Oral Argument Not Yet Scheduled

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

21-5238

JAHINNSLERTH OROZCO,

Plaintiff-Appellant,

—v.—

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

Defendant-Appellee.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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GLOSSARY

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

GLOSSARY OF KEY STATUTES AND NAMES

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

INTRODUCTION

This appeal turns on a single question of statutory construction: can both federal employees and members of the public with disabilities avail themselves of the full panoply of rights and remedies provided, either explicitly or implicitly, by Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, including the right to file a civil action for injunctive relief? The text, structure and purpose of the statute all point to the same answer, and that answer is yes.

Unfortunately, the district court mistakenly reached a different conclusion because, like other district courts in earlier cases, the district court here misunderstood the specific remedial language that Section 508's enforcement provision incorporates. But a closer look at the history of that remedial language, as well as the law around incorporation and statutory cross-references more generally, only underscores that the district court's flawed reasoning led it to the wrong answer about who, and against whom, Section 508 expressly authorizes suit.

Finally, if this Court has any doubt about whether Section 508 includes an express right of action for federal employees with

disabilities like Mr. Orozco, then it should find that the unequivocal legislative history of the statute and its 1998 amendment—which focused on the need for greater enforcement to benefit federal employees with disabilities—supports an implied right of action for Mr. Orozco to pursue his claim for injunctive relief. Either through affording an express cause of action to "any individual with a disability" who files a complaint against a federal department or agency, or at a minimum through a statutory scheme that has been held to authorize injunctive remedies for people with disabilities harmed by federal agencies, Congress intended the Rehabilitation Act to provide federal employees like Mr. Orozco with judicial recourse when their federal agency employers fail to use technology that disabled employees can access in a comparable manner to their nondisabled coworkers.

The government correctly acknowledges that "the scope of the statute is defined in Section 508(a)," which covers all federal departments and agencies. (Brief for Defendant-Appellee ("Appellee Br.") at 28.) What the government, and the district court, get wrong about Section 508 is that its enforcement provision also authorizes civil actions against all federal departments and agencies, including federal

departments and agencies acting as employers. Correcting this single error of law is all this Court need do to resolve this appeal.[1]

ARGUMENT

A. Congress created an express private right of action under Section 508 available to both federal employees with disabilities and members of the public with disabilities.

The government rewrites Section 508's enforcement provision, suggesting it provides for "two types of complaints": an administrative complaint mechanism under Section 508(f)(2) available against any federal department or agency that develops, procures, maintains, or uses information technology that is not comparably accessible under Section 508(a)(1); and a second, more limited civil action mechanism under Section 508(f)(3) available only against federal agencies providing financial assistance within the meaning of Section 505 (a)(2). (Appellee

[1] This Court should not be distracted by the government's offhand mention of Section 508's exemption for national security systems (Appellee Br. at 3), an issue that the parties have never briefed and that is not part of this motion. Nor should the Court consider the factual dispute over whether Mr. Orozco exhausted his administrative remedies before filing suit (Appellee Br. at 12-13), but if it does consider that issue, should conclude that he did so. (*See* JA 009-10 ¶¶ 16-25.)

Br. at 5.) However, such a two-tiered complaint structure bears no resemblance to the statute Congress actually drafted.

The text of the enforcement provision is straightforward. Section 508(f)(1)(A) defines the universe of complainants ("any individual with a disability") and the universe of entities against whom complaints can be made (Federal departments and agencies), and (f)(2) explains how such complaints are to be filed in the first instance. Finally, (f)(3) extends the "remedies, procedures, and rights" of Section 505(a)(2) and Section 505(b) to the full universe of complainants identified in (f)(1)(A).

The fact that Section 508(f)(3) borrows remedies, procedures, and rights from another statutory provision does not alter this straightforward textual analysis. To the contrary, when Congress incorporated Section 505 remedies into Section 508, it was following an already well-worn path: one Congress had taken first in 1978 when it added Section 505 to the Rehabilitation Act and that it retraced in 1990 when it passed the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. In both of these earlier instances, the remedies, procedures, and rights available under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d *et seq.*, were adopted without simultaneously adopting Title VI's

express limitations on the entities against whom those remedies, procedures, and rights could be enforced. Instead, Congress specified in each borrowing statute—first Section 505 and later the ADA—who could enforce the borrowed rights and remedies, and against whom.

