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' CONSOLIDATED OPENING BRIEF

STATEMENT REGARDING ORAL ARGUMENT
Oral argument is requested.

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STATEMENT OF RELATED CASES

Hollonbeck v. United States Olympic Committee, No. 07-1053, and Shepherd v. United States Olympic Committee, No. 07-1056, are related and have been consolidated for briefing. There are no other related cases.

JURISDICTIONAL STATEMENT

The District Court's subject-matter jurisdiction arose under 28 U.S.C. §§ 1331 and 1343, because Plaintiffs-Appellants Mark Shepherd, Scot Hollonbeck, Jose Antonio Iniguez, and Jacob Walter Jung Ho Heilveil ("the Athlete Plaintiffs") allege discrimination on the basis of disability by Defendant-Appellee the United States Olympic Committee ("USOC") in violation of Section 504 of the Rehabilitation Act of 1973 ("Section 504"). 29 U.S.C. § 794.

This Court's jurisdiction arises under 28 U.S.C. § 1291 because the Athlete Plaintiffs appeal from a final judgment of the United States District Court for the District of Colorado. Judgment entered on January 10, 2007. (Joint Appendix ("JA") at 545, 550.) The Athlete Plaintiffs filed their Notice of Appeal on February 6, 2007 (JA at 595), within 30 days of that judgment. This appeal is therefore timely pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure. This appeal is from a judgment pursuant to Rule 54(b) of the Federal

Rules of Civil Procedure as to the claims of the Athlete Plaintiffs under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 - 12189.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Does the United States Olympic Committee, which is responsible for supporting the Amateur Athletes who compete in the Olympics, Pan-American Games, and Paralympics, violate Section 504 when it excludes Paralympic athletes -- all of whom are disabled -- from the grants, tuition support, and health insurance provided to competitors in the Olympic and Pan-American Games?

This question was raised in the parties' cross-motions for summary judgment and partial summary adjudication in Shepherd v. United States Olympic Committee and in the parties' briefing on the USOC's motion to dismiss in Hollonbeck v. United States Olympic Committee. (JA at 73, 135, 178, 227, 246, 260, 277, 325, 355.) It was ruled on in the district court's Memorandum Opinion and Order Granting Defendants' Dispositive Motions re Athlete Claims, dated November 16, 2006. (JA at 500.)

STATEMENT OF THE CASE

The USOC offers benefits through its Athlete Support Programs -- including, for example, grants, tuition assistance, and health insurance -- to

Olympic and Pan-American athletes that it denies to Paralympic athletes, a class that the USOC itself defines as elite disabled athletes. Plaintiffs allege that this denial of benefits constitutes a violation of Section 504, which prohibits discrimination on the basis of disability by recipients of federal financial assistance.

The USOC defends its right to deny these benefits to Paralympic athletes based on its assertion that the Olympics are a separate program from the Paralympics and that its treatment of participants in the two programs cannot be compared -- under any circumstances -- to determine whether disabled athletes were denied the benefits of" the USOC's programs or activities in violation of Section 504. The USOC does not attempt to put before the Court -- much less legally defend -- any particular level of funding or support for the Paralympics. Rather, it reserves for itself the unilateral right to determine what benefits, if any, it may elect to provide to Paralympic athletes, free from the antidiscrimination requirements that apply to all other recipients of federal financial assistance.

This issue arose in two cases before the United States District Court for the District of Colorado: Shepherd v. United States Olympic Committee, 99-cv-2077-JLK, and Hollonbeck v. United States Olympic Committee, 03-cv-1364-JLK. Although the two cases came before that court in differing procedural postures,

there are no facts in dispute in either case and very little relevant discovery has been conducted in either case. The district court consolidated the cases for oral argument and decision of the issues now before this Court.

