Nos. 07-1053 & 07-1056

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SCOT HOLLONBECK, JOSE ANTONIO INIGUEZ, and
JACOB WALTER JUNG HO HEILVEIL,
Plaintiffs-Appellants,

v.

UNITED STATES OLYMPIC COMMITTEE, a federally chartered corporation,
Defendant-Appellee.

and

MARK E. SHEPHERD, SR.,
Plaintiff-Appellant,

v.

UNITED STATES OLYMPIC COMMITTEE, a federally chartered corporation,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Colorado
The Honorable John L. Kane, United States District Judge
Civil Action Nos. 99-cv-2077-JLK & 03-cv-1364-JLK

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Appellees' brief is long on adjectives -- "high-pitched," "sprawling," "newly-minted"[1] -- but short on substance, presenting a series of unsupported facts and meritless legal arguments to defend the policy of the United States Olympic Committee ("USOC") of providing its Athlete Support Programs to two of the three teams for which it is responsible, denying them only to the one team that consists entirely of athletes with disabilities.

The USOC's brief confirms that it is responsible for the U.S. teams in the Olympic, Pan American and Paralympic Games, not amateur athletes in general. (USOC Br. at 39.) Paralympic athletes are, thus, "otherwise qualified" for benefits offered to participants in the other two Games. The mere fact that the Olympics are technically open to individuals with disabilities does not provide the meaningful access required by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), and does not, therefore justify the categorical exclusion of Paralympic athletes from the Athlete Support Programs. Finally, where a single entity administers separate but equivalent programs for disabled and nondisabled individuals, it cannot provide benefits to the latter that it does not provide -- or provides in systematically inferior amounts -- to the former.

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[1] Brief for Appellees ("USOC Brief" or "USOC Br.") at 19, 42, 25.

Appellants Mark Shepherd, Scot Hollonbeck, Jose Antonio Iniguez, and Jacob Walter Jung Ho Heilveil (the "Athlete Plaintiffs") begin by summarizing the key undisputed facts and identifying several unsupported assertions on which the USOC relies in its brief.

The parties agree that the scope of the USOC's responsibility is organizing, financing and controlling U.S. participation in the Olympic, Pan American, and Paralympic Games. (USOC Br. at 39.) The teams for which the USOC asserts responsibility will be referred to herein as "The International Teams."

The parties agree that "[t]he Paralympics are the equivalent of the Olympic Games for the physically challenged." (JA at 167, 302.) Indeed, Congress has stated that the Paralympics are "the Olympics for disabled amateur athletes." S. Rep. No. 105-325 at 2 (1998), 1998 WL 604018.

Contrary to the USOC's assertion, there is no evidence that Pan American Athletes are "almost always the same athletes" as Olympic athletes. (See USOC Br. at 7 n.2.) This assertion is not only unsupported within or outside the record in this case -- the USOC offers no citations for it -- it also requires the implausible assumption that Olympic level sprinters, swimmers, or skaters, for example, spend their off-season not training for their own sport but pursuing Pan American medals in non-Olympic sports like bowling or water skiing.

There is no evidence that the USOC provides separate benefits for separate programs. The only evidence in the record is that the USOC administers a single benefits program: the Athlete Support Programs. (JA at 110.) This program is made available to participants on two of the three International Teams: Olympic and Pan American. There is no evidence of separate Pan American benefits; those athletes are eligible for the Athlete Support Programs just as Olympic athletes are. And there is no evidence of separate Paralympic benefits: those athletes are not eligible for benefits at all.[2] Thus, when the USOC states that it "operates . . . a separate Paralympic Team benefits package . . ." (USOC Br. at 40), this is unsupported in the record. If such a program exists, it was the USOC's decision not to produce evidence of it in Shepherd v. United States Olympic Committee, No. 07-1056 -- but instead to defend the pure legal position that it has the right to deny benefits to Paralympic athletes -- and to move to dismiss before discovery in

[2] Paralympic athletes were not eligible for any Athlete Support Programs during the period relevant to the events in the record. After the Shepherd litigation commenced and after the Athlete Plaintiffs had already won a number of Paralympic medals for which they were not compensated, Paralympic athletes became eligible for one small part of the Athlete Support Programs: they are eligible to receive monetary rewards for medals in amounts lower than those afforded Olympic athletes but similar to those awarded Pan American athletes. Compare JA at 103-04 with JA at 115. There is no evidence of a separate benefit program.

Hollonbeck v. United States Olympic Committee, No. 07-1053. (See Appellants' Consolidated Opening Brief ("Athletes' Br.") at 4-5, 7.)