Nothing in Section 508's text or structure indicates a reason to depart from this well-established borrowing scheme. Indeed, courts interpreting language borrowed from other statutes have repeatedly emphasized that the context of the borrowing statute is paramount, and perverse results are to be avoided. But the limitation the district court imposed on Section 508 based on the borrowed language from Section 505, reading employers and employees out of the enforcement provision altogether, could hardly be more perverse in the context of a statute that was passed in 1986 and strengthened in 1998 out of concern for the working conditions of federal employees with disabilities.

1. Section 508(f) specifies both who may take enforcement action and against whom enforcement action may be taken.

As Mr. Orozco explained at length in his opening brief, Section 508 consistently describes both those whom it is intended to benefit and those on whom it imposes obligations. The beneficiaries are "individuals

with disabilities," who, Section 508(a) maintains, must have "have access to and use of information and data that is comparable to the access to and use of the information and data by" those without disabilities. 29 U.S.C. § 794d(a)(1)(A). And those tasked with obligations are "each Federal department or agency, including the United States Postal Service." *Id.*

Neither providers nor recipients of federal financial assistance are mentioned anywhere in Section 508. Considered as a self-contained unit, Section 508 involves two, and only two, actors: a group of individuals with disabilities (either federal employees or members of the public seeking information from the government) on whom the statute confers a right to access information in a nondiscriminatory manner, and a group of federal departments and agencies who must ensure such nondiscriminatory access "[w]hen developing, procuring, maintaining, or using electronic and information technology." *Id.*

That laser focus on the two principal actors—rights-holders and obligation-holders—continues in the enforcement provision codified at subsection (f). That subsection establishes that "any individual with a disability" may file a complaint against "a Federal department or

agency" that allegedly "fails to comply with subsection (a)(1) in providing electronic and information technology." 29 U.S.C. § 794d(f)(1)(A). For purposes of the enforcement provision, then, the two principal actors of the statute appear not as groups but as individuals: an individual with a disability who files a complaint and the department or agency about which they complain. This shift from the aggregate to the individual explains why the second paragraph of subsection (f), which focuses on the mechanics of the administrative complaint process, is written in the singular form. 29 U.S.C. § 794d(f)(2) (discussing "[t]he Federal department or agency receiving the complaint").

The government makes much of the fact that the third and final paragraph of subsection (f) does not mention departments or agencies yet again. By the government's account, this suggests (f)(3) contemplates a different type of complaint that can be brought only against the smaller subset of federal actors who are acting in their role as funding providers rather than employers. (Appellee Br. at 21.) But the text of the provision cannot support this reading. Congress told us within this provision itself who could use the remedies, procedures, and

rights it referenced, or to use the precise words of the statute, to whom those remedies, procedures, and rights "are available": they are available to "any individual with a disability filing a complaint under paragraph (1)." 29 U.S.C. § 794d(f)(3). In other words, they are available to "any individual with a disability" who alleges "that a Federal department or agency fails to comply with subsection (a)(1) in providing electronic and information technology." *Id.* at § 794d(f)(1). If Congress had intended to limit enforcement as suggested by the government, Congress would not have made "[c]ivil [a]ctions" available to "any individual with a disability," *id.* at § 794d(f)(3), but instead only to "individuals with disabilities who are members of the public seeking information or services from a Federal department or agency." But Congress did not use such limiting language.[2]

[2] Besides, there is a more likely explanation than the government's as to why (f)(3) does not mention Federal departments and agencies. Congress needed, in (f)(3), to refer to "filing a complaint under paragraph (1)" to communicate that an injured party should exhaust their administrative remedies under (f)(1) before bringing a civil action under (f)(3). Given that necessary reference, there was no need for (f)(3) to identify explicitly, for the third time, the entities against which an individual with a disability could bring a Section 508 complaint.