Shepherd v. United States Olympic Committee, No. 07-1056

Mark Shepherd filed suit against the USOC on October 26, 1999. His Third Amended Complaint included claims under Section 504 as well as title I and title III ("Title III") of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111 - 12117, 12181 - 12189, and two state-law employment-related claims. (JA at 54-61.) Mr. Shepherd's Section 504 and Title III claims (the "Athlete Claims") related to his status as a Paralympic athlete; the remainder, to his status as a former employee of the USOC. In his Athlete Claims, Mr. Shepherd asserted that the USOC violated Title III and Section 504 by providing benefits to Olympic and Pan-American athletes that it did not provide to Paralympic athletes. Only the Section 504 claim is at issue here.

In 2002, the parties reached an impasse concerning the proper scope of discovery relating to the Athlete Claims. Because the USOC asserted that it had the power and discretion to provide benefits to Olympic athletes that it did not provide to Paralympic athletes, unfettered by the antidiscrimination provisions of Section 504 and Title III, it refused to produce in discovery certain information

and documents relating to such benefits. Plaintiff Shepherd moved to compel. In an attempt to resolve the impasse, the parties agreed to stay discovery on the Athlete Claims and to submit to the district court -- on stipulated facts and cross-motions for summary judgment -- the question whether the USOC violates Section 504 and/or Title III by providing benefits to Olympic and Pan-American athletes that it does not provide to Paralympic athletes. (JA at 142-45.) As part of that agreement, the parties entered a series of stipulations concerning the benefits that the USOC denies to Paralympic athletes. (JA at 171.)

The question of discrimination under Title III and Section 504 was thus before the district court based on these stipulations and a limited set of undisputed exhibits submitted by the parties. No evidence was before the court concerning the USOC's actual levels of funding or support for Olympic, Pan-American, or Paralympic athletes.

In accordance with the parties' agreement, in the fall of 2002, the USOC moved for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure and Mr. Shepherd moved for partial summary adjudication pursuant to Rule 56(d) on the designated question. (JA at 73, 135.) The USOC argued that the Athlete Plaintiffs were in reality asserting claims under the Ted Stevens Olympic and Amateur Sports Act ("ASA"), 36 U.S.C. §§ 220501-220529, which

does not have a private right of action. In the alternative, it argued that the Olympics and Paralympics were separate programs that could not be compared for purposes of an antidiscrimination analysis, that Paralympic athletes were not qualified for the benefits at issue because they were not Olympic athletes, and that the Athlete Plaintiffs were requesting "accessible or special goods," in violation of Title III regulations, 28 C.F.R. § 36.307(a).

The Athlete Plaintiffs responded by demonstrating that the ASA does not preempt federal antidiscrimination claims, that the USOC in fact discriminates against Paralympic athletes by denying them the benefits of the Athlete Support Programs that it provides to Olympic and Pan-American athletes, and that the Athlete Plaintiffs were not asking for anything special, but rather that they be eligible for the same types of Athlete Support Programs provided Olympic and Pan-American athletes.

While those motions were pending, Scot Hollonbeck and his co-plaintiffs filed suit.

Hollonbeck v. United States Olympic Committee, No. 07-1053

Scot Hollonbeck, Jose Antonio Iniguez, Jacob Walter Jung Ho Heilveil, and Vie Sports Marketing, Inc. ("Vie Sports"), filed suit against the USOC on July 28, 2003, alleging claims under Title III and Section 504 that raised the same issues as

the Athlete Claims in Shepherd. The complaint also included claims for breach of contract and promissory estoppel on behalf of Vie Sports. (JA at 299.)

In lieu of filing an answer, on October 6, 2003, the USOC moved to dismiss the Hollonbeck Athlete Claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (JA at 277.) The parties' briefs made virtually the same arguments as they had made in connection with the cross-motions in Shepherd.

Cases Consolidated for Oral Argument and Decision.

The parties and the district court agreed that the Athlete Claims in the Shepherd and Hollonbeck cases raised identical legal issues. The district court consolidated the cases for purposes of oral argument on the cross-motions in Shepherd and the motion to dismiss in Hollonbeck, which argument was held on September 21, 2005. (JA at 439.)