There is no evidence that the USOC excludes Paralympic athletes from the Athlete Support Programs to promote U.S. standing or obtain the best delegation of athletes for international competition. (See USOC Br. at 6, 38.) The USOC has a bright line rule: Olympic and Pan American athletes are eligible for Athlete Support Programs; Paralympic athletes are not. The USOC presented no evidence of any more nuanced analysis concerning the use of funds to promote U.S. teams. the USOC's record citations for these points are to a recitation of medal statistics without any explanation of how they influenced funding decisions (JA at 240-45) and a portion of counsel's oral argument on summary judgment (JA 486-88).

ARGUMENT

I. The Athlete Plaintiffs are Otherwise Qualified for the Athlete Support Programs.

The USOC has done precisely what the Supreme Court told it not to do. In limiting its benefits to Olympians, it has "defined [its benefits] in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." See Alexander v. Choate, 469 U.S. 287, 301 (1985). Indeed, the effort the USOC has to put into this act of redefinition

underscores how improper it is. First, the USOC ignores the definition that would flow naturally from the category that the USOC itself insists is the most salient: the athletes on the International Teams (see USOC Br. at 39), and defines eligibility only by membership on the Olympic team. Next, the USOC takes what it called -- pre-litigation -- its "Athlete Support Programs" (see JA at 110), and relabels them "Olympic Team benefits." (See, e.g., USOC Br. at 3, 14-21.) Finally, since it is inconvenient for this new label that Pan American athletes are also qualified for "Olympic Team benefits," the USOC declares -- without support -- that Pan American athletes are "almost always the same athletes" as Olympic athletes. (USOC Br. at 7 n.4.)

After relabeling its benefits, artificially limiting their scope to Olympic athletes, and counterfactually declaring all Pan American athletes to be Olympic athletes, the USOC declares circularly that it does not constitute discrimination to limit "Olympic Team benefits" to the Olympic team. Both parties -- and Congress -- agree, however, that the Paralympics are the equivalent of the Olympics and Congress assigned the USOC responsibility for all three International Teams. Thus, the proper qualifying criterion is membership on one of those teams, a criterion Paralympic athletes meet.

This conclusion defeats the USOC's assertion that it does not discriminate against Paralympians on the basis of disability but rather "because they -- like more than 99% of the general population -- are not training for the Olympic team." (USOC Br. at 15.) The USOC's responsibility does not extend to the general population but rather is limited to the International Teams which, again, include the Paralympics. This argument makes as much sense as a Denver law firm refusing to hire lawyers with gray hair, and asserting that they do not discriminate on the basis of age because the gray-haired lawyers who it refused to hire are treated the same as the over 99% of the population of Colorado who do not have law licenses. The relevant universe is, of course, lawyers, not the population of the entire state, just as here the relevant universe consists of the International Teams, not the population of the United States, athlete and couch potato alike.[3]

The USOC's example of a special benefits package for active-duty soldiers or foot-patrol police officers suffers from a similar analytical flaw. (See USOC Br. at 30-31.) In neither case is there -- at least in the example constructed by the USOC -- an equivalent but disabled group that is systematically denied those

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[3] Likewise, it is clear that -- within the relevant universe as defined by the USOC (see USOC Br. at 39), limiting benefits to Olympic athletes "has the effect" of discriminating on the basis of disability. See 28 C.F.R. § 41.51(b)(3)(i). It is not relevant that it screens out 99% of the American population.

benefits. For example, if a city had two sets of police officers, one who patrolled on foot, while another patrolled in wheelchairs, but provided benefits only to the former, we would easily recognize the situation as discriminatory.

II. Denying Benefits to Paralympic Athletes That Are Provided to Pan American and Olympic Athletes Violates Section 504.

A. Section 504 Mandates Meaningful Access to, and Equal Opportunity to Participate in or Benefit from, the Benefits and Services of a Recipient of Federal Funding.

The USOC attempts improperly to restrict the requirements of Section 504, asserting that it only requires "evenhanded treatment" or the "same access" for individuals with disabilities. (See, e.g., USOC Br. at 12, 52.) This proposition is essential to the success of its argument, because the Olympics and Pan American Games are effectively closed to most elite disabled athletes, especially those with mobility disabilities. Thus, the USOC's policy of offering benefits only to athletes on those two teams -- and denying them athletes in the third, all-disabled, of the International Teams -- is only defensible if Section 504's mandate is limited to technical access rather than meaningful access.

Throughout its brief, the USOC attempts to contrast the ostensibly bare-bones requirements of Section 504 with what it portrays as the "unique"[4] and

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[4] See, e.g., USOC Br. at 8, 13, 25, 33.

presumably more onerous requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"). The USOC labels this "unique" requirement "parity" -- often followed by a hyphen and the word "like" in order to increase the aura of strangeness.[5] The word "parity" is not found in Title IX's statutory or regulatory language, however, and it is not, in any event, an alien concept: "parity" means simply "equality,"[6] a concept that is common to Section 504, Title IX, and other antidiscrimination statutes.

