

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-289

TITLE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,  
Petitioners V. PARALYZED VETERANS OF AMERICA, ET AL.

PLACE Washington, D. C.

DATE March 26, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES DEPARTMENT OF :  
TRANSPORTATION, ET AL., :  
Petitioners :  
v. : No. 85-289  
PARALYZED VETERANS OF AMERICA, :  
ET AL. :

-----x  
Washington, D.C.

Wednesday, March 26, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:58 o'clock a.m.

APPEARANCES:

CHARLES FRIED, ESQ., Solicitor General,  
Department of Justice, Washington, D.C.;  
on behalf of Petitioners.

DOUGLAS L. PARKER, ESQ., Washington, D.C.;  
on behalf of Respondents.

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P R O C E E D I N G S

1 CHIEF JUSTICE BURGER: Mr. Solicitor General,  
2 I think you may proceed whenever you're ready.

3 ORAL ARGUMENT OF CHARLES FRIED, ESQ.

4 ON BEHALF OF PETITIONERS

5 MR. FRIED: Thank you, Mr. Chief Justice, and  
6 may it please the Court.

7 In this case the Civil Aeronautics Board,  
8 which at that time was the Government agency charged  
9 with the regulation of airline services, issued  
10 regulations under Section 504 regarding discrimination  
11 against handicapped persons. It limited those, it  
12 limited the reach of those regulations, to airline  
13 subsidized by the Federal Government, subsidized under  
14 the small communities program.

15 The Court of Appeals invalidated those  
16 regulations insofar as they were so limited, and on  
17 remand required the Department of Transportation, which  
18 is the successor agency to CAB, to extend the reach of  
19 those regulations to all commercial air carriers. It is  
20 that invalidation and that order on remand that we seek  
21 to have reversed.

22 In 1979 the Department of Transportation  
23 through its component the Federal Aviation  
24 Administration issued regulations regarding  
25

1 discrimination against handicapped persons in airport  
2 services, the FAA being the agency charged with and  
3 administering subsidies to airports. Those regulations  
4 have never been challenged and are not in issue in this  
5 case.

6 It is worth at the outset identifying what the  
7 underlying policy judgment of Section 504 is. That  
8 policy judgment is a commitment, I think it's a moral  
9 commitment, that handicapped persons must be allowed the  
10 opportunity to be independent and productive citizens.  
11 And that means removing barriers of discrimination to  
12 that independence, barriers usually erected by  
13 thoughtlessness and ignorance.

14 What this case is about, why there is a  
15 litigation at all, is because Congress chose to embody  
16 that policy in Section 504, not by legislating to the  
17 full extent of its very broad powers, for instance under  
18 the commerce clause as it did in Title VII, but rather  
19 Congress chose to limit the reach of its regulations to  
20 those receiving federal moneys and to the programs of  
21 those receiving federal moneys, thereby assuring that  
22 anyone receiving federal money accept as a condition of  
23 that receipt the obligation not to discriminate against  
24 handicapped persons.

25 This Congressional choice was by no means

1 casual or unprincipled. Accepting the obligation to  
2 accommodate handicapped persons will not always be easy  
3 or costless, as this Court recognized in the case of  
4 Alexander and Choate.

5 It was a rational judgment for Congress when  
6 it first ventured into this area to limit the scope of  
7 regulation to those who choose to accept moneys from the  
8 Federal Government and to impose a condition on that  
9 receipt that in the assisted program they must accept  
10 the burden of regulation.

11 Now, when Congress has determined to restrain  
12 the reach of federal regulation, it behooves the United  
13 States to respect that judgment, as we have done in this  
14 case, I believe, and not to seek by strained and  
15 imaginative arguments to make the regulatory scheme more  
16 nearly universal after all.

17 That I think is what is at stake in this  
18 case.

19 QUESTION: Mr. Fried, would you mind giving us  
20 a bit of explanation about what the position of the  
21 Department of Transportation really is? It sounds like  
22 the Department agreed at least in part with the  
23 Respondents in that it wanted to apply certain  
24 regulations prohibiting discrimination to handicapped  
25 people by commercial airlines.

1 And so what is their position and what are  
2 they relying on if they intend to promulgate and make  
3 effective such regulations?

4 MR. FRIED: Justice O'Connor, the original  
5 regulations of the CAB would have reached all airlines,  
6 but not all aircraft. It was limited to aircraft with  
7 30 or more seats. The final regulations in question  
8 here reached all airplanes, but only of subsidized  
9 carriers.

10 By executive order, all regulations under  
11 Section 504 -- and these regulations are issued under  
12 the statutory authority of Section 504 -- all  
13 regulations under Section 504 must be cleared and must  
14 be approved by the Department of Justice. Therefore,  
15 the expert agency to whom I believe deference is  
16 required in respect to the jurisdictional aspect, if you  
17 will, of these regulations is the Department of  
18 Justice.

19 The Department of Transportation is the expert  
20 agency and the agency deserving deference is respect to  
21 what are the needs of handicapped persons and how those  
22 needs may properly be accommodated. The Department of  
23 Justice by executive order is the expert agency in  
24 identifying the jurisdictional limits of Section 504,  
25 and in that --

1 QUESTION: Well, is Section 504 the only  
2 section on which the Department of Transportation could  
3 rely if it wanted to adopt these regulations?

4 MR. FRIED: There are two other sections under  
5 the Federal Aviation Act. Section 404(a) and 404(b) are  
6 pertinent. Section 404(a) required simply that all air  
7 carriers assure safe and adequate carriage. Section  
8 404(b), which has since lapsed with the sunseting of  
9 the CAB and with airline deregulation, forbade any  
10 unfair discrimination.

11 Now, the original regulations which were first  
12 promulgated in 1979 when 404(b) was still extant and  
13 when it had three more years of life, three or four more  
14 years of life before it, would have been able to use  
15 404(b), the unfair discrimination peg, for the extent of  
16 those regulations.

17 But 404(b) has lapsed and is no longer  
18 available as a predicate for regulation, leaving only  
19 404(a), which speaks only to obligations of safe and  
20 adequate carriage. And these regulations have not  
21 sought to have been promulgated and were not promulgated  
22 pursuant to that authority.