All of the "who" questions in this case—that is, all the questions about who can take action against whom—can be answered within the confines of Section 508. There is no need to cross-reference any other statutory provisions. While reference to Section 505 is necessary to determine what remedies, procedures, and rights Congress was providing—that is, the "how" of the enforcement regime—Congress specified within Section 508(f) itself both those to whom the incorporated Section 505 remedies are available (individuals with disabilities who file complaints) and those against whom they can be used (federal departments and agencies). This should come as no surprise, for these are the same two actors—the same two "who"s—that Congress consistently referenced throughout Section 508.

It would be far more surprising if, after setting forth a statutory scheme describing Federal departments and agencies' obligations to individuals with disabilities who are federal employees or members of the public seeking information, Congress then limited the scope of enforcement authority to only those federal departments or agencies that were acting as providers of financial assistance when a complaint about their allegedly inaccessible technology was made. At a minimum,

if Congress had intended such a drastic limitation, we would expect to see more unequivocal evidence than a statutory cross-reference. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress … does not alter the fundamental details of a regulatory scheme through vague terms or ancillary provisions"). And this is especially true where that same statutory cross-reference has been used twice before and has not had the same limiting effect that the district court and the government ascribe to it here.

2. Congress imported remedies and rights from Title VI twice prior to amending Section 508 in 1998, once directly and once indirectly, without also borrowing the limits of Title VI liability.

The phrase "remedies, procedures, and rights" did not appear for the first time in the 1998 amendments to Section 508. Rather, the phrase's first appearance pertinent to this case was in 1978, when Section 505 was added to the Rehabilitation Act. At that time, as Mr. Orozco outlined in his opening brief, federal courts were split as to whether Title VI contained an implied right of action only against recipients of federal financial assistance, who were mentioned by name in 42 U.S.C. § 2000d, or also against federal agencies who failed to meet their own statutory obligations to stamp out discrimination in the

programs and activities they funded. (*See* Opening Brief for Plaintiff-Appellant ("Appellant Opening Br.") at 21 (citing *Little Earth of United Tribes, Inc. v. United States Dep't of Hous. & Urban Dev.*, 584 F. Supp. 1292, 1297 (D. Minn. 1983) (collecting cases)).)

But there was no corresponding ambiguity about who could enforce Section 504, 29 U.S.C. § 794, when Title VI's remedies, procedures, and rights were added to the Rehabilitation Act as an enforcement provision. 29 U.S.C. § 794a(a)(2). That's because the text of the borrowing statute, Section 505, explicitly stated to whom Title VI's remedies, procedures, and rights were being made available: "to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." *Id.* Section 505 thus set the example that later cross-references would follow: rights and remedies could be borrowed from an earlier-enacted statute, but the borrowing statute would spell out who could avail themselves of those rights and remedies, and against whom they could be exercised.

The Supreme Court provided additional guidance six years later regarding what Section 505 did, and did not, borrow from Title VI in

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984). Noting that back pay was a remedy available under Title VI and that Section 505(a)(2) imported such Title VI remedies into Section 504, the Court found back pay also available as a Section 504 remedy. *Id.* at 630-31. Later in the same opinion, however, the Court held that a limitation on the types of federal funding recipients subject to Title VI was not imported because it was not a right or remedy, and Section 504 contained no similar limiting language. *Id.* at 631-32. Moreover, to import Title VI's limiting language into Section 504 would have undermined Section 504's remedial purpose. *Id.* at 633-35.

Thus, the government's statement that Section 505(a)(2) does "two things"—the second of which is to limit Title VI's remedies to only those aggrieved by acts or inactions of recipients and providers of federal financial assistance (Appellee Br. at 18)—is profoundly misleading. Section 505(a)(2)'s reference to recipients and providers of federal financial assistance was not a limitation but an expansion of coverage, relative to Title VI, when Congress enacted Section 505 in 1978.

More importantly, *Darrone* erases any doubt that Section 505(a)(2)'s "who" language does not limit later-enacted statutes, like

Section 508, that borrow its rights and remedies. Just as Section 505 did not import Title VI's "who" language, neither does Section 508 import Section 505's.