As part of its effort to use the alleged contrast with Title IX to water down Section 504, the USOC asserts that "the inquiry under [Title IX] is necessarily much different than it is with any other anti-discrimination statute. Thus, the [Title IX] regulations try to guarantee 'equality' by requiring that a college 'provide equal opportunities for members of both sexes.'" (USOC Br. at 37-38 (quoting 34 C.F.R. § 106.41(c)).)[7] According to the USOC, Title IX is irrelevant

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[5] See id. at 8, 11, 25.

[6] See Webster's Third New International Dictionary 1642 (2002) ("the quality or state of being equal").

[7] The reason Title IX inquiry is "much different," per the USOC, is that, "unlike all other anti-discrimination statutes -- including [Section 504] -- the [Title IX] regulations recognize that there are many times in which it will be necessary to segregate along strictly gendered lines." USOC Br. at 37. This is incorrect. As explained in greater detail below, where a defendant can

(continued...)

to the Court's analysis here because it requires "equal opportunity" while Section 504 requires only "the same access."

To the contrary: Section 504 explicitly requires equal opportunity and meaningful -- not just technical -- access. Thus while reference to Title IX precedent is helpful in this case -- in light of the similarity of the situations in which the cases arise and the fact that both Congress and this Court have noted the similarity of the two laws in scope and effect[8] -- it is in no way necessary. Cases interpreting, and regulations implementing, Section 504 demonstrate that providing benefits to Olympic and Pan American athletes while denying them to Paralympic athletes constitutes illegal disability discrimination.

Section 504 requires that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers." Choate, 469 U.S. at 301. In Chaffin v. Kansas State Fair Board, 348 F.3d 850 (10th Cir. 2003), this Court rejected the assertion that mere access was sufficient

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[7](...continued)
demonstrate that it is necessary to the provision of equally effective benefits, it may provide separate benefits or services to individuals with disabilities. 28 C.F.R. § 41.51(b)(1)(iv); see infra at 21-22.

[8] See Athletes' Br. at 31-32.

under the Americans with Disabilities Act, 42 U.S.C. § 12131 et seq. ("ADA").[9] In that case, individuals who used wheelchairs challenged the physical access at the Kansas State Fair. The state argued that because the plaintiffs had access to the fairgrounds, the ADA did not require it to provide specialized facilities designed to ensure that people with disabilities could use the restrooms or enjoy a concert. Id. at 857. This Court held: "We reject the argument that the ADA requires no more than mere physical access. Instead, we have held that the ADA requires public entities to provide disabled individuals 'meaningful access' to their programs and services. . . .." Id. This Court further observed that, with the ADA, "Congress prohibited a broad, comprehensive concept of discrimination . . . includ[ing] . . . relegation to lesser services, programs, activities, benefits, and other opportunities." Id. at 858. Here, the USOC has taken an entire category of disabled athletes who participate on International Teams and relegated them to lesser services, programs, and benefits.

There is nothing "radically new," "newly-minted," or "novel" (see USOC Br. at 25, 33, 34) about this right to equal opportunity and meaningful access. Section 504 regulations have required recipients to provide qualified individuals

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[9] Both parties agree that precedent interpreting the ADA is instructive in interpreting Section 504. See USOC Br. at 17 n.3.

with disabilities an equal opportunity to participate in their benefits since 1977. 28 C.F.R. § 41.51(b)(1)(ii) (2007); see also 45 C.F.R. § 84.52(a)(2), 42 Fed. Reg. 22676, 22685 (June 3, 1977) (Addendum Tab 1); 45 C.F.R. § 85.51(b)(1)(ii), 43 Fed. Reg. 2132, 2138 (January 13, 1978) (Addendum Tab 2).[10] The commentary to these latter regulations made clear what this meant:

> [I]t is equal opportunity, not merely equal treatment, that is essential to the elimination of discrimination on the basis of handicap. Thus, in some situations, identical treatment of handicapped and nonhandicapped persons is not only insufficient but is itself discriminatory.

43 Fed. Reg. at 2134. Another helpful example appeared in the commentary to the earlier regulations: "eliminating . . . gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. . . . [I]t is meaningless to 'admit' a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building." 42 Fed. Reg. at 22676.

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[10] The Supreme Court has held that these 1978 regulations "particularly merit deference." Consol. Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984).

B. The USOC Does Not Provide Equal Opportunity or Meaningful Access to its Athlete Support Programs for Elite Athletes with Disabilities.

The USOC asserts that it satisfies Section 504 because the Olympics are technically open to all, that is, there is no rule barring people with disabilities. This is nonsense: athletes with mobility disabilities -- the wide variety of conditions that impair one's ability to walk, run, jump, swim, ski, or skate -- cannot, by definition, compete in most of the events of the Olympics, and do not, therefore, have meaningful access. Indeed, the USOC points to four disabled Olympic athletes over a period of 101 years, only two of whom have mobility disabilities. (See USOC Br. at 21.) It is clear that the Athlete Plaintiffs would neither be able to compete in Olympic track trials without their racing wheelchairs nor be welcome to compete in them.[11] The fact that the occasional deaf or blind runner might be able to participate in an Olympic sport does not provide meaningful access for Paralympic wheelchair racers, amputee swimmers, soccer players with cerebral palsy, and other elite athletes who are unable to compete in the Olympics precisely because of their disability.

