44-1). However, Smith fails to explain how this note on his twenty-

[16] The Court here uses the term "intellectual disability" because "as the Supreme Court stated in *Hall v. Florida*, both law and medicine have moved away from the terms 'mentally retarded' and 'mental retardation.'" *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1303 n.1 (11th Cir. 2015) (citing *Hall v. Florida*, 572 U.S. 701, 704–05 (2014)).

[17] These results were presented by the State in Smith's prior litigation. *See Smith*, 112 So. 3d at 1117–18.

nine year old intake form is sufficient to put the ADOC on notice that he required any accommodation for this Election Form.

The record instead reveals that for years, the ADOC evaluated Smith's mental functioning, memory, speech, and concentration as "normal," and his demeanor and behavior as "rational." (*See*, for example, Docs. 47-3 at 17–20; 47-1 at 22). On forms to identify special needs, the ADOC never marked Smith as "Developmentally Disabled" or as having "Special Mental Health Needs." (*See* Docs. 47-25 at 2–3, 7, 11, 14, 17; 47-30 at 18, 23). Spaces to indicate required special accommodations on multiple forms were repeatedly left blank. (*See* Doc. 47-30 at 18, 23). Smith himself appears to have answered in the negative when asked if he had "ever been told [he had] a mental disorder, learning disability, physical or a developmental disability." (Doc. 47-4 at 40).

Additionally, at the Court's August 27, 2021 evidentiary hearing on this motion, testimony indicated that ADOC employees perceived no deficiency in Smith's ability to understand written material. Warden Stewart, Emberton, and Defendant Raybon all testified that they had no indication that Smith struggled to read things, and that he had never requested help in understanding a document. (*See* Doc. 139 at 26–27, 56–57, 144–45, 147). Emberton went further, explaining that Smith "always seemed very intelligent to [him]," and could "understand, [and] comprehend a lot." (*Id.* at 64). Emberton also noted that he had seen "[m]agazines, mail," and the like in Smith's cell, which indicated to him that Smith could read and understand written materials. (*Id.* at 57).

The record also makes clear Smith's history of understanding and completing forms and other paperwork. During his time at Holman, Smith has filled out dozens of forms,

many containing legal jargon[18] and complicated medical terminology.[19] Many more indicated that he read and understood what it was he signed. (*See* Doc. 47-37 at 11 ("I have read and understand all the information above"), 15 ("My signature below signifies that I have read and understand all of the above"); Doc. 47-29 at 14 ("I have read this form and certify that I understand its contents"), 37 ("I have read the information sheet"), 39 ("I have read the above information")). Nothing in the record indicates that he ever required help reading or understanding the forms, and so nothing indicates that it was obvious to the Defendants that Smith would require an accommodation to read the Election Form.

The record also clearly indicates that Smith can write, making it far from obvious that he needed an accommodation to elect nitrogen hypoxia in writing. Smith has included his own annotations on forms. (Docs. 47-25 at 52 (writing on a release of responsibility form that "all [he] wanted was to see the dentist"); 47-1 at 68 (writing on an inmate property sheet that he wished someone would "get the TV [he] donated to Van Felt," as it was "the last day")). He appears to have drafted at least three handwritten letters to the warden, complete with excellent spelling and penmanship. (Doc. 47-2 at 10–12). Additionally, as noted above, he was found to spell at an "11.5 grade point level." (Doc. 44-4 at 1). Without

[18] *See, e.g.*, Doc. 47-2 at 99 ("I further understand my failure to provide these documents or falsification on any part of the documentation is grounds for denial of marriage and sanctions in accordance with state laws and AR 403, *Procedures for Violations and Infractions*"), 14 ("the undersigned does hereby release and does save harmless . . . for libel, slander, invasion of the right of privacy").

[19] *See, e.g.*, Doc. 47-37 at 14 ("I am aware that dental procedures and oral surgery carry some risks including . . . rot tips placed into the sinuses, oropharynx, mandibular canal or other fascial spaces"). Smith also appears to correctly spell "benzoyl peroxide" on at least one occasion. (Doc. 47-30 at 47). The scan of that document is relatively poor—Plaintiff *might* have written "perozide," but either word appears comparably difficult to "nitrogen" or "hypoxia." On another form he wrote "benzoil peroxzide." (Doc. 47-25 at 35).

evidence that he was aided in drafting these forms or letters, Smith fails to show it was obvious to the Defendants that he could not elect nitrogen hypoxia in writing as required by ALA. CODE § 15-18-82.1.

Smith also argues that, in essence, none of this matters: the ADOC simply does not provide accommodations for mental disabilities. (Doc. 74 at 24–26). According to Smith, since the ADOC does not accommodate mental disabilities, it did not and would not know to look for them—as such, evidence that a need was "obvious" is impossible to find.[20] Smith asserts that there "would be no record of a prior accommodation made for [his] cognitive deficiencies because the ADOC provides none." (*Id.* at 24). Smith notes that the Defendants (or their agents) testified that "if they were made aware of [his] learning disability, he would have been instructed to find a fellow inmate to assist him with understanding or comprehending written information." (*Id.* at 25) (footnote omitted). That might very well be true. But in making this argument, however, Smith misconstrues what he needs to show. Regardless of whether the ADOC would, in fact, accommodate his disability does not mean Smith satisfies his burden of demonstrating that he obviously needed an accommodation for his disability. Put a different way, even if the ADOC *had* an extensive program of mental accommodations, this record does not make obvious that Smith needed an accommodation with respect to the Election Form.

[20] This contradicts the argument Smith makes in his reply brief that since the ADOC *did* accommodate him by reading him his death warrant, it knew he required similar accommodations to read the nitrogen hypoxia form. (Doc. 99 at 6–8). Smith does not explain how the ADOC could both offer accommodations and simultaneously not do so. That said, the record contains no evidence to show that Smith's death warrant was read to him as an accommodation of any intellectual inability to understand it.