On November 16, 2006, the district court issued its consolidated decision, granting the USOC's motion for summary judgment and denying Mr. Shepherd's motion for partial summary adjudication as to the Athlete Claims in the Shepherd case and granting the USOC's motion to dismiss in the Hollonbeck case. (JA at 500.)

The district court held that the Athlete Plaintiffs' claims were not preempted by the ASA. (JA at 527.) The USOC has not appealed this holding.

The district court went on to analyze the merits of the Title III and Section 504 claims, holding -- in relevant part[1] -- (1) that the Paralympics were a separate program from the Olympics and Pan-American games, and thus the USOC could deny benefits to Paralympic athletes that it provided to Olympic and Pan-American athletes (JA 534), and (2) that Paralympic athletes were not qualified for the benefits at issue because they were not Olympic athletes, a necessary criterion (JA at 532). The court did not address the USOC's "accessible or special goods" argument.

On January 10, 2007, the district court issued an order directing entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the Athlete Claims in each case. (JA at 542, 546.) On the same date, final judgment entered as to those claims. (JA at 545, 550.)

The Athlete Plaintiffs appeal only their Section 504 claims, that is, the granting of the USOC's motion for summary judgment on Mr. Shepherd's Section 504 claim and the granting of the USOC's motion to dismiss the Section 504 claims of Messrs. Hollonbeck, Iniguez, and Heilveil. The Athlete Plaintiffs do not

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[1] The district court also questioned whether the USOC was a "place of public accommodation" as that term is defined in Title III. (JA at 531.) Because the Athlete Plaintiffs do not appeal their Title III claims, this holding is not relevant to the present appeal.

appeal their Title III claims and Vie Sports does not appeal either its Section 504 or Title III claims. Mr. Shepherd's employment claims, Vie Sports's breach of contract and promissory estoppel claims, and the USOC's counterclaim against Vie Sports remain pending before the district court.

The Athlete Plaintiffs in both cases filed an unopposed motion before this Court to consolidate the Shepherd and Hollonbeck cases for briefing, which motion was granted by Order dated February 23, 2007.

STATEMENT OF FACTS

Because the questions before this Court were presented to the district court on cross motions for summary judgment and summary adjudication based on stipulated facts (in Shepherd) and on a motion to dismiss (in Hollonbeck), the following facts are undisputed.

The Paralympics are a series of highly competitive elite athletic competitions for athletes with disabilities. They are the second-largest sporting event in the world behind the Olympics. (JA at 169, 303.) Paralympic athletes are elite athletes with disabilities that include, for example, blindness, cerebral palsy, spinal cord injury, multiple sclerosis, and dwarfism. (JA at 170.) The first Paralympic Games were held in 1960. Recent Paralympic Games -- now occurring immediately after the Olympic Games in the same host city -- have involved more

than 4,000 athletes in the summer games and more than 1,100 athletes in the winter games. (JA at 169.)

The USOC equates Paralympic athletes with elite athletes with disabilities. It states that the Paralympics "showcas[e] the talents and abilities of the world's most elite athletes with physical disabilities" (JA at 169), and that "[t]he Paralympics are the equivalent of the Olympic Games for the physically challenged" (JA at 167, 302). Similarly, the legislative history of the 1998 amendments that gave the USOC responsibility for the Paralympics and Paralympic athletes described the Paralympics as "the Olympics for disabled amateur athletes." S. Rep. No. 105-325 at 2 (1998), 1998 WL 604018.