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[11] See, e.g., USA Track & Field 2007 Competition Rules, Rule 143(3)(a) - (f) (defining precisely the types of shoes in which racers must race), http://www.usatf.org/about/rules/2007/2007USATFRules.pdf at 57.

The USOC's argument that the Olympics are open to all is the equivalent of the Kansas State Fair arguing that it did not discriminate because people who use wheelchairs could get onto the fairgrounds, or a recipient of federal funding arguing that a program held on the third floor of a walk-up building was open to all. Although it's true in each case that there is no rule barring people with disabilities and that some people with certain disabilities will be able to access the programs -- those who do not need specialized restroom facilities or concert seats, or an elevator to get to the third floor, or whose disabilities permit them to run, jump, swim, skate or ski -- this does not constitute the meaningful access and equal opportunity required by Section 504.

Providing access to some individuals with disabilities does not constitute meaningful access. The Ninth Circuit addressed this question in the context of a state benefit program that categorically excluded individuals with disabilities. Lovell v. Chandler, 303 F.3d 1039 (9th Cir. 2002). The state argued that it did not violate Section 504 because many individuals with disabilities received similar benefits from the state because they were poor enough to qualify for Medicaid. Id. at 1053. The Ninth Circuit rejected this argument, holding "[t]he . . . appropriate treatment of some disabled persons does not permit [the defendant] to discriminate against other disabled people . . .." Id. at 1054; cf. Asbury v. Brougham, 866 F.2d

1276, 1281-82 (10th Cir.1989) (holding that evidence of a high percentage of protected-class residents could not by itself defeat an intentional housing discrimination claim). Likewise, it is illegal under both Section 504 and the ADA to construct a new building so as to be physically inaccessible to individuals who use wheelchairs. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 41.58. That is, it is discriminatory to construct a building that is fully accessible to people who are blind or deaf but excludes people who use wheelchairs.

Ultimately, there is no need for this Court to refer to Title IX or cases interpreting that statute in order to conclude that the USOC is violating Section 504. Section 504, its regulations and the cases interpreting it all demonstrate that -- by offering Athlete Support Programs only to Olympic and Pan American athletes -- the USOC does not provide meaningful access and equal opportunity to elite disabled athletes.

C. Denying Athlete Support Programs to Paralympic Athletes is a Proxy for Disability Discrimination.

It is irrelevant that the USOC does not explicitly exclude disabled athletes from its Athlete Support Programs; excluding Paralympic athletes is a proxy for that protected class. A defendant commits discrimination by proxy when the "fit" between an excluded category and a protected class is sufficiently close that

discrimination against the former constitutes facial discrimination against the latter. See, e.g., McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992). In this case, Paralympic athletes are the only category of athletes on International Teams that are denied eligibility for Athlete Support Programs. Because Paralympic athletes are, by definition, disabled, this is an excellent proxy for disability discrimination.

The USOC attempts to rebut this argument by asserting that it does not exclude Paralympic athletes, but rather only includes Olympic athletes, and excludes the rest of the world. (USOC Br. at 50.) First, this is simply incorrect: the USOC includes both Olympic and Pan American athletes in its Athlete Support Programs. In addition, this approach -- Olympics vs. the rest of the world -- contradicts the USOC's own statement that it is obligated to organize, finance and control U.S. teams in the Olympics, Pan American Games, and Paralympics and not, it emphasizes, to organize, finance and control elite athletic competition or amateur athletics generally. (USOC Br. at 39.) Thus, the USOC defines the relevant universe and, within that universe, excludes Paralympic athletes.

The USOC also argues, oddly, that "the Olympic athlete classification is no proxy for disability" because some Olympic athletes are disabled. (USOC Br. at 50.) The Athlete Plaintiffs do not argue that "Olympic" is a proxy for disability

but rather that "Paralympic" is a proxy for disability. Considering that Paralympic athletes are all disabled, this is a self-evident proposition. If the USOC meant to argue that the Paralympic classification cannot be a proxy for disability since some disabled athletes compete in the Olympics, this goes to the question of "fit."