Smith also gestures to, but does not explicitly make, the argument that he did not need to request an accommodation because it would have been futile to do so. (*See id.* at 24–26; Doc. 139 at 196). It is not clear that the futile gesture doctrine applies to claims under Title II of the ADA in the same way it does to claims under other Titles. Smith has not directed the Court to a case in which a court finds that a plaintiff satisfies his obligations under this third ADA factor in a Title II claim if it was futile to make a request to the public entity providing the program or service. Additionally, the enforcement section of Title II does not contain the same language as the enforcement section of Title III.[21]

Even if a futility argument does apply to this claim, it is not clear that it applies to this *claimant*. Other sections of the ADA make clear that when the futile gesture doctrine applies, a plaintiff must have "*actual notice*" that the provider of the public accommodation did not intend to comply with the ADA. 42 U.S.C. § 12188 (emphasis added). This requirement is consistent across the caselaw. *See Resnick v. Magical Cruise Co.*, 148 F. Supp. 2d 1298, 1302 (M.D. Fla. 2001) (holding that plaintiffs could not rely on the futile gesture doctrine since they lacked "'actual notice' at the time suit was filed that [the defendant] did not intend to comply with the statute"). Such notice can be acquired by "having 'encountered discrimination or having learned of the alleged violations through expert findings or personal observation.'" *Schwarz v. Vill. Ctr. Cmty. Dev. Dist.*, 2013 WL 945402 (M.D. Fla. Mar. 12, 2013) (quoting *Resnick*, 148 F. Supp. 2d at 1302).

[21] Section 12188 says that "[n]othing in this section shall require a person with a disability to *engage in a futile gesture* if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. § 12188 (emphasis added). The comparable section for Title II regarding public services and benefits lacks such language. *Id.* § 12133.

Smith did neither. Since no inmate appears to have requested an accommodation for a mental disability, they have not encountered explicit discrimination on that basis. (*See* Doc. 74 at 25–26). The record also lacks indication that Mr. Smith saw any alleged violations or was informed about them by expert findings at the time the suit began. Indeed, his brief makes clear that he learned about the lack of mental disability accommodations at Holman only during discovery for this litigation, information he includes in his brief under the heading, "*b. New facts*." (*Id.* at 24). Facts newly learned in discovery are not known at the onset of litigation, and so Smith lacked actual knowledge of the ADOC's alleged intent to not comply with the ADA with respect to mental disabilities. Smith, then, likely cannot show that even if the futile gesture doctrine applies to claims under Title II of the ADA, he qualifies for its application here.

All told, Smith is unlikely to successfully demonstrate that his disability and need for an accommodation were open and obvious, or, in the alternative, that he did not need to request an accommodation because doing so was futile. He thus fails to demonstrate a substantial likelihood of success on the merits of his ADA claim.

"Controlling precedent is clear that injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005) (per curiam). However, the Court finds that Smith is not entitled to a preliminary injunction "for still another reason: the equities are not in his favor." *Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1296 (11th Cir. 2016).

b. *Equitable Factors*

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). In determining whether to grant this extraordinary remedy, the Court must "assess[] the harm to the opposing party and weigh[] the public interest." *Nken*, 556 U.S. at 435. These separate factors "merge when the [State] is the opposing party." *Id.* "[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Smith argues that any delay in his execution will not harm the State. The State has taken years to implement a nitrogen hypoxia protocol, so adding Smith to the pool of inmates already waiting to be executed by nitrogen hypoxia is not an additional harm. (Doc. 74 at 27–28). By July 2022, either his ADA claim will be resolved at trial, or he will be executed by nitrogen hypoxia. (*Id.* at 28). Smith additionally argues that the public interest would be harmed if the State were allowed to moot his lawsuit by executing him. Smith contends that because the parties proposed, and the Court ordered, a trial schedule that runs through June 13, 2022, the Court should allow the litigation to continue through that date. He suggests it would be unfair for the State to execute him before discovery is completed, before dispositive motions are filed, or before a trial on the merits, and he implores the Court to "not countenance Defendants' attempt to usurp [its] review and jurisdiction." (*Id.* at 6). He additionally argues that the "public has an interest in persons aggrieved by ADA violations receiving judicial review." (*Id.* at 29). By contrast, the Defendants argue that a preliminary injunction will harm the public interest because "[b]oth the State and the

victims of crime have an important interest in the timely enforcement of a sentence." (Doc. 88-16 at 38 (quoting *Hill*, 547 U.S. at 584)). The Defendants point out that Smith has been on death row since 1992 and that his execution has already been delayed.

The Court begins by addressing Smith's argument that the State is attempting to unfairly moot his lawsuit by executing him while the case is pending. On February 25, 2021, the Court ordered the parties to meet and confer and file a Rule 26(f) report of parties' planning meeting. (Doc. 59). The Order explained that the undersigned's trial terms "as well as all other dates" used in the Court's Uniform Scheduling Order ("USO") are found on the Court's website. (*Id.* at 2). On March 5, 2021, before the State moved to set Smith's execution date, the parties submitted their Rule 26(f) report, in which they agreed to a trial date on or after June 13, 2022. (Doc. 61 at 4). However, the parties' proposed deadlines for completing discovery and filing dispositive motions did not match the Court's USO deadlines tied to their proposed trial date, and they did not explain why they needed different deadlines. Based on their proposed trial date, the Court entered a USO setting forth deadlines for discovery, filing dispositive motions, and other matters. (Doc. 62). The USO set a November 15, 2021 discovery deadline and a December 15, 2021 dispositive motions deadline. (*Id.* at 2). It also provided a 14-day window in which a party could object to the deadlines. (*Id.* at 5). Neither party filed any objections. The USO also outlined procedures for requesting extensions of deadlines. (*Id.* at 4). Additionally, Federal Rule of Civil Procedure 16(b) allows a scheduling order to be modified "for good cause and with the judge's consent."

On July 6, 2021, the State of Alabama moved to set Smith's execution date. (Doc. 70-1). His execution is scheduled for October 21, 2021, well before the June 13, 2022 trial date. True, the Defendants acquiesced to a discovery and litigation timeline that, by moving to execute Smith, they appear to be disregarding. But the parties' Rule 26(f) report contained no stipulation that the State would not move to set Smith's execution while this case is pending. Moreover, Smith points to nothing in the record indicating that the Defendants informally agreed or even represented to him that the State would not move to set his execution until his case is over. He presents no persuasive reason why the State would not be able to take concurrent action to set his execution while this case is pending. Additionally, after the State moved to set his execution, Smith could have moved this Court to modify the scheduling order, expedite discovery, and set an earlier trial date, pursuant to the USO and Rule 16(b). He did not. Instead, Smith requested, jointly with the Defendants, that the Court delay his deposition from September 2, 2021, to October 11, 2021. (Doc. 121).