23 Now, the Court of Appeals and the Respondents  
24 call to our attention what they characterize as an  
25 anomaly, and that is that handicapped persons are

1 protected in their use of airports and are protected in  
2 their use of a small number of subsidized carriers, but  
3 do not get the benefit of federal protection in the  
4 large number of commercial airlines.

5 We submit that this is not indeed an anomaly  
6 at all. It is the familiar result whenever legislation  
7 does not go as far as constitutional power would allow  
8 it, whenever Congress seeks to draw a line. Whenever a  
9 line is drawn, there will of course be cases on either  
10 side of that line which are quite close to each other.

11 But that is a fact which this Court, and I  
12 think any mature legal system, is entirely familiar with  
13 and should not be unduly bemused by. I don't think it's  
14 appropriate to belabor this anomaly, but rather the  
15 appropriate thing to do is to determine in an altogether  
16 straightforward way what was Congress' intent here.

17 And its intent was to regulate only recipients  
18 of federal financial assistance, and then only the  
19 assisted programs of such recipients. And our  
20 obligation in the Department of Justice was to  
21 faithfully and in a simple and straightforward way  
22 identify who is the recipient.

23 And it seemed that the recipient here is quite  
24 easily identified. It is the subsidized airline, or in  
25 respect to the regulations not in issue here it is the

1 subsidized airport. Those are the recipients. There is  
2 no great mystery about that.

3 And the identification of the assisted program  
4 follows also rather directly and naturally. It is  
5 flying to small communities in the case of subsidized  
6 airlines. It is provision of airport services in the  
7 case of the subsidized airports.

8 Now, the Court --

9 QUESTION: Mr. Solicitor General, may I ask a  
10 little bit about the nature of the airport subsidy.  
11 Does that involve continuing payments for activities  
12 that go on in the airports, or are they like  
13 construction grants to build runways and buildings?  
14 What exactly is it?

15 MR. FRIED: They are construction grants to  
16 build runways, to build or improve lighting and safety,  
17 features having to do with airport operations, and they  
18 have on occasion, particularly in the past, although  
19 there are no such grants currently involved, been moneys  
20 for the actual construction of airport terminals.

21 QUESTION: As I understand it, the regulations  
22 contemplate some control over activities of lessees and  
23 concessionaires in the airport terminals, is that  
24 correct?

25 MR. FRIED: Well, that is a rather complicated

1 point, and if you'll bear with me I'll try to sort it  
2 out.

3 QUESTION: My question is, why are they  
4 different from the airlines. That's the thrust of the  
5 question.

6 MR. FRIED: I would like to sort that out.  
7 There are regulations, and clearly the regulations we  
8 have here -- well, not the airline regulations, but the  
9 airport regulations, clearly protect the handicapped  
10 traveler, handicapped persons, is such airport  
11 activities as baggage handling, access to ticket  
12 counters and the like.

13 There are other regulations which were adopted  
14 under Title VI, which are not in issue in this case, and  
15 which were adopted prior to this Court's decision in  
16 North Haven and therefore of course prior to this  
17 Court's decision in the Grove City College case, which  
18 regulations spoke rather broadly and included  
19 restaurants, included taxi services, included car rental  
20 services, and so on.

21 And it is of course a question whether, had  
22 the regulations dealing with handicapped persons been  
23 extended in that way here, whether those would be  
24 valid. But we don't have that question before us now.

25 QUESTION: May I ask about the ticket

1 handling, for example. Do they in substance say that a  
2 handicapped person must be given non-discriminatory  
3 treatment in connection with the sale of tickets? Do  
4 they in fact insist then that the ticket give them a  
5 ride on an airplane that's just like the non-handicapped  
6 person gets?

7 MR. FRIED: I think that would be the kind of  
8 stretch which we very much think going over the  
9 jurisdictional lines which Congress drew. What is meant  
10 by discrimination against handicapped persons in the  
11 ticketing process is that a handicapped person  
12 approaching the ticket counter should be able to  
13 approach the ticket counter, should be able to buy a  
14 ticket if one is available on the same basis as anyone  
15 else.

16 QUESTION: This is a transaction that the  
17 person has with the airline, which is I guess a lessee  
18 of the airport, isn't it?

19 MR. FRIED: The actual transaction of the  
20 purchase and sale of the ticket depends -- is not  
21 covered, no, because after all the ticket --

22 QUESTION: Well, isn't access -- aren't the  
23 facilities managed entirely by the airlines? The ticket  
24 selling and baggage handling, isn't that all done by the  
25 airlines?

1 MR. FRIED: Baggage handling is done by  
2 airline employees on facilities leased from the airport  
3 operators, so the facilities of the airline, as are for  
4 instance boarding activities are activities carried on  
5 often by airline personnel, but on facilities leased  
6 from the airport operator.

7 QUESTION: But normally when you have a --  
8 your remedy if there is a violation of a 504 regulation  
9 is to withhold funds, I suppose, would be one thing you  
10 would do. If an airline said, we're just not interested  
11 in handling baggage for these handicapped people, they  
12 present us with all sorts of problems, we won't do it,  
13 what would the remedy be against the airlines? Would  
14 you cut off the money for the airport?

15 MR. FRIED: It's quite clear that the airport  
16 is under an obligation that, where there is a covered  
17 airport service, it may not slough off its 504  
18 obligations by contracting those obligations out. So  
19 for instance, it cannot by leasing the whole airport  
20 building to some third party slough off its obligations  
21 to make that airport --

22 QUESTION: Well, but it normally doesn't do  
23 the baggage handling itself anyway. It's not something  
24 it would normally do. I mean, that's part of an airline  
25 operation, I would assume.

1 But you're suggesting that the airport  
2 regulation is -- the regulation may lawfully extend to  
3 control over the manner in which the airlines handle  
4 baggage within the airport terminal?