In one of the earliest proxy discrimination case, the Seventh Circuit held that a policy requiring women to provide advance notice of maternity leave could be a proxy for disability discrimination because it effectively discriminated against women who, due to infertility, had to adopt, a process that was not as predictable as pregnancy. McWright, 982 F.2d at 228. While this policy tended to exclude women disabled by infertility, the fit was not perfect in either direction: the policy would disadvantage nondisabled adoptive mothers, id.; and would not affect women with disabilities not affecting their fertility. The court provided other examples of "fit." "[U]sing gray hair as a proxy for age: there are young people with gray hair (a few), but the 'fit' between age and gray hair is sufficiently close that they would form the same basis for invidious classification." Id. at 228. Similarly, a policy excluding wheelchairs would "no doubt" be proxy discrimination. Id. This is so despite the fact that many people with disabilities do not need wheelchairs and would thus not be affected by such a policy.

There are a number of cases holding that zoning classifications based on the need for on-site staff constitute proxies for disability. See, e.g., Sharpvisions, Inc. v. Borough of Plum, 475 F. Supp. 2d 514, 524-25 (W.D. Pa. 2007) (holding that definition of "group home" as up to ten persons "plus staff" was a proxy for persons with disabilities); Children's Alliance v. City of Bellevue, 950 F.Supp. 1491, 1496 (W.D. Wash. 1997) (same with respect to the category "staffed living facilit[ies] for a group of persons, which may include both children and adults"). In each of these cases, the fact that the category singled out some people with disabilities for less favorable treatment was sufficient to conclude it constituted facial discrimination, notwithstanding that the category did not affect the many people with disabilities who do not require in-home staff.

The fact that the occasional disabled Olympic athlete may qualify for Athlete Support Programs under the current policy does not make the decision to categorically exclude Paralympic athletes anything other than a very tight fit with -- and therefore an excellent proxy for -- disability discrimination.

D. Patton and Choate Do Not Permit The USOC to Deny Athlete Support Programs to Paralympic Athletes.

This case is not one -- like Choate, 469 U.S. 287, or Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir. 1996) -- in which a defendant provides benefits in

the same quantity to everyone -- disabled and nondisabled -- but people with disabilities, because of their disabilities, tend to need more of the benefit. In Choate, the state limited the number of inpatient hospital days available to Medicaid recipients. The plaintiffs argued that because people with disabilities generally required more inpatient hospital days, this regulation affected them disproportionately. Id., 469 U.S. at 289. Similarly, in Patton, the state of Kansas capped tort damage awards for noneconomic loss at $250,000. The plaintiff in that case argued that this cap discriminated against him on the basis of disability. Id., 77 F.3d at 1246. In each case, however, there is no dispute that people with disabilities -- all of them -- got the mandated benefit. The disabled Medicaid recipients in Choate got their 14 inpatient hospital days; the disabled tort litigants in Patton were eligible for the full $250,000 in noneconomic damages. This is in stark contrast to the present case in which an entire category of elite athletes -- defined by the fact that they are elite disabled athletes -- is ineligible for the Athlete Support Programs.

These cases would only apply here if the USOC allowed Paralympic athletes to be eligible for Athlete Support Programs such as Elite Athlete Health Insurance, and the Athlete Plaintiffs were arguing that, based on their disabilities, they required a more robust health insurance plan than the USOC offered. In such

a case, Choate and Patton would mandate the result that offering the same Elite Athlete Health Insurance to Olympic, Pan American and Paralympic athletes would not violate Section 504. Those cases do not permit the USOC to deny all health insurance to Paralympic athletes while offering it to Olympic and Pan American athletes.

The USOC also makes much of a quote in Patton to the effect that Section 504 "requires only that Patton have the same access to a jury determination of damages as everyone else." Id., 77 F.3d at 1246. The USOC repeatedly quotes the phrase "same access" in support of the concept that merely not barring disabled athletes from the Olympics constitutes the "same access" for everyone. (See, e.g., USOC Br. at 12, 23.) But, again, in Patton, all disabled litigants in fact had access to the same damages as other litigants. This Court's understanding of the access required by Choate and Patton was explained in greater detail in Chaffin -- which the USOC does not cite -- in which it stressed that mere access was not enough. According to the USOC's understanding of the term, the disabled plaintiffs in Chaffin had the "same access" to the restrooms and concert seats as did nondisabled attendees; that "same access" was not, however, meaningful access. Id., 348 F.3d at 857.

The USOC also relies on the case of McFadden v. Grasmick, 485 F. Supp. 2d 642 (D. Md. 2007). In that case, a high school athletic league had a rule providing that the results of a new event would not count in state tournaments until high schools representing 40% of the jurisdictions participated in that event. Id. at 646. The plaintiff challenged the application of that rule to wheelchair racing. The court held that the rule was "neutral in intent and in effect," and denied the racer's request for an injunction. Id. at 650. The USOC argues that its rule limiting the Athlete Support Programs to Olympic and Pan American athletes is neutral in the same way that the 40% rule is neutral. But the McFadden opinion makes clear that this is not the case: the 40% rule in fact applied to exclude similarly situated teams of non-disabled students, for example, diving and pole vaulting. Id. at 646. That is, among the relevant universe -- high school athletes -- the neutral rule excluded not only wheelchair racers but also nondisabled teams as well. In contrast, the allegedly neutral rule at issue here works to exclude -- within the relevant universe -- only disabled athletes.