On balance, the equities favor the Defendants. Smith was sentenced to death in 1992, nearly thirty years ago. An injunction that further delays Smith's execution "impose[s] a cost on the State and the family and friends of the murder victim." *Bowles v. DeSantis*, 934 F.3d 1230, 1248 (11th Cir. 2019). While Smith is right that the "public has an interest in persons aggrieved by ADA violations receiving judicial review," (doc. 74 at 29), he has not demonstrated that such an interest outweighs the public interest "in the timely enforcement of a sentence," *see Hill*, 547 U.S. at 584. And as noted above, Smith could have acted to expedite and complete this litigation before his execution, but he did

not. His inaction with respect to the litigation timeline further undermines his entitlement to the "extraordinary remedy" of a preliminary injunction in order to fully litigate his case. *See Winter*, 555 U.S. at 24; *see also Jones*, 811 F.3d at 1291.

Because Smith has not shown a substantial likelihood of success on the merits of his ADA claim, and because the equities weigh against him, Smith has not met his burden of establishing his right to a preliminary injunction.

Accordingly, it is

ORDERED that the Plaintiff's motion for preliminary injunction is DENIED.

DONE this 17th day of October, 2021.

/s/ Emily C. Marks
EMILY C. MARKS
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

WILLIE B. SMITH, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 2:19-cv-927-ECM
	)	[WO]
JEFFERSON S. DUNN, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Now pending before the Court is Plaintiff Willie B. Smith, III's ("Plaintiff" or "Smith") motion for partial summary judgment. (Doc. 140). Upon consideration of the briefs, evidence, and applicable law, and for the reasons that follow, the Plaintiff's motion for summary judgment is due to be DENIED.

II. JURISDICTION

The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. Personal jurisdiction and venue are uncontested.

III. LEGAL STANDARD

"Summary judgment is proper if the evidence shows 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1311 (11th Cir. 2018) (quoting Fed. R. Civ.

P. 56(a)). "[A] court generally must 'view all evidence and make all reasonable inferences in favor of the party opposing summary judgment.'" *Fla. Int'l Univ. Bd. of Trs. v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252 (11th Cir. 2016) (citation omitted). However, "conclusory allegations without specific supporting facts have no probative value." *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 924–25 (11th Cir. 2018) (citation omitted). If the record, taken as a whole, "could not lead a rational trier of fact to find for the non-moving party," then there is no genuine dispute as to any material fact. *Hornsby-Culpepper*, 906 F.3d at 1311 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The movant bears the initial burden of demonstrating that there is no genuine dispute as to any material fact, and the movant must identify the portions of the record which support this proposition. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); Fed. R. Civ. P. 56(c).

IV. FACTS

Smith is a death-row inmate in the custody of the Alabama Department of Corrections ("ADOC") at Holman Correctional Facility ("Holman"). In his amended complaint (the operative complaint), the Plaintiff brings a claim pursuant to the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*. ("ADA"),[1] against Defendants Jefferson S. Dunn, in his official capacity as the Commissioner of the ADOC ("Commissioner Dunn"), and Terry Raybon, in his official capacity as the Warden of

[1] Title II of the ADA states in relevant part: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Holman ("Warden Raybon").[2] (Doc. 36). The Plaintiff's ADA claim centers on ADOC officials' provision to him of an "Election Form" by which the Plaintiff could elect nitrogen hypoxia as his method of execution in place of lethal injection, Alabama's default method of execution. The Plaintiff claims that the Defendants violated his rights under the ADA by failing to provide him a reasonable accommodation for his cognitive deficiencies with respect to the Election Form, which he says prevented him from making a timely election.

In their answer (doc. 58), the Defendants admitted certain paragraphs of the Plaintiff's amended complaint in their entirety (*see, e.g.*, *id.* at 3, paras. 13–14); denied certain paragraphs in their entirety (*see, e.g.*, *id.* at 5, paras. 29, 31); and admitted only specific portions of other paragraphs, setting forth the part that was admitted (*see, e.g.*, *id.* at 4, para. 19). Pertinent to this motion are the Defendant's responses to the Plaintiff's allegations in Paragraphs 33–36 of the amended complaint. The relevant paragraphs from the amended complaint and the corresponding responses from the answer are as follows:

> PARAGRAPH 33: Mr. Smith has been in the custody of the Alabama Department of Corrections since 1992. At all times relevant, the State of Alabama was aware and acknowledged Mr. Smith's WAIS III full scale IQ score was 72. Likewise, the State was aware that Mr. Smith's Stanford-Binet 5th ed. full scale IQ score was 64. Mr. Smith's need for an accommodation was obvious.[3]
>
> ANSWER: Admitted only to the extent that Smith has been in the ADOC's custody since 1992 and the Smith's state postconviction *Atkins* testing rendered scores of 72 (WAIS-III) and 64 (SB-5). Smith's expert,

[2] The Plaintiff also brought an Eighth Amendment claim pursuant to 42 U.S.C. § 1983 challenging his method of execution. However, this Court previously dismissed the Eighth Amendment claim with prejudice. (Doc. 46 at 23).