5 MR. FRIED: Yes, that is our contention and  
6 the regulations so provide, because that is a ground  
7 operation.

8 QUESTION: What about the process of boarding  
9 the aircraft itself?

10 MR. FRIED: Well, when we get to the point of  
11 the --

12 QUESTION: Or putting the baggage on the  
13 airplane.

14 MR. FRIED: If your question is directed at  
15 the seating of passengers, that is no longer an airport  
16 service. That has something to do with the actual  
17 flying of the plane. We don't think that flying planes  
18 is an airport service, to make the point directly.

19 And seating a passenger is a necessary  
20 preliminary part of flying that passenger, and it takes  
21 place within the airplane.

22 Now, the boarding gate -- if you have an  
23 airport which does not have available facilities to  
24 allow handicapped persons to reach an airport, that  
25 airport is in violation of its 504 obligations, because

1 of course there are airlines, some of them subsidized  
2 airlines and therefore they're compelled and other  
3 voluntarily, which do accommodate handicapped persons.

4 And therefore it would violate the direct  
5 intention of the statute and the regulation if those  
6 persons whom the airlines wish to accommodate couldn't  
7 get to their planes because the airport itself was  
8 interposing a barrier. That's precisely the kind of  
9 thing which is within the sights of this regulation.

10 QUESTION: Well, Mr. Solicitor General,  
11 suppose the airport makes sure the handicapped person  
12 can get to the boarding gate, wheelchairs and what-not,  
13 but it's the airline, I take it, that will either get  
14 the handicapped person on board or not. It's not the  
15 airport.

16 MR. FRIED: Once you are at the perimeter of  
17 the building, if you like -- and one can make --

18 QUESTION: Say you're at the boarding gate.  
19 The airport gets the handicapped person to where, to the  
20 gate, to gate A or wherever it is, and he is sitting  
21 there in his wheelchair. And then the airline says:  
22 Awfully sorry, but we don't furnish wheelchairs for you  
23 to get on the plane.

24 MR. FRIED: Justice White, here we are exactly  
25 at that line which is so troublesome.

1 QUESTION: I know, but which side of the line  
2 does this fall?

3 MR. FRIED: May I -- with your leave, may I  
4 try to draw the line more finely. If you have one of  
5 those devices which rolls out of the airport and then  
6 kind of attaches onto the airport, onto the airplane, we  
7 would submit that that's an extension of the boarding  
8 gate and the airport must not, must not not have  
9 available that kind of a device so that a handicapped  
10 person, should the airline be there to receive him, he  
11 should not be able to get to that airline.

12 But once you get to the door of the airplane,  
13 the airline takes over, that is correct. That's where I  
14 would draw the line.

15 QUESTION: When you say the door, you mean the  
16 bottom of the ramp or the top?

17 (Laughter.)

18 QUESTION: Well, Mr. Chief Justice, that's a  
19 case that troubled me, and I would distinguish between  
20 these devices which creep out of the building and attach  
21 onto the plane, and I think those devices are an  
22 extension of the terminal and therefore are covered, and  
23 --

24 QUESTION: Are you sure they're not owned by  
25 the airline?

1 MR. FRIED: I doubt that they're owned by the  
2 airlines, but even --

3 QUESTION: Well, they have the name of the  
4 airline on them.

5 MR. FRIED: Oh, but so does the building and  
6 so do the counters.

7 QUESTION: I've never seen a building that  
8 said "American Airlines."

9 QUESTION: Sections of it are labeled, are  
10 they not?

11 MR. FRIED: Oh, I think there's a good bit --

12 QUESTION: On these runways they've all got  
13 labels on them, and you don't have any -- they say the  
14 airline. I'm just raising the question.

15 MR. FRIED: Well, I think I would disagree,  
16 Your Honor, respectfully, that the presence of the name  
17 on that device is particularly significant.

18 QUESTION: Well, may I respectfully disagree  
19 with your determination that it is a part of the  
20 terminal, unless you're sure.

21 QUESTION: May I make a suggestion, that  
22 really you'd have the same question if you have it out  
23 on the runway, you have to walk to it, and then go up a  
24 stairway along the side of the plane. That might well  
25 be owned by the airline, and would still, I assume,

1 under your position be an airport service.

2 MR. FRIED: Yes.

3 QUESTION: Even if owned by the airline.

4 MR. FRIED: The one case which I was  
5 struggling with and which I would call to your attention  
6 is in some of the smaller aircraft, where in fact the  
7 boarding stairway is a part of the aircraft itself. And  
8 at that point, I think we have a clear case of something  
9 that would not be covered.

10 Insofar as the boarding facilities are part of  
11 the services supplied by the airport, then those  
12 boarding facilities would be covered.

13 QUESTION: The thing that troubles me -- I  
14 hate to keep interrupting, but you say supplied by the  
15 airport. But does it in the Government's view make a  
16 difference whether those facilities are leased, owned,  
17 leased or owned by the airline, as opposed to being the  
18 property of the airport? I don't think it does.

19 MR. FRIED: I think, Justice Stevens, I think  
20 your suggestion is helpful, because the crucial point is  
21 not what short of the airplane itself is covered, and  
22 that's where we are bumping up against this line and  
23 having difficulty with, but the point that we insist on  
24 is, whatever short of the airplane may or may not be  
25 covered, one thing is quite clear: The airplane itself

1 is not covered.

2 QUESTION: Under the regulations. But if the  
3 statute justifies the regulation for airline-owned  
4 equipment that is used on the airport, why doesn't it  
5 equally justify the airplane, what happens to the  
6 airplane while it's taxiing down the runway? That's the  
7 problem.

8 MR. FRIED: Justice Stevens, the way I would  
9 respond to that is that the regulations do not justify  
10 the actual airline operations because the airline is not  
11 a recipient of the assistance. And whether they do in  
12 fact justify the stairways or this creeping device or  
13 not is a difficult question, and we rather suppose that  
14 the regulations do include that.

15 But it's possible that we are incorrect on  
16 that point. What we wish to insist on is that the  
17 airline -- the airplane itself and its flying is not  
18 covered. And there I think the most helpful analogy  
19 would be, if we'd like to return to ground, is a  
20 highway.

21 And the program receiving money is highway  
22 assistance, and they are highway operators, people who  
23 keep highways in repair, who build them and maintain  
24 them and so on. Now, whatever else may or may not be a  
25 highway service, it seems to us that running a bus and

1 providing bus transportation is not a highway service.