III. The USOC's Separate Benefits Argument Fails.

The USOC's catch-all argument is that Section 504 "does not require equal benefits across separate programs." (USOC Br. at 12, 26-32.) This argument fails because is based on a false premise -- there are no separate benefits -- and

incorrectly assumes that separate benefits would be permissible in this case. The application of this rationale to deny benefits to Paralympic athletes is a pretext for discrimination. Finally, even if the USOC were permitted to maintain separate benefits programs, it would not be permitted to discriminate among separate but equivalent -- that is, similarly situated -- athletic programs for disabled and non-disabled athletes.

A. The Separate Benefits Argument is Based on a False Premise.

The USOC argues that it provides separate benefits for athletes on the Olympic and Paralympic teams. (See USOC Br. at 34.) This is incorrect. Although the teams are separate, there is no evidence in the record of any other benefit program besides the Athlete Support Programs. Specifically, there is no evidence of what the USOC refers to as "Paralympic Team benefits." There are no separate benefits; there is one unified set of benefits -- provided to Olympic and Pan American athletes -- from which Paralympic athletes are excluded. This alone is sufficient to demonstrate a violation of Section 504.

B. Separate Benefits Are Prohibited By Section 504 Because the USOC Has Not Demonstrated That They Are Necessary in Order to Provide Benefits That Are As Effective As Those Provided Others.

Even if the USOC did provide a separate benefits package for Paralympic athletes, this would violate Section 504 unless the USOC could demonstrate that it was necessary to do this in order to provide Paralympic athletes with benefits that were as effective as those provided others. 28 C.F.R. § 41.51(b)(1)(iv). The Athlete Plaintiffs made this argument in their opening brief, and explained that this was a defense as to which the USOC had the burden of proof. (See Athletes' Br. at 45-46.) The USOC did not mention -- much less attempt to rebut -- this argument.

Because there is no evidence in the record that it would be necessary to provide a separate package of grants and health insurance in order to provide Paralympic athletes with equally effective grants and health insurance, separate benefits are not permitted, and Paralympic athletes must be eligible for the Athlete Support Programs.

C. The USOC's Separate Benefits Argument is A Pretext.

The USOC supports its argument for providing (theoretical though nonexistent) separate benefits to Paralympic athletes by stating that Olympic and

Paralympic athletes "compete in separate athletic competitions that are organized by entirely separate entities: the International Olympic Committee, on the one hand, and the International Paralympic Committee, on the other." (USOC Br. at 33-34.) The Olympic and Pan American teams differ in precisely the ways the Olympic and Paralympic teams differ: (1) they "compete in separate athletic competitions" -- the Pan American Games involve athletes only from the Americas, occur every four years the year before the Olympic games,[12] and include sports that are not part of the Olympics (USOC Br. at 7 n.2); and (2) they are "organized by entirely separate entities" -- the International Olympic Committee and the Pan American Sports Organization.[13]

The fact that the reasons given by the USOC for denying benefits to Paralympic athletes are equally applicable to Pan American athletes, and yet those latter athletes are not denied benefits, demonstrates that these reasons are a pretext for discrimination.

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[12] "The Pan American Games: History," ¶ 1, http://www.cob.org.br/pan2007/ingles/jogos_historico.asp (last visited July 11, 2007).

[13] "The Pan American Games: PASO, ¶¶ 1-2, http://www.cob.org.br/pan2007/ingles/jogos_odepa.asp (last visited July 11, 2007).

D. Even If Separate Benefits Programs Were, Theoretically, Permitted, the USOC Could Not Provide Systematically Inferior Benefits to Paralympic Athletes.

Even if, arguendo, separate benefits were permissible under 28 C.F.R. § 41.51(b)(1)(iv), and if, theoretically, the USOC in fact provided separate benefits to Olympic, Pan American and Paralympic athletes, because those programs are equivalent and together constitute the limited universe -- per the USOC -- of the athletes for which it is responsible, the USOC cannot provide systematically inferior benefits to the one of the three programs composed entirely of disabled athletes.

This is the lesson of Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004), and Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994). In both of those cases, the defendant offered a set of separate but equivalent programs. In Rodde, it was a series of county-run hospitals, only one of which offered services for individuals with disabilities. Id., 357 F.3d at 990. In Dreher Park, it was a series of recreational programs, only some of which were designed for individuals with disabilities. Id., 846 F. Supp. at 988-89. In each case, the decision to close or withdraw funding from the programs designed for individuals with disabilities violated Section 504. See Rodde, 357 F.3d at 998; Dreher Park, 846 F. Supp. at 991-92. And this was so

despite the fact that the programs that the defendants continued to support -- the non-specialized hospitals and the general recreational programs -- were technically but not effectively open to people with disabilities.