[3] (Doc. 36 at 7, para. 33).

who testified as to the latter score, also testified that Smith is not intellectually disabled.[4]

PARAGRAPH 34: Intake records from 1992 demonstrate that ADOC was on notice that Mr. Smith struggled with comprehension and understanding. The intake officer recorded that even after explaining the purpose and subjects of the intake interview that he did not believe Mr. Smith understood.[5]

ANSWER: Admitted only to the extent that two documents from Smith's 1992 intake indicate that he might not have fully understood the purpose of the intake evaluation.[6]

PARAGRAPH 35: Neuropsychological testing place [sic] Mr. Smith in the moderately to severely impaired ranges in the ability to process and recall new information. Further, the Election Form handed out by the prison scores a 15.6 grade level on the Flesch-Kincaid Readability Scale. This level is that of an academic paper, and considered college level reading. At best, Mr. Smith reads at an 8th grade level. With his borderline IQ, general cognitive limitations, and limited reading abilities, it is clear that Mr. Smith was unlikely to understand the Election Form without assistance.[7]

ANSWER: Admitted only to the extent that Smith was administered neuropsychological tests during his state postconviction proceedings.[8]

PARAGRAPH 36: As a qualified individual without any reasonable accommodation made for his well-known disability, Mr. Smith did not submit an Election Form electing to be executed by nitrogen hypoxia within the 30-day window provided under Senate Bill 272. Such reasonable accommodations may have included, but are not limited to, use of simple language, a comprehension check, additional time, or assistive technology.[9]

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[4] (Doc. 58 at 6, para. 33).

[5] (Doc. 36 at 7, para. 34).

[6] (Doc. 58 at 6, para. 34).

[7] (Doc. 36 at 7, para. 35).

[8] (Doc. 58 at 6, para. 35).

[9] (Doc. 36 at 7–8, para. 36).

> ANSWER: Admitted only to the extent that Smith did not make a timely hypoxia election.[10]

After responding to the amended complaint paragraph by paragraph, the Defendants stated, under the heading "DEFENSES," that "Defendants deny any claim or allegation of Smith's amended complaint that is not expressly admitted above." (Doc. 58 at 9, para. B).

V. DISCUSSION

The Plaintiff's motion for partial summary judgment rests on a narrow legal argument: that the Defendants' answer fails to comply with Federal Rule of Civil Procedure 8(b)(4) because it fails to specifically deny certain allegations in Paragraphs 33–36 of the amended complaint, and that the failure to specifically deny certain allegations means that the Defendants have admitted them pursuant to Rule 8(b)(6). According to the Plaintiff, the Defendants admitted the following material facts: (1) the Plaintiff's need for an accommodation was obvious; (2) the ADOC knew about his need; (3) it was unlikely that the Plaintiff would have understood the Election Form without assistance; and (4) reasonable accommodations for the Plaintiff's disability include but are not limited to "use of simple language, a comprehension check, additional time, or assistive technology." The Plaintiff contends that because the Defendants "admitted" these material facts, he is entitled to summary judgment on the final prong of his ADA claim.

To prevail on a claim under Title II of the ADA, a plaintiff must demonstrate:

> (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by

[10] (Doc. 58 at 6, para. 36).

> the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability.

J.S., III by and through J.S. Jr. v. Houston Cnty. Bd. of Ed., 877 F.3d 979, 985 (11th Cir. 2017) (per curiam) (citation omitted); *see also* 42 U.S.C. § 12132. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Generally, "the duty to provide a reasonable accommodation is not triggered unless a specific demand for an accommodation has been made." *Gaston v. Bellingrath Gardens & Home, Inc.*, 157 F.3d 1361, 1363 (11th Cir. 1999) (per curiam). However, a specific demand for an accommodation "may be unnecessary where the need for an accommodation is obvious." *Arenas v. Ga. Dep't of Corr.*, 2020 WL 1849362, at *12 (S.D. Ga. Apr. 13, 2020); *see also Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197–98 (10th Cir. 2007) ("[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation.").

Federal Rule of Civil Procedure 8 provides in relevant part:

> A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

Fed. R. Civ. P. 8(b)(3). Additionally, the Rule provides that "[a] party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest." Fed. R. Civ. P. 8(b)(4). "An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied." Fed. R. Civ. P. 8(b)(6). As a "general rule," a party "is bound by the admissions in his pleadings." *Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) (affirming grant of summary judgment that bound non-moving party to admissions made in pleadings). Admissions in pleadings are judicially admitted facts that are "established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1178 (11th Cir. 2009) (quoting *Hill v. Fed. Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941)).

The Plaintiff's argument fails to appreciate the effect of page 9 of the Defendants' answer, in which the Defendants "den[ied] any claim or allegation of Smith's amended complaint that [was] not expressly admitted above." (Doc. 58 at 9, para. B). Citing the first sentence of Rule 8(b)(3), the Plaintiff contends that the Defendants' "general denial" was "insufficient" because they did not intend to deny all the allegations in the amended complaint. (Doc. 140 at 4 n.11). This is partially correct, since the Defendants did *not* deny all the allegations in the amended complaint. Instead, the Defendants admitted certain allegations and then "generally den[ied] all [allegations] except those specifically admitted" as authorized by the second sentence of Rule 8(b)(3). The Defendants' denial

on page 9 of their answer is consistent with Rule 8(b)(3) and thus is sufficient to deny the remaining allegations in Paragraphs 33–36 of the amended complaint.

The Plaintiff's sole argument to escape the reach of Rule 8(b)(3)'s second sentence is that in *Grayson v. Warden, Commissioner, Alabama DOC*, 869 F.3d 1204, 1217 n.31 (11th Cir. 2017), the Eleventh Circuit "clearly found" that this type of general denial "was improper and should not be raised as a defense." (Doc. 143 at 3 & n.8). The Plaintiff misunderstands *Grayson*. In *Grayson*, the Eleventh Circuit, in discussing the procedural history of the case, noted that the defendants raised eighteen affirmative defenses in their answer. 869 F.3d at 1217. The court listed all the affirmative defenses in Paragraphs A–R of the answer in a footnote. *Id.* at n.31. Paragraph R stated: "Defendants deny any claim or allegation of Frazier's amended complaint that is not expressly admitted," *id.*, similar to the "general denial" the Defendants used here. The Eleventh Circuit opined that certain defenses, including Paragraph R, "were simply denials that should not have been raised as defenses." *Id.* But *Grayson* did not hold that such denials are ineffective when labeled as "defenses." When read in context, it appears to the Court that the Eleventh Circuit's remarks about "denials that should not have been raised as defenses" were more about how to properly plead an affirmative defense than how to properly deny a complaint's allegations.