The Athlete Plaintiffs are all Paralympic athletes. Mark Shepherd is a wheelchair basketball player who was a member of the United States Paralympic Wheelchair Basketball team in 1996. (JA at 171.) Scot Hollonbeck, Jose Antonio Iniguez, and Jacob Walter Jung Ho Heilveil are all wheelchair racers. Mr. Hollonbeck has competed in three Paralympic Games, winning two gold medals and a silver medal in 1992, two silver medals in 1996, and competing as a finalist in three events in 2000. (JA at 304.) Mr. Iniguez competed in the 1992 Paralympic Games, in the 100 and 800 meter races and the marathon and qualified for the 2000 Paralympic Games in several distances. (JA at 305.) Mr. Heilveil

competed in the Paralympic Games in 2000, racing in the 800 meter, the 1500 meter, the 5000 meter, the 10,000 meter, and the marathon. (JA at 306.) The Athlete Plaintiffs all have disabilities that cause them to use wheelchairs for mobility. (JA at 171, 301.)

The USOC is a federally chartered corporation, 36 U.S.C. § 220502(a), that receives federal financial assistance (JA at 43, 320). The corporation is defined by the ASA, which gives it responsibility for "all matters pertaining to United States participation in the Olympic Games, the Paralympic Games, and the Pan-American Games, including representation of the United States in the games." Id. § 220503(3)(A).[2] The USOC's purposes include "obtain[ing] for the United States the most competent amateur representation possible in each event" in the Olympic, Pan-American, and Paralympic Games. Id. § 220503(4).

The term "amateur athlete" -- which plays a role in so many of the USOC's purposes, see, e.g., id. § 220503(1), (2), (5) - (9) -- is central to understanding what the USOC does and who it serves. Although to read the USOC's briefing

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[2] "The Pan American games are a continental version of the Olympic Games which includes the Olympic Program sports and others that are not part of the Olympics." "U.S. going to Rio for 2007 Pan Am Games," http://www.rio2007.org.br/pan2007/ingles/jogos_historico.asp (last accessed April 28, 2007). This evidence was not in the record below; it is included here as explanatory material.

below, one might believe that Olympic and Pan American athletes enjoy a more favored status under the ASA than Paralympians, that is not the case.

The ASA defines "amateur athlete" -- capitalized as "Amateur Athlete" herein to reference the statutory definition -- as "an athlete who meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes." 36 U.S.C. § 220501(b)(1). That is, the term "Amateur Athlete" includes Paralympic athletes. Further, in crafting the amendment to the ASA that assigned the USOC responsibility for Paralympic athletes and the development of our country's Paralympic team, Congress stated that "[t]he legislation would fully incorporate the Paralympics into the Amateur Sports Act . . ." and "would give the USOC the same duties with respect to the Paralympic Games as it has with the Olympic Games." S. Rep. No. 105-325 at 2, 5 (1998), 1998 WL 604018. The legislation was also intended to "make clear that disabled athletes are 'amateur athletes' under the Act's existing definition . . ." Id. at 5.

Despite this comprehensive definition of the participants in its program, the USOC provides a number of benefits and services to the (largely non-disabled) Amateur Athletes who participate in the Olympic Games and Pan-American Games that it denies to the (by definition disabled) Amateur Athletes who

participate in the Paralympic Games. The USOC's "Resource Allocation Policy" states that "Participation in Athlete Support Programs is available only to athletes who are eligible to represent the United States and who intend to compete, if selected, in the next Olympic or Pan American Games." (JA at 110.) Paralympic athletes are not eligible to apply for Athlete Support Programs. For example, the USOC provides grants and health insurance to Olympic and Pan-American athletes for which Paralympic athletes are ineligible to apply. (JA at 112, 173, 307.) For the purposes of this case, the USOC denominates these benefits "Olympic Programming." (See, e.g., JA at 171.) The USOC's Resource Allocation Policy, however, refers to these benefits as "Athlete Support Programs." (JA at 110.) This is more accurate: the Resource Allocation Policy makes clear that both Olympic and Pan-American athletes are eligible to apply for the Athlete Support Programs from which Paralympic athletes are excluded. (Id.)[3]

[3] The only one of the Athlete Support Programs that has, more recently, been opened to Paralympic athletes is the award of cash for medals. This part of the program excluded Paralympic athletes completely until 2002. (JA at 103-04, 110-15.) That is, during the period when the Athlete Plaintiffs were competing and winning medals, the USOC provided such cash awards to Olympic and Pan American athletes but not to Paralympic athletes. Starting in 2002, Paralympic athletes who won medals were awarded cash in amounts one-tenth that awarded Olympic athletes. (JA at 103.)