Since *Darrone*, other courts have similarly interpreted other statutes that cross-reference Section 505. Consider the Americans with Disabilities Act, passed by Congress in 1990. Title II of that statute prohibits disability discrimination in programs or activities conducted by public entities, regardless of whether those entities receive federal funds. 42 U.S.C. § 12132. The enforcement provision for this title of the ADA, in turn, incorporates the "remedies, procedures, and rights" of Section 505 (Section 794a of Title 29)—themselves drawn from Title VI—as the "remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132." 42 U.S.C. § 12133. And, of course, Section 505 and Title VI's remedies are only available against federal agencies and federal funding recipients. 29 U.S.C. § 794a; 42 U.S.C. § 2000d. Were the scope of liability under the ADA "confined to that of [Section 505 and] Title VI … public entities that do not receive federal funding"

would be "free from private suit." *Shotz v. City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003).

But the ADA contains no such limitation. *Id.* That's because it is the borrowing statute, here the ADA, that determines the "who" of enforcement, while the borrowed remedial provisions specify only the "how." *See id.* at 1174-75 (holding that the remedial provisions of Title VI incorporated into the ADA through Section 505 do not preclude individual liability, as contemplated by the plain text of the ADA's anti-retaliation provision codified at 42 U.S.C. § 12203). Any other reading would produce "a result Congress logically did not intend." *Shotz*, 344 F.3d at 1174. Indeed, if courts were to read the incorporated remedies as a sieve to limit the scope of liability under Title II of the ADA, Title II "would be rendered superfluous as the Rehabilitation Act also prohibits disability discrimination by public entities receiving federal funds." *Id.*

So when Congress amended Section 508 in 1998 and added an enforcement provision that both incorporated the "remedies, procedures, and rights" of Section 505(a)(2) and explicitly specified to whom those rights and remedies were available, it was making an

identical move to one it had made eight years earlier when enacting the ADA. Just as the language of Section 12133 controls who may enforce the borrowed rights and remedies in that statute—"any person alleging discrimination on the basis of disability in violation of section 12132"—the language of Section 508(f)(3) controls who may enforce the subset of borrowed rights and remedies imported into Section 508: "any individual with a disability filing a complaint under paragraph (1)." *See Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 137 S. Ct. 553, 563 (2017) (explaining that where "courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates … that the new provision has that same meaning."); *see also Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (explaining that where statutes "pertain[ing] to the same subject" or operating in a common "context" use similar language, that language should be interpreted consistently). Section 505 simply has nothing to say about these "who" questions when it is the borrowee, rather than the borrowing, statute.

3. Interpreting Section 508(f)(3) to incorporate the "how" of Section 505, but not the "who," is consistent with interpretations of statutory cross-references in other contexts.

These cases about Section 505's "who" language are no aberration. Beyond this context, courts approach statutory cross-references in a manner consistent with Mr. Orozco's interpretation of Section 508(f)(3). The Supreme Court has made clear that "statutory cross-references will not always incorporate every component of the referenced section." *Ortega-Lopez v. Barr*, 978 F.3d 680, 692 (9th Cir. 2020) (citing *Torres v. Lynch*, 578 U.S. 452, 457-59, 472-73 (2016)). Instead, courts should incorporate the substance of referenced laws in a manner consistent with the structure and purpose of the borrowing statute. In *Torres v. Lynch*, the Supreme Court addressed whether the Immigration and Nationality Act (INA)'s definition of "aggravated felony" incorporated the entirety of a cross-referenced criminal arson statute. 578 U.S. at 454. The answer was no: the INA definition did not incorporate "jot-for-jot" each element of the cross-referenced statute. *Id.* at 461, 473. That result, the Court explained, was the one that made the most sense in the context of the borrowing statute as a whole. *Id.* at 459-60. Reading the cross-reference to incorporate the full definition would create a

"perverse" outcome and "'haphazard coverage" that Congress would not have intended. *Id.* at 462-63.