To be sure, it would have been better if the Defendants had not labeled their general denial as a "defense" in their answer. But nothing in the Federal Rules or in the case law indicates that this improper labeling renders the denial ineffective. Such a result would

elevate form over substance. And "litigation is not meant to be a game of 'gotcha.'" *Trustgard Ins. Co. v. Daniels*, 2020 WL 762541, at *3 (S.D. Ga. Feb. 14, 2020).

Because the Defendants did not admit the at-issue allegations in the Plaintiff's amended complaint, the Plaintiff has failed to meet his initial burden under Rule 56(c) to show that there are no genuine disputes of material fact regarding the final prong of his ADA claim. Thus, the Plaintiff is not entitled to summary judgment.

VI. CONCLUSION

For the reasons stated, it is hereby ORDERED that Smith's motion for partial summary judgment (doc. 140) is DENIED.

DONE this 17th day of October, 2021.

/s/ Emily C. Marks
EMILY C. MARKS
CHIEF UNITED STATES DISTRICT JUDGE

Appendix E

AMERICANS WITH DISABILITIES ACT OF 1990, AS AMENDED

Following is the current text of the Americans with Disabilities Act of 1990 (ADA), including changes made by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. The ADA was originally enacted in public law format and later rearranged and published in the United States Code. The United States Code is divided into titles and chapters that classify laws according to their subject matter. Titles I, II, III, and V of the original law are codified in Title 42, chapter 126, of the United States Code beginning at section 12101. Title IV of the original law is codified in Title 47, chapter 5, of the United States Code. Since this codification resulted in changes in the numbering system, the Table of Contents provides the section numbers of the ADA as originally enacted in brackets after the codified section numbers and headings.

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TITLE 42 - THE PUBLIC HEALTH AND WELFARE

CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

Sec. 12101. Findings and purpose

(a) Findings. The Congress finds that

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this chapter

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Sec. 12101 note: Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553, provided that:

(a) Findings. Congress finds that

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes. The purposes of this Act are

(1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) to convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.

Sec. 12102. Definition of disability

As used in this chapter:

(1) Disability. The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major Life Activities

(A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment. For purposes of paragraph (1)(C):

(A) An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability. The definition of “disability” in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term “substantially limits” shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph

(I) the term “ordinary eyeglasses or contact lenses” means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term “low-vision devices” means devices that magnify, enhance, or otherwise augment a visual image.

Sec. 12103. Additional definitions. As used in this chapter

(1) Auxiliary aids and services. The term “auxiliary aids and services” includes

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) State. The term “State” means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

SUBCHAPTER I - EMPLOYMENT

Sec. 12111. Definitions

As used in this subchapter:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual. The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified

readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

Sec. 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a) of this section, the term “discriminate against a qualified individual on the basis of disability” includes

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration

(A) that have the effect of discrimination on the basis of disability;

(B) that perpetuates the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a

relationship or association;

(5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitute discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general. The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

Sec. 12113. Defenses

(a) In general. It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards. The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Qualification standards and tests related to uncorrected vision. Notwithstanding section 12102(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.

(d) Religious entities

(1) In general. This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement. Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(e) List of infectious and communicable diseases

(1) In general. The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public.

Such list shall be updated annually.

(2) Applications. In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction. Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

Sec. 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability. For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity. A covered entity

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general. For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction. Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees. Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

Sec. 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

Sec. 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

Sec. 12117. Enforcement

(a) Powers, remedies, and procedures. The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination. The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

SUBCHAPTER II - PUBLIC SERVICES

Part A - Prohibition Against Discrimination and Other Generally Applicable Provisions

Sec. 12131. Definitions

As used in this subchapter:

(1) Public entity. The term "public entity" means

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Sec. 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Sec. 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Sec. 12134. Regulations

(a) In general. Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards. Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers

Compliance Board in accordance with section 12204(a) of this title.

Part B - Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory

Subpart I - Public Transportation Other than by Aircraft or Certain Rail Operations

Sec. 12141. Definitions

As used in this subpart:

(1) Demand responsive system. The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation. The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system. The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates. The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation. The term "public school transportation" means transportation by school bus vehicles of schoolchildren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary. The term "Secretary" means the Secretary of Transportation.

Sec. 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles. It shall be considered discrimination for purposes of section which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990, and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Purchase and lease of used vehicles. Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Remanufactured vehicles

(1) General rule. Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended; unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Exception for historic vehicles

(A) General rule. If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) Vehicles of historic character defined by regulations. For purposes of this paragraph and section 12148(a) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

Sec. 12143. Paratransit as a complement to fixed route service

(a) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs that are sufficient to provide to such individuals a level of service

(1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or

(2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations. Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) Required contents of regulations

(1) Eligible recipients of service. The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section

(A) (i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (a), accompanying the individual with a disability provided that space for these additional individuals are available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) Service area. The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) Service criteria. Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) Undue financial burden limitation. The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) Additional services. The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) Public participation. The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) Plans. The regulations issued under this section shall require that each public entity which operates a fixed route system

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation

services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) Provision of services by others. The regulations issued under this section shall

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) Other provisions. The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) Review of plan

(1) General rule. The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) Disapproval. If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) Modification of disapproved plan. Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) "Discrimination" defined. As used in subsection (a) of this section, the term "discrimination" includes

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d) (3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) Statutory construction. Nothing in this section shall be construed as preventing a public entity

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

Sec. 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

Sec. 12145. Temporary relief where lifts are unavailable

(a) Granting. With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress. Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application. If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

Sec. 12146. New facilities

For purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Sec. 12147. Alterations of existing facilities

(a) General rule. With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule. For purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility. Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation] in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(B) Extension for extraordinarily expensive structural changes. The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones. The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

Sec. 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities

(1) In general. With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of

this title and section 794 of title 29, for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) Exception. Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(a) of this title (relating to key stations).

(3) Utilization. Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule

(1) General rule. Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system, for purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) Historic trains. In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

Sec. 12149. Regulations

(a) In general. Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

(b) Standards. The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this part. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

Sec. 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be

necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

Subpart II - Public Transportation by Intercity and Commuter Rail

Sec. 12161. Definitions

As used in this subpart:

(1) Commuter authority. The term "commuter authority" has the meaning given such term in section 24102(4) of title 49.

(2) Commuter rail transportation. The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in section 24102(5) of title 49.