Those cases are directly applicable here. The only "programs" for which the USOC provides benefits -- the Olympic and Pan American teams -- are not meaningfully accessible to Paralympic athletes. Participants in a third, designed for persons with disabilities, are not eligible. Indeed, on this issue, Dreher Park is directly on point. The programs at issue in that case were a general recreation program and a recreation program designed for individuals with disabilities. The former program would be just as available to disabled participants as the Olympics are: a blind runner or deaf swimmer (see USOC Br. at 7, 21, 50) or any other athlete with a non-mobility disability would be well-served by the general recreational programs of the City of West Palm Beach. That court made clear that this was not sufficient. While it was true that the general programs did not explicitly exclude people with disabilities, because of the nature of their disabilities and the activities involved, many people with disabilities could not benefit from them. Dreher Park, 846 F. Supp. at 991. Ultimately, without the specialized recreational programs, the disabled plaintiffs were "without a meaningful access to the benefits of the City's recreational programs." Id. at 992

n.14. Similarly, while athletes with disabilities are not barred from Olympic competition, it is clear that the Olympics do not provide meaningful access to elite disabled athletes.

The results in Rodde and Dreher Park are consistent with the results in Klinger v. Department of Corrections, 107 F.3d 609, 615-16 (8th Cir. 1997), and Jeldness v. Pearce, 30 F.3d 1220, 1229 (9th Cir. 1994), both of which held that, under Title IX, a prison system could not discriminate between separate but equivalent programs for men and women. Klinger is especially relevant here, because it relied on the definition of "program or activity" in Title IX that is identical to that in Section 504 to hold that equivalent programs must be compared throughout an institution. Id. at 615. (See Athletes' Br. at 23-24, 31.)

Neither John Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996), nor Castellano v. City of New York, 142 F.3d 58 (2d Cir. 1998), is relevant here: in neither case was the court addressing separate but equivalent programs; and in both cases the favored program was not only technically but effectively open to people with disabilities.

In Chandler, the Ninth Circuit held that a state did not violate the ADA when it provided benefits of unlimited duration to needy persons with dependent children and benefits of up to one year in duration to needy disabled persons. Id.,

83 F.3d at 1151-52. For this case to be relevant, the Olympics would have to be as open to disabled athletes as the category needy persons with dependent children is to disabled persons. Not so. Approximately 30% of all disabled adults are parents,[14] and approximately 30% of all families have one or more members who have a disability.[15] So "families with dependent children" will include a significant percentage of individuals with disabilities. In contrast, again, the USOC can point to only four disabled Olympians in over 100 years.

Furthermore, in contrast to the Paralympics -- which are the "equivalent of the Olympics" for disabled athletes -- needy disabled persons are not the disabled equivalent of needy persons with dependent children. In Does 1-5, there was no equivalent-but-disabled group to whom the state was permitted to provide no or lesser benefits.

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[14] Linda Toms Barker and Vida Maralani, "Challenges and Strategies of Disabled Parents: Findings From a National Survey of Parents with Disabilities," Berkeley Planning Associates (July 1997) at 2-5.

[15] Mitchell P. LaPlante, et al., "Families with Disabilities in the United States," 8 Disability Statistics Report, Nat'l Inst. on Disability and Rehabilitation Report No. ED-OSERS-96-12, Univ. of Cal. San Francisco (Sept. 1996) at 7. The USOC argues that the category "families with dependent children" will tend to screen out those whose disabilities affect their fertility. USOC Br. at 29. However, the category is not "families with dependent biological children," but simply dependent children, including adoptive and foster children as well as those conceived naturally.

In Castellano, the City of New York provided different benefits packages to "for-service" retirees -- those who had retired after twenty or more years of service -- than it did to those who had retired before that time. Id., 142 F.3d at 64. A number of individuals who had retired before 20 years due to disability filed suit alleging that they should be entitled to the for-service benefits. In contrast to the situation here -- involving participants in three equivalent sets of athletic programs -- the Second Circuit made clear that these two sets of retirees were not equivalent. Rather those disabled retirees who had retired before completing twenty years of service "are similarly situated not with twenty-year 'for-service' retirees, but with non-disabled retirees who retire after an equivalent period of service. Because the latter group is not entitled to [for-service] benefits, there is no unlawful discrimination. " Id., at 70. Similarly, the for-service retirement benefits "are available equally to persons with and without disabilities who retire after twenty years of service." Id.[16] In other words, all pre-20-year retirees were treated the same and all post-20-year retirees were treated the same, disabled or not.

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[16] The other two cases on which the USOC relies concerned identical situations with identical results. See Bass v. City of Orlando, 57 F. Supp. 2d 1318, 1325 (M.D. Fla. 1999) (relying on the analysis in Castellano cited in text); Fobar v. City of Dearborn Heights, 994 F. Supp. 878, 887 (E.D. Mich. 1998) ("In the instant case, all employees, including disabled employees, may qualify for the regular pension so long as they meet the age and service requirements.").