While there is much discussion in the USOC's briefs below and in the district court's opinion concerning "separate benefits," this phrase is a misnomer. The benefits at issue here are in a unified program -- the Athlete Support Programs -- from which the USOC has elected to exclude Paralympic athletes. It is true that the Amateur Athletes for which the USOC is responsible all compete in different sports comprising different international competitions; however, the Athlete Plaintiffs do not seek to alter the rules of or qualifications for any of those sports or competitions. The USOC's benefits, on the other hand, are not -- nor need they be -- separated for Olympic, Pan-American, and Paralympic athletes, except to the extent the USOC has artificially -- and circularly -- labeled the Athlete Support Programs "Olympic Programming" for purposes of this litigation.

In sum, the Athlete Plaintiffs are all Amateur Athletes as that term is defined by Congress. Yet, they are not eligible for Athlete Support Programs for which similarly-situated non-disabled Amateur Athletes -- participating in either the Olympic or Pan-American Games -- are eligible.

SUMMARY OF ARGUMENT

The district court's central error was to focus its analysis on one discrete part of the USOC's overall program -- the Olympics. This error led it to conclude that the qualification of being an Olympic athlete to obtain the benefits at issue

here was necessary and that, because the Olympics were technically (even if not effectively) open to all, no discrimination had occurred.

This erroneously narrow focus was based on the district court's incorrect factual assessment that Congress had essentially given the USOC responsibility for the Paralympics as an afterthought, when in fact Congress intended to fully incorporate the Paralympics into the USOC, and to "give the USOC the same duties with respect to the Paralympic Games as it has with the Olympic Games." S. Rep. 105-325 at 2, 5 (1998), 1998 WL 604018.

The district court's narrow focus on the Olympics was contrary to Section 504's definition of "program or activity," which requires an institution-wide analysis of discrimination, see 29 U.S.C. § 794(b)(3)(A). A proper anti-discrimination analysis here requires comparison of the USOC's treatment of Amateur Athletes who compete in the Olympic, Pan-American and Paralympic Games. This approach is supported by years of precedent interpreting Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, ("Title IX"), prohibiting discrimination on the basis of sex by recipients of federal funding. Title IX contains an identical definition of "program or activity," compare 20 U.S.C. § 1687 with 29 U.S.C. § 794(b), and this Court has stated that Section 504 was "'patterned after and is almost identical to the anti-discrimination language of'"

Title IX. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1379 (10th Cir. 1981) (quoting S. Rep. No. 93-1297, 1974 U.S.C.C.A.N. 6373, 6390). Under this "almost identical" statute, courts compare the treatment of male and female college athletes who compete on separate teams. See, e.g., Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 829-32 (10th Cir. 1993) (holding that university violated Title IX when it cut its women's softball team).

Once the proper focus of the analysis is recognized to be the USOC's entire program, it is clear that Paralympic athletes -- who are Amateur Athletes as that term is defined by statute -- are qualified for the Athlete Support Programs the USOC makes available to Olympic and Pan-American athletes. There is no evidence that the eligibility requirement of being an Olympic or Pan-American athlete is essential to the Athlete Support Programs. See 28 C.F.R. § 41.32(b) (defining "qualified" as a person with a disability who "meets the essential eligibility requirements for" for receiving the services in question).

Under a proper, institution-wide, analysis, it also becomes clear that the policy excluding Paralympic Amateur Athletes from Athlete Support Programs discriminates on the basis of disability, either outright or because "Paralympic athlete" is a proxy for "Amateur Athlete with a disability." In addition, that policy violates the Section 504 regulation barring criteria or methods of administration

that have the effect of excluding people with disabilities. 28 C.F.R. § 41.51(b)(3)(i).