(3) Intercity rail transportation. The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) Rail passenger car. The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single- level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) Responsible person. The term "responsible person" means

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) Station. The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

Sec. 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation

(1) One car per train rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New intercity cars

(A) General rule. Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Special rule for single-level passenger coaches for individuals who use wheelchairs. Single-level passenger coaches shall be required to

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair, only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs. Single-level dining cars shall not be required to

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs. Bi-level dining cars shall not be required to

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or

(iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches

(A) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches

(i) a number of spaces

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train, as soon as practicable, but in no event later than 5 years after July 26, 1990; and

(ii) a number of spaces

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train, as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) Location. Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) Limitation. Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) Other accessibility features. Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (a) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to be entered from the station platform by an individual who uses a wheelchair.

(4) Food service

(A) Single-level dining cars. On any train in which a single-level dining car is used to provide food service

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals. Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (I) through which an individual who uses a wheelchair

may enter.

(B) Bi-level dining cars. On any train in which a bi-level dining car is used to provide food service

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) Commuter rail transportation

(1) One car per train rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New commuter rail cars

(A) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Accessibility. For purposes of section 12132 of this title and section 794 of title 29, a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) Used rail cars. It shall be considered discrimination for purposes of section 1132 of this title and section 794 of title 29 for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) Remanufactured rail cars

(1) Remanufacturing. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to remanufacture a rail passenger car for use

in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Purchase or lease. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) Stations

(1) New stations. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Existing stations

(A) Failure to make readily accessible

(i) General rule. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) Period for compliance

(I) Intercity rail. All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) Commuter rail. Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) Designation of key stations. Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) Plans and milestones. The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) Requirement when making alterations

(i) General rule. It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) Alterations to a primary function area. It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) Required cooperation. It shall be considered discrimination for purposes of section 12132 of this title and section 794 of title 29 for an owner, or person in control, of a station governed by subparagraph (a) or (b) to fail to provide reasonable cooperation to a responsible person with respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

Sec. 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this subpart shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 504(a) of this title.

Sec. 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

Sec. 12165. Interim accessibility requirements

(a) Stations. If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance

with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) Rail passenger cars. If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162(a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this subpart and are in effect at the time such design is substantially completed.

SUBCHAPTER III - PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Sec. 12181. Definitions

As used in this subchapter:

(1) Commerce. The term "commerce" means travel, trade, traffic, commerce, transportation, or communications

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities. The term "commercial facilities" means facilities

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 12162 of this title or covered under this subchapter, railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) Demand responsive system. The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system. The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus. The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity. The term "private entity" means any entity other than a public entity (as defined in section 12131(1) of this title).

(7) Public accommodation. The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect

commerce

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad. The terms "rail" and "railroad" have the meaning given the term "railroad" in section 20102[1] of title 49.

(9) Readily achievable. The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered

entity.

(10) Specified public transportation. The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle. The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 12162 of this title or covered under this subchapter.

Sec. 12182. Prohibition of discrimination by public accommodations

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction

(1) General prohibition

(A) Activities

(i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities

that are not separate or different.

(D) Administrative methods. An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association. It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions

(A) Discrimination. For purposes of subsection (a) of this section, discrimination includes

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

(B) Fixed route system

(i) Accessibility. It shall be considered discrimination for a private entity which operates a fixed route system and which is not subject to section 12184 of this title to

purchase or lease a vehicle with a seating capacity in excess of 16 passengers (including the driver) for use on such system, for which a solicitation is made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(ii) Equivalent service. If a private entity which operates a fixed route system and which is not subject to section 12184 of this title purchases or leases a vehicle with a seating capacity of 16 passengers or less (including the driver) for use on such system after the effective date of this subparagraph that is not readily accessible to or usable by individuals with disabilities, it shall be considered discrimination for such entity to fail to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities.

(C) Demand responsive system. For purposes of subsection (a) of this section, discrimination includes

(i) a failure of a private entity which operates a demand responsive system and which is not subject to section 12184 of this title to operate such system so that, when viewed in its entirety, such system ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to individuals without disabilities; and

(ii) the purchase or lease by such entity for use on such system of a vehicle with a seating capacity in excess of 16 passengers (including the driver), for which solicitations are made after the 30th day following the effective date of this subparagraph, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to individuals without disabilities.

(D) Over-the-road buses

(i) Limitation on applicability. Subparagraphs (B) and (C) do not apply to over-the-road buses.

(ii) Accessibility requirements. For purposes of subsection (a) of this section, discrimination includes

(I) the purchase or lease of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title by a private entity which provides transportation of individuals and which is not primarily engaged in the business of transporting people, and

(II) any other failure of such entity to comply with such regulations.

(3) Specific construction. Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.

Sec. 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term. Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Elevator. Subsection (a) of this section shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

Sec. 12184. Prohibition of discrimination in specified public transportation services provided by private entities

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce.

(b) Construction. For purposes of subsection (a) of this section, discrimination includes

(1) the imposition or application by an entity described in subsection (a) of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the specified public transportation services provided by the entity, unless such criteria can be shown to be necessary for the provision of the services being offered;

(2) the failure of such entity to

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title

and with the requirements of section 12183(a)(2) of this title;

(3) the purchase or lease by such entity of a new vehicle (other than an automobile, a van with a seating capacity of less than 8 passengers, including the driver, or an over- the-road bus) which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; except that the new vehicle need not be readily accessible to and usable by such individuals if the new vehicle is to be used solely in a demand responsive system and if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(4) (A) the purchase or lease by such entity of an over-the-road bus which does not comply with the regulations issued under section 12186(a)(2) of this title; and

(B) any other failure of such entity to comply with such regulations; and

(5) the purchase or lease by such entity of a new van with a seating capacity of less than 8 passengers, including the driver, which is to be used to provide specified public transportation and for which a solicitation is made after the 30th day following the effective date of this section that is not readily accessible to or usable by individuals with disabilities, including individuals who use wheelchairs; except that the new van need not be readily accessible to and usable by such individuals if the entity can demonstrate that the system for which the van is being purchased or leased, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service provided to the general public;

(6) the purchase or lease by such entity of a new rail passenger car that is to be used to provide specified public transportation, and for which a solicitation is made later than 30 days after the effective date of this paragraph, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs; and

(7) the remanufacture by such entity of a rail passenger car that is to be used to provide specified public transportation so as to extend its usable life for 10 years or more, or the purchase or lease by such entity of such a rail car, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Historical or antiquated cars

(1) Exception. To the extent that compliance with subsection (a)(2)© or (a)(7)of this section would significantly alter the historic or antiquated character of a historical or antiquated rail passenger car, or a rail station served exclusively by such cars, or would result in violation of any rule, regulation, standard, or order issued by the Secretary of Transportation under the Federal Railroad Safety Act of 1970, such compliance shall not be required.