The Sixth Circuit has taken a similar approach in interpreting the Affordable Care Act's nondiscrimination provision, known as Section 1557. Section 1557 incorporates "[t]he enforcement mechanisms provided for and available under [] title VI, title IX, [Section 504], [and the] Age Discrimination Act." 42 U.S.C. § 18116. But that does not mean Section 1557 imports those statutes wholesale without regard for the rest of its text. Earlier this year, the Sixth Circuit decided Section 1557 does not incorporate Section 504's shorter statute of limitations. *Tomei v. Parkwest Med. Ctr.*, 24 F.4th 508, 514 (6th Cir. 2022). Both the text and structure of Section 1557 made clear that the statute sought to borrow from Section 504 the "*means* for 'compelling adherence'"—for example, "[p]rivate suits and agency actions"—without importing "the rules that apply to the means." *Id.* (emphasis added).[3]

[3] Applying the government's theory of incorporation to Section 1557 would lead to absurd results. Section 1557 prohibits discrimination by federally funded "*health* program[s and] activit[ies]." 42 U.S.C. § 18116 (emphasis added). Title IX of the Education Amendments of 1972 similarly prohibits sex discrimination by federally funded "*education* program[s and] activit[ies]." 20 U.S.C. § 1681(a) (emphasis added). If the

Here, too, the Court should adopt the interpretation most aligned with the borrowing statute. That interpretation avoids the perverse outcome of foreclosing civil suits by federal employees, contrary to Congress's manifest intent. The text of Section 508 clearly suggests a civil action can be brought by an employee aggrieved by the federal government's failure to fulfill their obligations as an employer. *See supra* Part A.1. The meaning of that text should drive the interpretation of what is borrowed from Section 505. Allowing the text of Section 505 to lead gets the order of operations backwards.

4. The government's attempt to rewrite the statute is unavailing.

For its part, the government relies heavily on a handful of unpublished district court decisions giving short shrift to the complicated statutory analysis of Section 508's structure, purpose, and

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government were right that incorporation of remedies and enforcement procedures narrows the incorporating statute to only those defendants who can be sued under the borrowee statute, Section 1557 would only allow sex discrimination suits and complaints against defendants who are both "health" *and* "education" programs or activities.

statutory relations. (Appellee Br. at 20.)[4] These few cases simply reflect the same initial misunderstanding of Section 508 being adopted uncritically from one court to another. They are no match for the text itself.

Neither is the government's reliance on *Lane v. Peña*, 518 U.S. 187 (1996). The government contends that its limited reading of Section 508's enforcement provision is appropriate because, when drafting that provision in 1998, Congress was presumably aware of *Lane*. As the government tells it, *Lane* "limited Section 505(a)(2)'s stated remedies as only being available to 'federal funding agencies acting as such,' not federal departments and agencies acting in their role as an employer."

[4] The academy has not found these district court opinions persuasive. M. Christine Fotopulos, *Civil Rights Across Borders: Extraterritorial Application of Information Technology Accessibility Requirements under Section 508 of the Rehabilitation Act*, 36 Pub. Cont. L.J. 95, 113-14 (2006) (criticizing *Latham v. Brownlee*, 16 A.D. Cases 1065, 2005 WL 578149, at *9 (W.D. Tex. 2005) as misinterpreting Section 508(f) as precluding a private right of action); Christopher R. Yukins, *Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement*, 33 Pub. Cont. L.J. 667, 716 (2004) (Proposing that under Section 508, an individual with disabilities (whether a member of the public or a federal employee) may file an administrative complaint or a private lawsuit against a federal agency alleging noncompliance with Section 508's accessibility requirements for EIT).

(Appellee Br. at 23 (citing *Lane*, 518 U.S. at 193).) But that is not *Lane*'s holding. *Lane* only held that monetary damages were not available in actions brought against agencies for violations of Section 504. *Id.* at 189. In doing so, *Lane* presumed that injunctive relief *was* available: the Court declined to disturb the injunction entered against the agency, reasoning that, in enacting Section 505(a)(2), Congress might reasonably have decided to "waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards." *Id.* at 196. Thus, the 1998 Congress that amended Section 508, informed by *Lane*, would have assumed the government can be sued for injunctive relief under Section 505(a)(2) and that attorneys' fees are available to prevailing parties other than the United States in such suits under Section 505(b). *Id.* at 194.[5]

[5] The government's citation of *Ass'n for Cmty. Affiliated Plans v. Dep't of Treasury*, 966 F.3d 782, 790 (D.C. Cir. 2020) for the proposition that Congress is presumptively aware of the interpretation given to a statute it incorporates is meaningful only insofar as the interpretation of the prior law is first accurately described. (Appellee Br. at 22.) When read fairly, the interpretation of Section 505(a)(2), as informed by *Lane*, that Congress would have adopted in adding Section 508's enforcement provision in 1998 is the same one Mr. Orozco offers.