2 QUESTION: Running a baggage cart out from the  
3 terminal to the airplane is?

4 MR. FRIED: It's possible, Justice Stevens,  
5 that if your concern prevails what you have succeeded in  
6 showing is that our regulations are too generous.

7 QUESTION: That's exactly right.

8 MR. FRIED: And that issue, of course, is not  
9 the issue before the Court. The claim is that they are  
10 not generous enough.

11 QUESTION: You were going to tell us, you were  
12 going to define the line with clarity for us, and that's  
13 what I'm really seeking, whether the line is really  
14 defined in the correct way.

15 MR. FRIED: I hope that there is sufficient  
16 clarity by drawing the line at the boundaries of the  
17 airplane for the straightforward reason that airlines  
18 don't receive the assistance and that flying is not an  
19 airport service, just as driving along a highway is not  
20 a highway service, it's a driving or a busing service.

21 If I may reverse the balance of my time for  
22 rebuttal, thank you.

23 CHIEF JUSTICE BURGER: Very well.

24 Mr. Parker.

25 ORAL ARGUMENT OF

1 DOUGLAS L. PARKER, ESQ.,

2 ON BEHALF OF RESPONDENTS

3 MR. PARKER: Mr. Chief Justice and may it  
4 please the Court:

5 Justice Stevens' questions I think point to,  
6 very clearly to the position of the Respondents in this  
7 case. Our position is that where the Federal Government  
8 is providing money for the construction of airport  
9 runways, that it is not consistent with Section 504 to  
10 protect a handicapped person from discrimination at a  
11 gift shop located inside the terminal and not protect  
12 that same person from discrimination if she wishes to  
13 board an airplane sitting on the runway that is  
14 conducted with federal money.

15 The Government's position is that only the  
16 most peripheral activities at airports are covered, that  
17 so long as those activities have nothing to do with  
18 people boarding airplanes that they've covered. That I  
19 think, as your questions suggest, leads to something  
20 other than a bright line, something other than a  
21 bemusing anomaly, but a frustration of the purposes of  
22 Section 504.

23 That position, we submit, ignores the basic  
24 purposes for which the grants are provided, and it  
25 distorts the decision of this Court in Grove City

1 College versus Bell.

2 The Court of Appeals below reached its  
3 conclusion that Section 504 had to extend to the landing  
4 and taking off at least of aircraft only after very  
5 careful consideration of the findings made by the Civil  
6 Aeronautics Board. Those findings are still very  
7 significant, even though the substance of the  
8 regulations are not before the Court.

9 The CAB and the DCT found that there was a  
10 problem of handicapped discrimination by airlines.  
11 There are real rights at stake here. The issues are not  
12 theoretical ones, but rather they are real ones.

13 The record below was replete with examples of  
14 actions by airlines which were arbitrary and  
15 inconsistent and which had the effect of denying access,  
16 and certainly causing a great deal of embarrassment and  
17 inconvenience, to any handicapped person who wished to  
18 use a commercial airline.

19 In response to that, after an extended  
20 rulemaking, the CAB came up with regulations. Those  
21 regulations are very limited in their scope, and it's  
22 correct that the substance of those regulations are not  
23 before the Court.

24 But it's important to keep in mind what they  
25 did and what they were trying to do. That was to try to

1 make certain, at a minimum, that the decisions made by  
2 airline personnel in selling tickets, in providing  
3 boarding assistance, in letting people get on the  
4 airplane -- the idea was to make sure that those  
5 decisions were based on safety considerations and based  
6 on the actual need, on the factors that were necessary  
7 in order to provide air transportation, to eliminate the  
8 possibility or at least reduce the possibility that  
9 those kinds of decisions would be made based on  
10 irrational assumptions and prejudice.

11 Basically what the regulations do is to define  
12 the circumstances under which advance notice can be  
13 required, define the circumstances under which a person  
14 can be required to have an attendant.

15 My clients don't think those regulations are  
16 perfect by any means. They do seem to be a step in the  
17 right direction, however.

18 At the same time --

19 QUESTION: You challenged them in the Court of  
20 Appeals and the Court of Appeals upheld them?

21 MR. PARKER: That's correct. That's correct,  
22 Your Honor. We are not challenging the substance of  
23 them here.

24 It's interesting that the regulations also  
25 seem to be acceptable to the airlines. The regulations

1 don't require any substantive structural modifications  
2 of the airplanes at all. They defer at every step of  
3 the way to safety consideration, both as established by  
4 the FAA and by airline personnel. And none of the  
5 airlines seem to claim, and no one has claimed  
6 specifically at least, that these particular regulations  
7 would impose any significant burden on the airlines.

8 Nevertheless -- I would add to that also that  
9 the Department of Transportation seems to agree with  
10 that position, that they don't impose any particular  
11 serious burden on airlines.

12 Nevertheless, as the result of this sort of  
13 jurisdictional misunderstanding between the Civil  
14 Aeronautics Board and the DOT, the regulations do not  
15 apply to any major airlines at all. And as a result of  
16 that, handicapped persons really have no protection if  
17 they wish to use airplanes and to fly on commercial  
18 airlines.

19 QUESTION: Have the commercial airlines  
20 continued to this day to conduct themselves in a manner  
21 which would be in violation of those proposed  
22 regulations?

23 MR. PARKER: Justice O'Connor, the airlines'  
24 activity is somewhat unpredictable. There are certainly  
25 airlines that have an excellent record and have not ever

1 treated handicapped people in any kind of an unfair  
2 way. But one never knows.

3 Basically what these regulations did, I think,  
4 and that's the reason airlines seem rather satisfied  
5 with them, was to take the existing practices of the  
6 best airlines and sort of codify them and say these are  
7 acceptable standards and this is what you should be  
8 complying with.

9 The thrust of our argument here, I think --  
10 and again, it goes to the question of drawing that sort  
11 of funny line at the airline. The thrust of our  
12 argument is that the Government's interpretation of what  
13 "program specificity" means leads to a very odd result.  
14 It certainly is a hard program to define, and we submit  
15 that the Government's program, however they have defined  
16 it, really doesn't make any sense and really makes Grove  
17 City, Grove City College versus Bell, almost impossible  
18 to apply.