(2) Definition. As used in this subsection, the term "historical or antiquated rail passenger car" means a rail passenger car

(A) which is not less than 30 years old at the time of its use for transporting individuals;

(B) the manufacturer of which is no longer in the business of manufacturing rail passenger cars; and

(C) which

(i) has a consequential association with events or persons significant to the past; or

(ii) embodies, or is being restored to embody, the distinctive characteristics of a type of rail passenger car used in the past, or to represent a time period which has passed.

Sec. 12185. Study

(a) Purposes. The Office of Technology Assessment shall undertake a study to determine

(1) the access needs of individuals with disabilities to over-the-road buses and over-the- road bus service; and

(2) the most cost-effective methods for providing access to over-the-road buses and over-the-road bus service to individuals with disabilities, particularly individuals who use wheelchairs, through all forms of boarding options.

(b) Contents. The study shall include, at a minimum, an analysis of the following:

(1) The anticipated demand by individuals with disabilities for accessible over-the-road buses and over-the-road bus service.

(2) The degree to which such buses and service, including any service required under sections 12184(a)(4) and 12186(a)(2) of this title, are readily accessible to and usable by individuals with disabilities.

(3) The effectiveness of various methods of providing accessibility to such buses and service to individuals with disabilities.

(4) The cost of providing accessible over-the-road buses and bus service to individuals with disabilities, including consideration of recent technological and cost saving developments in equipment and devices.

(5) Possible design changes in over-the-road buses that could enhance accessibility, including the installation of accessible restrooms which do not result in a loss of seating capacity.

(6) The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of such requirements on such service to rural communities.

(c) Advisory committee. In conducting the study required by subsection (a) of this section, the Office of Technology Assessment shall establish an advisory committee, which shall consist of

(1) members selected from among private operators and manufacturers of over-the-road buses;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study, including manufacturers of boarding assistance equipment and devices.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) Deadline. The study required by subsection (a) of this section, along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall

be submitted to the President and Congress within 36 months after July 26, 1990. If the President determines that compliance with the regulations issued pursuant to section 12186(a)(2)(B) of this title on or before the applicable deadlines specified in section 12186(a)(2)(B) of this title will result in a significant reduction in intercity over-the-road bus service, the President shall extend each such deadline by 1 year.

(e) Review. In developing the study required by subsection (a) of this section, the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 792 of title 29. The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d) of this section.

Sec. 12186. Regulations

(a) Transportation provisions

(1) General rule. Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections12182 (b)(2)(B) and (C) of this title and to carry out section 12184 of this title (other than subsection (a)(4)).

(2) Special rules for providing access to over-the-road buses

(A) Interim requirements

(i) Issuance. Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations in an accessible format to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require each private entity which uses an over-the-road bus to provide transportation of individuals to provide accessibility to such bus; except that such regulations shall not require any structural changes in over-the-road buses in order to provide access to individuals who use wheelchairs during the effective period of such regulations and shall not require the purchase of boarding assistance devices to provide access to such individuals.

(ii)Effective period. The regulations issued pursuant to this subparagraph shall be effective until the effective date of the regulations issued under subparagraph (a).

(B) Final requirement

(i) Review of study and interim requirements. The Secretary shall review the study submitted under section 12185 of this title and the regulations issued pursuant to subparagraph (A).

(ii)Issuance. Not later than 1 year after the date of the submission of the study under section 12185 of this title, the Secretary shall issue in an accessible format new regulations to carry out sections 12184(b)(4) and 12182(b)(2)(D)(ii) of this title that require, taking into account the purposes of the study under section 12185 of this title and any recommendations resulting from such study, each private entity which uses an over-the-road bus to provide transportation to individuals to provide accessibility to such bus to individuals with disabilities, including individuals who use wheelchairs.

(iii) Effective period. Subject to section 12185(d) of this title, the regulations issued pursuant to this subparagraph shall take effect

(I) with respect to small providers of transportation (as defined by the Secretary), 3 years after the date of issuance of final regulations under clause (ii); and

(II) with respect to other providers of transportation, 2 years after the date of issuance of such final regulations.

(C) Limitation on requiring installation of accessible restrooms. The regulations issued pursuant to this paragraph shall not require the installation of accessible restrooms in over-the-road buses if such installation would result in a loss of seating capacity.

(3) Standards. The regulations issued pursuant to this subsection shall include standards applicable to facilities and vehicles covered by sections 12182(b) (2) and 12184 of this title.

(b) Other provisions. Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

(c) Consistency with ATBCB guidelines. Standards included in regulations issued under subsections (a) and (b) of this section shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

(d) Interim accessibility standards

(1) Facilities. If final regulations have not been issued pursuant to this section, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under this section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under section 12183 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(2) Vehicles and rail passenger cars. If final regulations have not been issued pursuant to this section, a private entity shall be considered to have complied with the requirements of this subchapter, if any, that a vehicle or rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such vehicle or car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such vehicles or cars, to the extent that such laws and regulations are not inconsistent with this subchapter and are in effect at the time such design is substantially completed.

Sec. 12187. Exemptions for private clubs and religious organizations

The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.

Sec. 12188. Enforcement

(a) In general

(1) Availability of remedies and procedures. The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

(2) Injunctive relief. In the case of violations of sections 12182(b)(2)(A)(iv) and Section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

(b) Enforcement by Attorney General

(1) Denial of rights

(A) Duty to investigate

(i) In general. The Attorney General shall investigate alleged violations of this subchapter, and shall undertake periodic reviews of compliance of covered entities under this subchapter.