ARGUMENT

I. Standard of Review

The district court granted the USOC's motion for summary judgment in the Shepherd case. This Court "review[s] the district court's grant of summary judgment de novo, considering the evidence in the light most favorable to the appellant." Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1209 (10th Cir. 2003). "In reviewing such dispositions, this court repeatedly has emphasized that we must draw all inferences in favor of the party opposing summary judgment." O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999).

The district court granted the USOC's motion to dismiss the Hollonbeck plaintiffs' Section 504 claim pursuant to Rule 12(b)(6) for failure to state a claim. "This Court reviews a district court's order granting a motion to dismiss for failure to state a claim de novo, . . . accept[ing] all well-pleaded factual allegations in the complaint as true and view[ing] them in the light most favorable to the nonmoving party. A dismissal pursuant to 12(b)(6) will be affirmed 'only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the

plaintiff to relief.'" Lovell v. State Farm Mut. Auto. Ins. Co., 466 F.3d 893, 898-99 (10th Cir. 2006) (citations omitted).

II. Elements of a Claim under Section 504.

Under Section 504, a qualified individual with a disability may not, solely by reason of his or her disability, be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Regulations implementing Section 504 define discrimination to include, among others things, denying qualified individuals with disabilities "the opportunity to participate in or benefit from" a benefit offered by the recipient, and affording such individuals "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 41.51(b)(1)(i), (ii).[4] Section 504 also prohibits criteria or methods of administration that have the effect of subjecting people with disabilities to discrimination. 28 C.F.R. § 41.51(b)(3)(i); see also Alexander v. Choate, 469 U.S. 287, 299 (1985).

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[4] The Department of Justice Coordination Regulations, 28 C.F.R. pt. 41, apply "to each Federal department and agency that is empowered to extend Federal financial assistance." 28 C.F.R. § 41.2. These regulations "are of particular significance" because there were issued by "the agency responsible for coordinating the implementation and enforcement of § 504." Bragdon v. Abbott, 524 U.S. 624, 632 (1998).

Under Section 504, the Athlete Plaintiffs are required to show that (1) they have a disability; (2) they are otherwise qualified to participate in the program; (3) the program receives federal financial assistance; and (4) the program discriminated against them. Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1151 (10th Cir. 1999). The USOC has stipulated in Shepherd and the Athlete Plaintiffs have properly alleged in Hollonbeck that the USOC receives federal financial assistance and that the Athlete Plaintiffs have disabilities. (JA at 43, 171, 301, 320.) Thus the only questions at issue here are whether the Athlete Plaintiffs are "otherwise qualified" to participate in the USOC's program and whether the USOC discriminated against the Athlete Plaintiffs.

III. The Fact That Olympic and Paralympic Athletes Participate in Separate International Competitions Does Not Justify Denying Paralympic Athletes Benefits Offered Other Amateur Athletes.

The district court erred in concluding that any attempt to analyze the USOC's obligation to all Amateur Athletes -- Olympic, Pan American and Paralympic -- in a unified fashion was belied by legislative history and the USOC's structure. (JA at 534.) Based on that essentially factual error, the district court erred in restricting its discrimination analysis to the Olympics, rather than considering the USOC as a whole, as compelled by Section 504's definition of "program or activity": "all of the operations of" the recipient of federal funding.

29 U.S.C. § 794(b). The history of that definition and an Eighth Circuit case based on identical language in Title IX demonstrate that it precludes the narrow single-program focus of the district court's decision. A number of cases under both Section 504 and Title IX provide additional support for this conclusion.

A. Legislative History and the USOC's Structure Demonstrate that It Has Direct and Equal Responsibility for all Amateur Athletes.