19 Grove City says that you look at the  
20 underlying statute and you look at what Congress thought  
21 they were funding. Congress here was not funding  
22 airports any more than they have funded colleges or  
23 higher education. They certainly, while they provide  
24 grants to airports, they are not, as the Solicitor  
25 General correctly pointed out, they are not grants for

1 sort of running the airports.

2 They are discrete earmarked grants: We need  
3 to resurface our runway; we need to install lighting  
4 equipment so that airplanes can taxi around on our  
5 runways more safely. Those are the kinds of grants.

6 QUESTION: Well, are you saying, Mr. Parker,  
7 then that you do go back and look at the grant statute  
8 and just, and that is the program, whatever the grant  
9 was for?

10 MR. PARKER: Absolutely, absolutely. The  
11 grants here --

12 QUESTION: But then if you do that, and say  
13 one of the airlines decides not to comply with the  
14 anti-discrimination mandate of the statute, what do you  
15 do? Withdraw the money for the runway that the airline  
16 uses?

17 How do you enforce it against an airline?

18 MR. PARKER: There are various remedies that  
19 you can impose. I suppose that in this situation you  
20 would not terminate the grant. You would not tear up  
21 the runway, in effect.

22 The Justice Department has the authority, at  
23 least, and a court has the authority to enter injunctive  
24 relief and say, in the future --

25 QUESTION: I suppose they could do that even

1 without the regulations if the statute covers the  
2 activity, couldn't they? Which in turn would mean, it  
3 seems to me, that they could enforce the statute against  
4 individual operators of private planes and the like.

5 MR. PARKER: . They shouldn't be able to enforce  
6 it against an individual operator of a private plane  
7 because the individual operator of a private plane is  
8 simply not covered by the statute.

9 QUESTION: If a big airplane is covered when  
10 it lands and takes off, why isn't a small airplane?

11 QUESTION: They use the same runway.

12 MR. PARKER: They do, yes.

13 QUESTION: They use the same runway and the  
14 same --

15 MR. PARKER: And they receive exactly the same  
16 kind of assistance. The difference is that -- the  
17 difference is the posture that the airlines are in both  
18 vis a vis the airports and vis a vis their passengers.

19 QUESTION: You may have a small taxi operator  
20 who says, I just won't take people of a race that I  
21 don't like. I suppose Title VI would apply.

22 MR. PARKER: And that taxi operator would be  
23 covered, would be covered by Title VI.

24 QUESTION: Well, what about a private  
25 individual who says, I don't -- I'll just take my

1 friends and I won't take take people of an opposite  
2 race?

3 MR. PARKER: A private individual who is not  
4 in a position to deny access to someone else, a  
5 passenger, is not covered. The reason that person is  
6 not covered is because in that situation someone who  
7 uses a private plane, is lucky enough to have their own  
8 private plane, is not under our definition a recipient.  
9 They are --

10 QUESTION: Why not? He's using the airport  
11 facilities.

12 MR. PARKER: Because they're an ultimate  
13 beneficiary.

14 QUESTION: So is the big airline.

15 MR. PARKER: No. The big airline, with all  
16 respect, the big airline --

17 QUESTION: The small plane has two seats in  
18 the back and he can take guest or not. Why isn't that  
19 the same?

20 MR. PARKER: Because the -- it is not the same  
21 because the small airlines are not in a position -- for  
22 one thing, they are not in the business of providing  
23 transportation, and they are not in the position of  
24 denying access.

25 QUESTION: The word is "recipient,"

1 not "business."

2 MR. PARKER: I'm sorry?

3 QUESTION: The word is "recipient," not  
4 "business."

5 QUESTION: Yes, it doesn't say anything about  
6 business.

7 MR. PARKER: That's correct. The definition  
8 of recipient is -- excludes ultimate beneficiaries. The  
9 question -- the reason this gets somewhat confusing, I  
10 think, is that you have to look at the statutory scheme  
11 and say who are the ultimate beneficiaries and who is or  
12 are the recipients here.

13 QUESTION: And that is in terms of the grant  
14 statute? In other words, who are the ultimate  
15 recipients under the grant statute and who are the  
16 beneficiaries?

17 MR. PARKER: That's correct. The statutes  
18 themselves unfortunately -- the statutes don't give you  
19 as much help in defining who the ultimate beneficiary  
20 is.

21 QUESTION: Well, maybe it isn't that  
22 complicated. Maybe it's just who received the federal  
23 money. And in Grove City the college actually received  
24 the federal money.

25 Now, here who receives the federal money?

1 MR. PARKER: The federal money in terms of  
2 cash is received by an airport authority.

3 QUESTION: Right.

4 MR. PARKER: The airport uses that to build a  
5 runway.

6 QUESTION: Yes, we know. But maybe the  
7 statute has to be applied as it's written as to who  
8 receives the federal money.

9 MR. PARKER: Well, I certainly agree that it  
10 does. I think the definitional question is helped a  
11 little bit by looking at what the Government -- what we  
12 agree on with the Government. First, we agree that the  
13 airports, as you correctly point out, are a recipient.  
14 The airport is undoubtedly a recipient; the airport  
15 authority is prevented from discriminating.

16 The airline passenger is, again by the  
17 Government's definition, an ultimate beneficiary. Where  
18 we differ from the Government is where the airlines fit  
19 into that. We say -- the Government says that the  
20 airlines are no different from their passengers and that  
21 they have no obligations to their passengers at all.

22 We say that the airlines are very different  
23 from their passengers, that they have a totally  
24 different kind of role with regard to their passengers.

25 QUESTION: Well, that may be true. But you

1 still have to convince us that they are recipients.

2 MR. PARKER: Well, I agree with that. I think  
3 they are recipients because there's no question that the  
4 airports receive something. They receive the use of --

5 QUESTION: You mean the airlines?

6 MR. PARKER: I'm sorry, that's correct, the  
7 airlines. There's no question the airlines receive  
8 something. They receive the use of the runway, which is  
9 basically federal cash transformed into a runway. The  
10 grant says: Here's some cash; you're going to use it to  
11 build a runway.