(ii) Attorney General certification. On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certification, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this chapter for the accessibility and usability of covered facilities under this subchapter. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this chapter.

(B) Potential violation. If the Attorney General has reasonable cause to believe that

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or

(ii) any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) Authority of court. In a civil action under paragraph (1) (B), the court

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this subchapter

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure,

or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) Single violation. For purposes of paragraph (2) (C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) Punitive damages. For purposes of subsection (b) (2) (B) of this section, the term "monetary damages" and "such other relief" does not include punitive damages.

(5) Judicial consideration. In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this chapter by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

Sec. 12189. Examinations and courses

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

SUBCHAPTER IV - MISCELLANEOUS PROVISIONS

Sec. 12201. Construction

(a) In general. Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws. Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance. Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter I and III of this chapter.

(d) Accommodations and services. Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

(e) Benefits under State worker's compensation laws. Nothing in this chapter alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(f) Fundamental alteration. Nothing in this chapter alters the provision of section 12182(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

(g) Claims of no disability. Nothing in this chapter shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

(h) Reasonable accommodations and modifications. A covered entity under subchapter I, a public entity under subchapter II, and any person who owns, leases (or leases to), or operates a place of public accommodation under subchapter III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 12102(1) solely under subparagraph (C) of such section.

Sec. 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Sec. 12203. Prohibition against retaliation and coercion

(a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation. It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures. The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

Sec. 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines. Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines. The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general. The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register. With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites. With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

Sec. 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Sec. 12205a. Rule of Construction Regarding Regulatory Authority

The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this chapter includes the authority to issue regulations implementing the definitions of disability in section 12102 (including rules of construction) and the definitions in section 12103, consistent with the ADA Amendments Act of 2008.

Sec. 12206. Technical assistance

(a) Plan for assistance

(1) In general. Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan. The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance. The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance. Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I. The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) Subchapter II

(i) Part A. The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B. The Secretary of Transportation shall implement such plan for assistance for part B of subchapter II of this chapter.

(C) Subchapter III. The Attorney General, in coordination with the Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV. The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals. Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts

(1) In general. Each Federal agency that has responsibility under subsection (2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or grants described in this paragraph.

(2) Dissemination of information. Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance. An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

Sec. 12207. Federal wilderness areas

(a) Study. The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) Submission of report. Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access

(1) In general. Congress reaffirms that nothing in the Wilderness Act (16 U.S.C. 1131 et seq.) is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined. For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

Sec. 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

Sec. 12209. Instrumentalities of Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general. The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities. The chief official of each

instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress. The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentalities. For purposes of this section, the term "instrumentality of the Congress" means the following: the General Accounting Office, the Government Printing Office, and the Library of Congress.

(5) Enforcement of employment rights. The remedies and procedures set forth in section 2000e -16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations. The remedies and procedures set forth in section 2000e -16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 of this title or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(7) Construction. Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

Sec. 12210. Illegal use of drugs

(a) In general. For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction. Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services. Notwithstanding subsection (a) of this section and section 12211(b)(3) of this subchapter, an individual shall not be denied health services, or services

provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Sec. 12211. Definitions

(a) Homosexuality and bisexuality. For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions. Under this chapter, the term "disability" shall not include

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

Sec. 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Sec. 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the chapter, and such action shall not affect the enforceability of the remaining provisions of the chapter.

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER II - COMMON CARRIERS

Part I - Common Carrier Regulation

Sec. 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions. As used in this section

(1) Common carrier or carrier. The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this

title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(a) and 221(a) of this title.

(2) TDD. The term "TDD" means a Telecommunications Device for the Deaf which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services. The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) Availability of telecommunications relay services

(1) In general. In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) Use of general authority and remedies. For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services. Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general. The Commission shall, not later than 1 year after July 26, 1990, prescribe

regulations to implement this section, including regulations that

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met in carrying out subsection (c) of this section;

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from failing to fulfill the obligations of common carriers by refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) Technology. The Commission shall ensure that regulations prescribed to implement this section encourage, consistent with section 157(a) of this title, the use of existing technology and do not discourage or impair the development of improved technology.

(3) Jurisdictional separation of costs

(A) In general. Consistent with the provisions of section 410 of this title, the Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) Recovering costs. Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction. In a State that has a certified program under subsection (f) of this section, a State commission shall permit a common carrier to recover the costs incurred in providing intrastate telecommunications relay services by a method consistent with the requirements of this section.

(e) Enforcement

(1) In general. Subject to subsections (f) and (g) of this section, the Commission shall enforce this section.

(2) Complaint. The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

(f) Certification

(1) State documentation. Any State desiring to establish a State program under this section shall submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services and the procedures and remedies

available for enforcing any requirements imposed by the State program.

(2) Requirements for certification. After review of such documentation, the Commission shall certify the State program if the Commission determines that

(A) the program makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets or exceeds the requirements of regulations prescribed by the Commission under subsection (d) of this section; and

(B) the program makes available adequate procedures and remedies for enforcing the requirements of the State program.

(3) Method of funding. Except as provided in subsection (d) of this section, the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) Suspension or revocation of certification. The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted. In a State whose program has been suspended or revoked, the Commission shall take such steps as may be necessary, consistent with this section, to ensure continuity of telecommunications relay services.

(g) Complaint

(1) Referral of complaint. If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) of this section is in effect, the Commission shall refer such complaint to such State.

(2) Jurisdiction of Commission. After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if

(A) final action under such State program has not been taken on such complaint by such State

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f) of this section.

TITLE 47 - TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5 - WIRE OR RADIO COMMUNICATION

SUBCHAPTER VI - MISCELLANEOUS PROVISIONS

Sec. 611. Closed-captioning of public service announcements

Any television public service announcement that is produced or funded in whole or in part by any agency or instrumentality of Federal Government shall include closed captioning of the verbal content of such announcement. A television broadcast station licensee

(1) shall not be required to supply closed captioning for any such announcement that fails to include it; and

(2) shall not be liable for broadcasting any such announcement without transmitting a closed caption unless the licensee intentionally fails to transmit the closed caption that was included with the announcement.