The ASA defines the USOC's duties and purposes. This statute makes clear that the USOC has responsibility for Olympic, Pan-American, and Paralympic athletes, and places no one category of athlete above the others. It defines "amateur athlete" to include all of these athletes, and "amateur athletic competition" as games in which amateur athletes compete. 36 U.S.C. § 220501(b)(1), (2). It then defines the USOC's purposes in terms of Amateur Athletes and amateur athletic competition and activities, and expressly assigns the USOC responsibility for "all matters pertaining to" the Olympic, Pan American, and Paralympic games and for "obtain[ing] for the United States . . . the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games, and Pan-American Games." 36 U.S.C. § 220503(3)(A), (4). Nothing in the language of the statute suggests that one of these games or categories of Amateur Athletes is paramount or privileged over the others.

Because this language is unambiguous, there should be no need to explore the legislative history to determine what Congress intended when it gave the USOC responsibility for the Paralympics and Paralympic athletes. See, e.g., Anderson v. U.S. Dep't of Labor, 422 F.3d 1155, 1177 (10th Cir. 2005).

Despite this, the district court looked to the legislative history of the 1998 amendments that assigned the USOC responsibility for the Paralympics and Paralympic athletes and concluded that these amendments merely "formalize[d] recognition of the existing Paralympic movement and add[ed] the Paralympics to the list of international competitions to which the United States will send representatives." (JA at 534.) This is inaccurate. The 1998 legislative history makes clear that the amendments did far more than that. The legislation was intended to "fully incorporate the Paralympics into the Amateur Sports Act . . ." and to "give the USOC the same duties with respect to the Paralympic Games as it has with the Olympic Games." S. Rep. No. 105-325 at 2, 5 (1998), 1998 WL 604018. It also was to "make clear that disabled athletes are 'amateur athletes' under the Act's existing definition . . ." Id. at 5. Congress did not just staple the Paralympics to the USOC as an afterthought; it intended fully to incorporate that program and its athletes into the USOC.

The district court's analysis of the USOC's structure was also incorrect. That court articulated its belief that while the USOC represents the United States internationally as its national Paralympic committee, "vis á vis individual citizens" the USOC works through national governing bodies ("NGBs") and paralympic sports organizations ("PSOs"). (JA at 507.) This is an incomplete picture. While the USOC delegates organizational responsibility to NGBs and PSOs, it also provides direct support to athletes. The USOC's Resource Allocation Policy states that the USOC "shall allocate performance-based resources to the NGBs and direct athlete support to the athletes . . ." and specifies that "[g]rants awarded to athletes by the USOC shall be paid directly to athletes . . .." (JA at 110-11, see also id. at 171, 307.)

Ultimately, the USOC is a single institution assigned responsibility for three categories of Amateur Athletes -- Olympic, Pan-American, and Paralympic -- only two of which are eligible for its Athlete Support Programs. Paralympic athletes -- the category that both the USOC and Congress equate with elite disabled athletes -- are excluded from those programs. The fact that these athletes do not compete in the same sports or set of Games does not justify the district court's decision to restrict the focus of its antidiscrimination analysis only to the Olympics.

B. The District Court Erred in Focusing its Analysis Only on the Olympics.

Section 504 prohibits disability discrimination by "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The statute defines "program or activity" in relevant part as "all of the operations of . . . an entire corporation, partnership or other private organization . . ." Id. § 794(b)(3)(A).

This definition and its history were crucial to the Eighth Circuit when it addressed a question similar to the present -- what program is the proper focus of an antidiscrimination analysis under this language? -- in Klinger v. Department of Corrections, 107 F.3d 609, 615-16 (8th Cir. 1997). In Klinger, female prisoners in Nebraska's only facility for women had alleged that their training opportunities were inferior to those provided at one specific facility for male prisoners, in violation of Title IX. Id. at 612. The Eighth Circuit held that it was inappropriate to compare only those two facilities; rather, the discrimination analysis should consider "[t]he Nebraska prison system as a whole." Id. at 615. This conclusion was based on Title IX's definition of "program or activity," which is identical to that of Section 504. Id.; compare 20 U.S.C. § 1687 with 29 U.S.C. § 794(b). Both definitions were added simultaneously to their respective statutes by the Civil

Rights Restoration Act of 1987 ("CRRA"). Pub. L. No. 100-259, § 4, 102 Stat. 28 (1988).