12 The question is, well, where do you put the  
13 airlines? The question is, did the Congress intend for  
14 --

15 QUESTION: Well, on that basis the passengers  
16 are recipients. There they are, there they are going  
17 down the runway in a plane, and that runway -- they're  
18 not ultimate beneficiaries any more than the airlines  
19 then.

20 MR. PARKER: No. The question -- I think it  
21 is a matter of labels. There's no question that it's a  
22 matter of deciding who to label as what. What we're  
23 emphasizing --

24 QUESTION: Kind of like finding a relevant  
25 market in an antitrust case.

1 MR. PARKER: Well, hopefully it's easier than  
2 that.

3 (Laughter.)

4 MR. PARKER: It may not be.

5 QUESTION: How do you -- on this airplane, you  
6 say when the passengers are on the airport they're  
7 covered; while they're walking down to get on the plane,  
8 they're covered; and as they go down the runway, they're  
9 covered. Isn't that your position?

10 MR. PARKER: That's correct, Justice  
11 Marshall.

12 QUESTION: At the end on the runway, what?

13 MR. PARKER: They remain covered. I cannot  
14 say that the airline's obligations --

15 QUESTION: That's pendent jurisdiction, I  
16 guess.

17 (Laughter.)

18 MR. PARKER: Something like that.

19 I cannot say that the airlines' obligation  
20 ceases when the wheels are no longer touching the  
21 ground. I think you've got to say that the program or  
22 activity which Congress intended to fund was airline or  
23 airport operations.

24 The specific grants are provided for the  
25 functioning of airplanes, and that I --

1 QUESTION: What about the --

2 MR. PARKER: I'm sorry.

3 QUESTION: What about the controllers, air  
4 controllers?

5 MR. PARKER: The air traffic control question  
6 I submit is not before the Court at this point. It was  
7 not the basis --

8 QUESTION: Who pays that?

9 MR. PARKER: The air traffic controllers are  
10 paid directly by the Federal Aviation Administration.  
11 That is a federally operated activity.

12 QUESTION: Well, isn't that just as important  
13 as the runway in this whole scheme?

14 MR. PARKER: Yes, it is. It is equally  
15 important.

16 QUESTION: You argued it, didn't you?

17 MR. PARKER: We argued it fully in the court  
18 below. We have not argued it --

19 QUESTION: And the Court of Appeals put it  
20 aside.

21 MR. PARKER: I'm sorry?

22 QUESTION: The Court of Appeals put it aside.

23 MR. PARKER: That's correct, the Court of  
24 Appeals did put that question aside.

25 It seems to me, in all candor, I think that

1 the analysis is clearer -- it may not seem that way, but  
2 the analysis is clearer if we focus on the funds that go  
3 to airports, rather than the air traffic control  
4 system. I think conceptually they are very different  
5 kinds of --

6 QUESTION: Well, the airlines are certainly  
7 receiving something, some benefit from the air traffic  
8 control system.

9 MR. PARKER: Well, that's correct, they do.

10 QUESTION: It certainly hurt you to take it  
11 into consideration, can it?

12 MR. PARKER: No. I think it can be taken into  
13 consideration, and I think it does demonstrate something  
14 about the relationship, the peculiar posture of the  
15 American commercial airline industry.

16 QUESTION: But if that isn't -- if whatever  
17 they receive, if whatever they are receiving from the  
18 air traffic control system isn't enough, why is it  
19 enough to be receiving the aid of a runway?

20 MR. PARKER: Because I think the relationship  
21 with the runway and the relationship with the airport --

22 QUESTION: Well, they wouldn't even use the  
23 runway until the air traffic control says go.

24 MR. PARKER: Well, that's correct. I think --  
25 I don't want to abandon the air traffic control issue

1 altogether. I think it does provide some general  
2 evidence about the particular role that airlines play.  
3 However --

4 QUESTION: Well, if you're going to rely at  
5 all on the air traffic control, how about the weather  
6 service of the Government?

7 MR. PARKER: Well, I think the difference  
8 there is that the weather service is something that is  
9 available to everyone. It is not something --

10 QUESTION: Well, certainly the air traffic  
11 control service is available to a lot of people besides  
12 commercial airlines. It's available to private planes.

13 MR. PARKER: It is, although I think as a  
14 matter of fact it is not used as much by others. But  
15 that's a factual sort of distinction.

16 The significance, I think, here is not that  
17 these various things -- that is, the weather service,  
18 the air traffic control, the airports -- it's not simply  
19 that they are important and significant for the  
20 operation of the airport.

21 Rather, it is that the airport -- the  
22 relationship between the airline and the airport is  
23 especially peculiar. As we point out, the critical  
24 statute here, I think, is the Airport and Airway Funding  
25 statute. That I think provides the clearest model and

1 the clearest analysis that we can focus on here.

2 QUESTION: Mr. Parker, while we're asking  
3 hypotheticals, what is the situation with respect to  
4 motor carriers that use the highways funded by the  
5 Federal Government?

6 MR. PARKER: Motor carriers I think are  
7 factually distinguishable.

8 QUESTION: Did you say distinguishable?

9 MR. PARKER: I'm sorry?

10 QUESTION: Did you say distinguishable?

11 MR. PARKER: Yes, I'm sorry. I think they are  
12 factually distinguishable.

13 QUESTION: Who receives the federal funds with  
14 respect to the highways?

15 MR. PARKER: I think we all receive those  
16 federal funds. I think there you really --

17 QUESTION: Who are they paid to?

18 QUESTION: Well, I didn't get mine.

19 (Laughter.)

20 MR. PARKER: What I should have said was that  
21 the federal highway system is indeed I think a public  
22 benefit that is generally available. The fact is -- and  
23 I don't think you can ignore this -- the fact is that we  
24 can buy cars. The federal highway system is much more  
25 in the nature of the public good.

1           QUESTION: If you have the automobile and ride  
2 in buses, passenger buses, is that different really from  
3 riding airplanes on airports? I don't know. Does  
4 Section 504 apply to all of it?