Furthermore, the favored group -- post-20-year retirees -- was effectively, not just technically, open to all: it is common sense that the rate of disability among those who have served as peace officers for more than twenty years will be similar to or greater than what it is in the general population.[17]

E. The Prohibition on Discrimination among Equivalent Programs for Disabled and Nondisabled Participants Does Not Require Equal Funding Across All Programs.

It is premature to state the contours of an eventual injunction should the Athlete Plaintiffs ultimately prevail. As explained in the Athletes' Brief, the Hollonbeck case was resolved on a motion to dismiss, before any discovery had been conducted, and the cross-motions for summary judgment that the district court resolved in Shepherd were filed in order to address the USOC's refusal to provide discovery concerning the benefits it was providing to various Olympic athletes. (Athletes' Br. at 4-5, 7.) With this discovery, the parties can propose, and the district court order, proper relief. The fact that complying with antidiscrimination statutes can be analytically complex does not obviate the need to comply.

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[17] This common sense is supported by census statistics. Approximately 18% of all individuals have disabilities; the figure is 32.8% for individuals 45 years and older. See "Prevalence of Disability by Age, Sex, Race, and Hispanic Origin: 2002," http://www.census.gov/hhes/www/disability/sipp/disab02/ds02t1.pdf.

One thing is clear, however: the USOC's caricature of compliance is inaccurate and unhelpful. The USOC asserts that the ruling requested by the Athlete Plaintiffs would be "unworkable" because recipients of federal funding "would be required to halt, aggregate and then evenly redistribute across all of their programs, regardless of the programs' need or objective, the funding, resources and benefits the institution provides." (USOC Br. at 45; see also id. at 42 ("sprawling, open-ended, institution-wide parity requirement").) Section 504 requires no such thing. Rather, where two programs are equivalent but one is designed specifically for individuals with disabilities while the other is effectively closed to individuals with disabilities, the two programs must be compared and subjected to an antidiscrimination analysis.

Indeed, even Title IX -- which the USOC is attempting to lampoon through the description above -- does not compare all programs, only equivalent programs. For example, Title IX would not require equal funding between men's basketball and women's chorus or -- in the prison context -- men's educational programs and women's nutritional programs. Only within the relevant universe -- for example, athletics or prison education programs -- is an antidiscrimination comparison required. This is the lesson of Klinger, 107 F.3d at 616, which held that a proper Title IX analysis would compare "educational opportunities for female and male

prisoners within the entire system of institutions . . .." See also Jeldness, 30 F.3d at 1229 ("The prohibited activity would be the offering of educational programs only in the men's prisons, without offering equivalent programs in the women's prison."). It is also why the ruling requested by the Athlete Plaintiffs would not require the city in Castellano to provide identical retirement programs or the state in Chandler to provide identical support for needy families with children and needy disabled people: in neither case are the programs at issue equivalent to one another. See supra at 26-28.

The USOC implicitly recognizes the need for a "system-wide analysis" here when it states that the Title IX regulations "try to guarantee 'equality' by requiring that a college 'provide equal opportunities for members of both sexes.' . . . And to do that, courts must necessarily undertake a system-wide analysis." (USOC Br. at 37-38 (quoting 34 C.F.R. § 106.41(c)).) As demonstrated in detail above, Section 504 also requires equal opportunities for individuals with disabilities. To do this, a system-wide analysis of equivalent programs is required; here, it requires a comparison of benefits provided to Olympic, Pan American and Paralympic athletes.

CONCLUSION

For the reasons set forth above and in the Athletes' Brief, Appellants respectfully request that this Court reverse the District Court's decision granting the USOC's motion for summary judgment in the Shepherd case and its motion to dismiss in the Hollonbeck case and remand for further proceedings in both cases.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), and that this brief contains 6,969 words. Counsel relied on the word count of WordPerfect X3, which was used to prepare this brief.

Respectfully submitted this 13th day of July, 2007.

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Certificate of Service and Digital Submission

The undersigned hereby certifies that,

1. Appellants' Reply Brief including the Addendum thereto were filed in writing and in Digital Form (as that term is defined in the Emergency General Order of October 20, 2004) and/or scanned PDF with the United States Court of Appeals for the Tenth Circuit on July 13, 2007.

2. No redactions being required, every document submitted in Digital Form (as that term is defined in the Emergency General Order of October 20, 2004) or scanned PDF format is an exact copy of the written document filed with the Court.

3. The digital submissions references in Paragraph 1 have been scanned for viruses with the most recent version of eTrust Antivirus and, according to the program, are free of viruses.

4. On July 13, 2007, copies of Appellants' Reply Brief including the Addendum thereto were sent by electronic mail and in hard copy, by first-class mail, postage prepaid, to:

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