The government's reading of *Lane* is off base in another critical way. In *Lane*, Section 505(a)(2) was acting as the borrowing statute, rather than the borowee, as is the case here. 518 U.S. at 191. The Court was determining whether it borrowed the availability of monetary awards from Title VI. *Id.* The Court compared the language of Section 505(a)(2), the borrower for Section 504, to the language of Section 501's borrower, Section 505(a)(1). *Id.* at 193. The Court noted that Section 505(a)(1)'s "broad language" made its remedies available for "any complaint under section 501," and concluded that this language suggested Congress "intend[ed] to treat all" Section 501 defendants alike. *Id.* *Lane* confirms that the "who" of enforcement is set by the borrower, not the borrowee. Notably, Section 508(f)(3), the borrower in this case, uses broad language that mirrors Section 505(a)(1), providing that the remedies it borrows are "available to any individual with a disability filing a complaint" for a violation of Section 508. Section 508's broad language indicates the same intent to treat all defendants alike as the broad language used in Section 505(a)(1).

The government also spends much of its brief battling strawmen. Its point that harm does not automatically lead to a private right of

action (Appellee Br. at 23-24) is both axiomatic and irrelevant. Mr. Orozco does not, as the government suggests, argue that anytime Congress writes a statute with legal obligations for federal entities, it also intends to create a private right of action for individuals. Instead, Mr. Orozco's premise is that when Congress writes a statute with a section entitled "enforcement" and "[c]ivil [a]ctions" under that, and says there that certain "remedies, procedures, and rights [shall be] available to any individual with a disability" filing a complaint against a "Federal department or agency," 29 U.S.C. §§ 794d(f)(1)(A), (f)(3), Congress really did intend what it said: to create a private right of action against federal departments and agencies.

El Paso Natural Gas Company v. United States, 750 F.3d 863, 871 (D.C. Cir. 2014), then, is of no matter. The statute at issue in that case, the Indian Lands Open Dump Cleanup Act, 25 U.S.C. § 3901 *et seq.*, contains no reference whatsoever to individuals, to civil actions, nor even to enforcement by anyone or any entity. Its stated purpose is to enable agency action to identify, assess, and then provide financial and technical assistance. 25 U.S.C. § 3901. In marked contrast, Section 508 explicitly and unambiguously enables enforcement of rights under it

through "civil actions" by "any individual with a disability." 29 U.S.C. §§ 794d(f)(1)(A) and (f)(3).

The government opines, too, about the definition of federal financial assistance, the nature of procurement contracts, and the relationship between Section 508 and Section 501 of the Rehabilitation Act. (Appellee Br. at 27-28, 29 n.11, 32.) All these points collapse into the question of whether Section 508 should be limited to only a recipient of federal assistance or federal provider of such assistance. Federal financial assistance, procurement, and Section 501 are relevant to show how the practical intent of Congress to offer enforcement avenues for federal employees who make complaints under Section 508(f)(1)-(2) would be frustrated without the additional remedy of a civil action provided through Section 508(f)(3). (Appellant Opening Br. at 4-5, 17, 22, 36-39, 45.)

Contrary to the government's exaggerated mischaracterization of his position, Mr. Orozco does not maintain that "the District Court's reading of the statute would give no meaning to the words 'civil actions' in Section 508(f)(3)." (Appellee Br. at 24-26.) Rather, the District Court's reading changed the plain statutory text. As explained at length above,

the statute refers to "any individual with a disability filing a complaint under [Section 508(f)(1)]," which facially covers federal employees filing complaints against any federal department or agency. *See supra* Part A.1. But the government rewrites the statute to provide civil actions only to non-employees of federal departments and agencies, and only against providers and recipients of federal assistance. The statutory text is clear and unambiguous; its meaning as written should be given effect.