5           MR. PARKER: I think if I were a bus company I  
6 would try to argue that it should not apply to me. I'm  
7 not certain that that would succeed. But I think if I  
8 were a bus company I would argue: Look, I don't have  
9 the kind of relationship to the federal highway system  
10 that these airlines have to airports.

11          QUESTION: You couldn't function at all unless  
12 you had the highways.

13          MR. PARKER: Well, that's true, that's true.  
14 But I think there are two factual -- two basic  
15 distinctions. One is that the bus company is going to  
16 say: I am not, I the bus company, am not in a position  
17 to truly deny access, because as a matter of fact people  
18 do really -- most people really do have cars.

19          Also, I think if I were the bus company I  
20 would argue that the Government doesn't have to consult  
21 with me before they can get a -- before they can build a  
22 highway. In other words, there really is, and I don't  
23 think we can ignore it, there really is not just a sort  
24 of functional interdependence between airports and  
25 airlines, but there is a contractual and statutory

1 relationship between them that I think is significant,  
2 and I think Congress had that in mind.

3 Let me go back, if I could, to this line of  
4 questioning about what is covered at the airport and  
5 what is not. The Government -- because I really would  
6 like to emphasize that. The Government recognizes that  
7 the grants for a runway cover -- even though the grant  
8 is only for a runway, triggers coverage of some things  
9 that go on inside the terminals: the ticket counter,  
10 the baggage claim area, gift shops, and that sort of  
11 thing.

12 However, it is quite clear that it does not  
13 cover everything that goes on inside the terminal. The  
14 Government's briefs continually try to draw a  
15 distinction between in-flight activities and presumably  
16 everything else.

17 And I think that the questions that were  
18 raised before demonstrate that the Government's line is  
19 -- I'm not even sure it's arbitrary. It's very unclear  
20 as to what is covered and what is not.

21 It does not cover the sale of a ticket. It  
22 does not cover boarding. It does not cover whether the  
23 airline has to assist a person in boarding or not. It  
24 does not cover wheelchair storage. All of those things  
25 occur well before the person even gets to the gate.

1 Some of them occur when a person just calls into the  
2 airport.

3 And it's a little hard to know exactly what  
4 the Government's definition of a program or activity is  
5 here. It seems that it is -- that it seems inconsistent  
6 with the statute to try to slice up the program or  
7 activity in that way.

8 It certainly would seem --

9 QUESTION: Mr. Parker, may I ask you, what  
10 sort of things are covered at the airport? Is it things  
11 like structural ramps and access facilities and rest  
12 room facilities and things like that that would be part  
13 of the structure itself, as opposed to activities in a  
14 gift shop?

15 MR. PARKER: You mean under the existing  
16 regulations?

17 QUESTION: Under the existing regulations.  
18 For example, what does a gift shop have to do to comply  
19 with the regulations?

20 MR. PARKER: The gift shop example comes  
21 basically from the Title VI regulations, which the  
22 Government now seems to be suggesting may not be all  
23 that valid after all, although they've been in existence  
24 for ten or twelve years. Longer than that; 20 years.

25 The gift shop and the restaurant sort of

1 analogies come out of the Title VI regulations, and  
2 presumably that person, the person in the gift shop,  
3 would be required under Title VI obviously not to  
4 discriminate on the basis of race.

5 If the 504 regulations applied to the gift  
6 shop, I assume that person would have to comply in some  
7 reasonable way, and that is -- what we're primarily  
8 talking about here, of course --

9 QUESTION: Did you go through any of these  
10 grants?

11 MR. PARKER: I'm sorry?

12 QUESTION: The grants themselves, did you see  
13 them, look at them?

14 MR. PARKER: I have a listing of the grants.

15 QUESTION: I'm wondering if my tax money is  
16 being used to construct gift shops.

17 MR. PARKER: Justice Marshall, I think that in  
18 some cases it probably is. The structure of the statute  
19 is initially, the way it was set up and the way under  
20 the 1970 statute especially, was to fund activities  
21 relating to the landing and taking off of airplanes.  
22 That's runways, taxiways, and that sort of thing. Under  
23 the 1970 statute, you couldn't use any of the money --

24 QUESTION: That would also include a bar?

25 MR. PARKER: A bar?

1 QUESTION: Yes, whiskey bar.

2 MR. PARKER: Well, it would.

3 QUESTION: Do you need that for an airplane?

4 MR. PARKER: It doesn't seem essential.

5 QUESTION: I bet you can fly an airplane  
6 without liquor.

7 MR. PARKER: I think that all of this, I  
8 think, points out the sort of peculiarity. It seems to  
9 me that the Government's definition starts from the  
10 wrong end, that it says, it sort of assumes, airport  
11 services, when in fact the grants are not provided for  
12 airport services. They are provided for, if anything,  
13 runway, landing and takeoff kinds of services.

14 QUESTION: Mr. Parker, I'm trying to think of  
15 tough questions to ask you. What about port  
16 authorities? They provide all sorts of services for  
17 passengers who use ships.

18 MR. PARKER: A port authority --

19 QUESTION: Docking facilities, wharves,  
20 channels, everything. And certainly they are recipients  
21 of federal funds.

22 MR. PARKER: If the relationship of -- and I  
23 take it the question extends to a ship or a shipping  
24 company that uses that port authority.

25 QUESTION: My question? I didn't hear you.

1 MR. PARKER: I'm sorry. I take it that the  
2 question is not whether the port authority itself is  
3 covered, but rather whether it would extend, and I take  
4 it if a port authority receives a federal grant.

5 QUESTION: Well, your concern is to make sure  
6 that handicapped passengers are properly treated when  
7 they fly. I suggest they also should be properly  
8 treated when they ride buses and also when they, for  
9 whatever reason, go on a tour to the Caribbean and have  
10 to use a port facility.

11 So the question in my mind is where does one  
12 draw the line, really, speaking of lines.

13 MR. PARKER: I think you have to draw the  
14 line, Justice Powell, in terms of whether or not there's  
15 a federal statute that provides money to that port  
16 authority.

17 QUESTION: I'm sure it does.

18 MR. PARKER: I think that's correct, I think  
19 it does. I think you would have to look at the specific  
20 grant statute.

21 The peculiarity of this particular grant  
22 statute is that it doesn't simply say: Here's money; go  
23 run an airport. It says: You apply for a grant; we are  
24 only going to give money to someone who applies for a  
25 grant, who identifies a specific project, and then you

1 can get the money for that specific project. But they  
2 are not sort of generalized grants that are provided.

3 And again, I think you'd have to look at the  
4 specific question.

5 I would, in the time that I have remaining,  
6 want to touch on a sort of separate argument here, and  
7 that is the arguments that are raised in parts two and  
8 three of our brief. Those arguments accept the  
9 Government's definition. I'm not sure I want to do that  
10 now.

11 We accept the Government's definition of the  
12 relevant program or activity as an airport, and we  
13 conclude that, even if that is the program or activity,  
14 that is if you define it as narrowly as the Government  
15 suggests as only airport services, our suggestion in  
16 that part of our brief is that under the DOT's own  
17 regulations that that airport nevertheless has some  
18 obligations not to discriminate and not to facilitate  
19 discrimination by other entities with which it deals.

20 The Government seems to be suggesting in its  
21 reply brief that a program or activity such as an  
22 airport exists sort of in a bell jar, sort of  
23 hermetically sealed off from everything else that goes  
24 on, and suggests that an airport can enter into a  
25 contract with a third party that denies access to the

1 airport.

2 The regulations, which we cite in our brief  
3 and which are the DOT's own regulations, those  
4 regulations suggest that that's not true; that an  
5 airport, even if the program or activity is defined only  
6 as an airport, that that airport nevertheless has some  
7 obligations and cannot enter into contracts with third  
8 parties.

9 QUESTION: So you would say that an airport  
10 under the regulations could say to the airline: If  
11 you're going to discriminate against the handicapped,  
12 we're no longer going to lease you space in the  
13 airport.

14 MR. PARKER: That's exactly correct, and that  
15 is exactly --

16 QUESTION: That's your argument right now?

17 MR. PARKER: Yes, Justice White, it is.

18 QUESTION: But that is not something the Court  
19 of Appeals used, is it?

20 MR. PARKER: No, it's not. It's separate, it  
21 is a separate argument, and it is driven forward by --

22 QUESTION: Which you're making as a  
23 Respondent.

24 MR. PARKER: That's correct, Your Honor.

25 It picks up the question that Justice O'Connor

1 asked at the outset, and that is whatever happened to  
2 DOT here. The DOT proposed regulations, which we cite  
3 and which are included in the appendix to our brief,  
4 which would do exactly what we asked in parts two and  
5 three.

6 We therefore request that the Court, this  
7 Court, affirm the judgment of the Court of Appeals and  
8 remand the regulations to the Department of  
9 Transportation.

10 Thank you very much.

11 CHIEF JUSTICE BURGER: Do you have anything  
12 further, Mr. Solicitor General? You have six minutes  
13 remaining.

14 ORAL ARGUMENT OF  
15 CHARLES FRIED, ESQ.,  
16 ON BEHALF OF PETITIONERS

17 MR. FRIED: Thank you very much, Mr. Chief  
18 Justice.

19 I would like first of all to emphasize,  
20 because the point is of great importance not just in  
21 this case but as a general matter of interpreting  
22 Section 504 and Title VI, that the proper way to proceed  
23 -- and this is where the Court of Appeals we think erred  
24 -- is in this sequence:

25 First, identify the recipient. That spells

1 the outer limit of regulatory power. And then identify  
2 the program of that recipient which is covered. That's  
3 precisely what this Court did in the Grove City College  
4 case, and it worked very hard at it. And we don't think  
5 that the procedure the Court of Appeals used helps  
6 analysis.

7 QUESTION: Well, under your argument do you  
8 ever get to the second question?

9 MR. FRIED: You do not in respect to the  
10 commercial airlines, because the commercial airlines are  
11 not recipients.

12 QUESTION: Are not recipients.

13 MR. FRIED: That is correct.

14 QUESTION: In your analysis, just the  
15 recipient is the person or the entity to whom the entity  
16 goes?

17 MR. FRIED: That is correct, Justice.

18 QUESTION: And that's the end of the case?

19 MR. FRIED: It's the end of this case.

20 QUESTION: This case, exactly.

21 MR. FRIED: It certainly wasn't the end of the  
22 Grove City College case. It's important to --

23 QUESTION: Now we've got this case. But in  
24 this case, you just say the money went to the airport  
25 authority and that's all there is to it.

1 MR. FRIED: That is correct, Justice White.  
2 And the Court of Appeals we think went about it the  
3 other way. They constructed it at the highest level of  
4 generality, a program, and then said that people  
5 participating in that program thereby become  
6 recipients.

7 They did it in the wrong sequence, and that is  
8 what threatens to obliterate the distinction between  
9 beneficiaries on one hand, which is a very wide class of  
10 persons, including the employees of the airlines and the  
11 others, the distinction between beneficiaries and  
12 recipients.

13 It also threatens to obliterate the  
14 distinction, as the Court of Appeals did, we think,  
15 between the program and the general policy which  
16 Congress had in mind. That is what we think also  
17 occurred here.

18 On a practical level, there is a problem.  
19 There are what one might call good airlines, airlines  
20 that make a real effort to accommodate handicapped  
21 persons. And certainly it would be a serious matter if  
22 those airlines which seek to accommodate handicapped  
23 persons were unable to do so because of discrimination  
24 by airports.

25 What the regulations and the interpretation

1 we're asking for here does is to ensure that travelers,  
2 handicapped travelers, are not disadvantaged in that  
3 way. The reach is not broader than that.

4 It might be a good idea if the reach were  
5 broader than that, but that seems to us to be a plea  
6 which is properly addressed to the Congress.

7 Thank you very much.

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
9 The case is submitted.

10 (Whereupon, at 11:57 a.m., oral argument in  
11 the above-entitled case was submitted.)  
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# CERTIFICATION

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#85-289 - UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., Petitioners

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V. PARALYZED VETERANS OF AMERICA, ET AL.

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