B. In the alternative, Section 508 contains an implied private right of action.

Even if the Court is unsure that Section 508 provides an express private right of action, it should recognize that, at the least, such a remedy is implied. The government does not contest that Mr. Orozco is "within the class for whose benefit Section 508 was enacted" and that "inferring a private right of action is not inconsistent with the underlying purposes of the legislative scheme." (Appellee Br. at 33.) The only remaining question is whether Congress intended "to create an implied action" under Section 508. (*Id.*)

Section 508's legislative history demonstrates that it did. In 1997, in a proposed bill to amend Section 508, members of Congress sought to

solve Section 508's central problem: as originally enacted, the statute lacked a meaningful "enforcement mechanism," resulting in noncompliance by federal agencies. H.R. 1255, 105th Cong., § 2 (1st Sess. 1997); *see also* S. 761, 105th Cong., § 2 (1st Sess. 1997) (same). The problem, as the sponsors saw it, was primarily one for federal employees. Both the House and Senate bills started with the following findings:

> (1) There are approximately 145,000 *Federal employees* with disabilities and these employees comprise 7.5 percent of the Federal workforce.
>
> (2)(A) Although section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) requires Federal agencies to comply with Federal guidelines to ensure that electronic and information technology used by such agencies is accessible to individuals with disabilities, there is no enforcement mechanism in such Act to provide for compliance.
>
> (B) As a result, Federal agencies have an uneven record of offering accessible technologies *to their employees with disabilities*.

H.R. 1255, 105th Cong., § 2 (emphasis added); *see also* S. 761, 105th Cong., § 2 (same). The following year, Congress significantly amended Section 508 with a more ambitious version of the 1997 bill. Rehabilitation Act Amendments of 1998, Pub. L. No. 105-220, § 508, 112 Stat. 1203, 1206 (1998) (codified as amended at 29 U.S.C. § 794(d)).

The amendments added, among other provisions, a guarantee of comparable access for employees with and without disabilities, *id.* at § 508(a)(1)(A), and an enforcement regime including a "[c]ivil [a]ction," *id.* at § 508(f).[6] Once again, the sponsors were focused centrally on employees with disabilities. 144 Cong. Rec. S168 (1998) (statement of Senator Jim Jeffords) (explaining amendments' central concern was the "bottom line for individuals with disabilities-more jobs, better jobs"). It would be odd, then, to imagine that Congress created a robust civil right of action for violations of Section 508 for everyone *but* the particular class of people with whom they were most concerned. Congress must have meant to extend Section 508's full enforcement mechanism to federal employees with disabilities.

The text of Section 508 supports a reading that includes federal employees. On its face, the amended statute concerns both the duties of regulated parties and the rights of protected individuals. *E.g.*, 29 U.S.C. §§ 794d(a), (d). And the Supreme Court is particularly inclined to

[6] The version of this bill originally introduced in the House modeled the 1997 bills' proposed enforcement mechanism—a certification requirement—but the Senate replaced that with the more forceful regime included in the final text. Yukins, *supra* note 5, at 678-79.

recognize implied causes of action when it has recognized similar remedies under other subsections of the same statute. *Int'l Ass'n of Machinists, AFL-CIO v. Cent. Airlines, Inc.*, 372 U.S. 682, 686-90 (1963). This Court should similarly view Section 508 as part of the larger Rehabilitation Act, for which Congress has consistently provided, and courts have consistently recognized, express and implied private rights of action for injunctive relief. *See, e.g.*, *Nat'l Ass'n of the Deaf v. Trump*, 486 F. Supp. 3d 45, 53-55 (D.D.C. 2020) (discussing private rights of action available under the Rehabilitation Act and why recourse to the Administrative Procedure Act was unnecessary in light of the Rehabilitation Act's own remedial scheme), *appeal dismissed sub nom. Nat'l Ass'n of the Deaf v. Biden*, No. 20-5349, 2021 WL 1438295 (D.C. Cir. Mar. 22, 2021). Section 508 contains, at the very least, such an injunctive remedy.

CONCLUSION

For the reasons stated above and in Mr. Orozco's opening brief, the Court should reverse the district court's order granting the government's motion to dismiss and remand this case for further proceedings.

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Respectfully submitted,

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