The Eighth Circuit gave considerable weight to the legislative history of the CRRA. The court noted that the statute had been passed to reverse the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), which had held that the term "program or activity" in Title IX was limited only to that discrete program within an institution that actually received federal funding. Klinger, 107 F.3d at 615 n.7. The court concluded that "the purpose of [the definition] was 'to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance.'" Id. at 615 (citing S. Rep. No. 100-64, at 4, reprinted in 1988 U.S.C.C.A.N. 3, 6). Thus, the definition of "program or activity" in Title IX, the Eighth Circuit held, "requires comparison of educational opportunities for female and male prisoners within the entire system of institutions operated by a state's federally-funded correctional department or agency . . ." Id. at 616.

The identical definition in Section 504 requires comparison of benefits provided to disabled and non-disabled Amateur Athletes within the entire institution of the USOC. Indeed, the legislative history of the CRRA states further that it would restore Section 504 -- as well as Title IX, Title VI of the Civil Rights

Act ("Title VI"), 42 U.S.C. § 2000d, and the Age Discrimination Act of 1975, 42 U.S.C. § 6101 - 6107 -- "to the broad, institution-wide application which characterized coverage and enforcement from the time of initial passage until the Grove City decision." S. Rep. No. 100-64, at 4, reprinted in 1988 U.S.C.C.A.N. 3, 6.

C. Other Cases Decided under Section 504 and Title IX Suggest That the Proper Focus of Analysis Is the USOC as a Whole.

1. The Fact That an Organization's Disabled Participants May Be in a Separate Program Does Not Excuse Discrimination.

The fact that an organization may provide services to participants with disabilities through a separate program does not insulate it from an antidiscrimination analysis. For example, in the Ninth Circuit case of Rodde v. Bonta, 357 F.3d 988 (9th Cir. 2004), the plaintiffs challenged, under Title II of the ADA ("Title II"),[5] the closure of a rehabilitation hospital that provided a unique range of services necessary for individuals with certain disabilities, id. at 990-91, in other words, a separate program for disabled county residents. The defendant

[5] 42 U.S.C. § 12131 - 12165 (prohibiting discrimination on the basis of disability by public entities). Title II "'essentially simply extends the anti-discrimination prohibition embodied in section 504 . . . to all actions of state and local governments.'" Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 859 (10th Cir. 2003) (quoting H.R. Rep. No. 101-485, pt. 2, at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367).

argued that the disabled plaintiffs could use any one of several hospitals that remained open and that they did not have a right to the services provided by the separate rehabilitation hospital. Id. at 995, 998. The Ninth Circuit disagreed, holding that if the county were to close the rehabilitation hospital, "it will reduce, and in some instances eliminate, necessary medical services for disabled Medi-Cal patients while continuing to provide the medical care required and sought by Medi-Cal recipients without disabilities" in violation of Title II. Id. at 998.

The Ninth Circuit also endorsed the similar holding of Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994), in which the court had held that it violated Title II when a city recreation department shut down its (separate) programs for individuals with disabilities, while continuing to provide programs -- theoretically open to all -- to nondisabled city residents. Rodde, 357 F.3d at 998; see also Dreher Park, 846 F. Supp. at 991.

In Rodde and Dreher Park, the fact that the program for people with disabilities was separate did not insulate it from review for disability discrimination. Rather, the analysis focused on the treatment of people with disabilities systemwide.

The district court distinguished Rodde and Dreher Park on the grounds that the programs for people with disabilities in those cases were eliminated

completely, while the Paralympics still exist. (JA at 534-37.) This misinterprets both the absolutism of the USOC's position and the posture of the present case.

The USOC does not argue that its current level of Paralympic support is sufficient to satisfy Section 504. Rather, it argues that the fact that the programs are separate removes them completely from scrutiny under Section 504. Under the USOC's theory, it could in fact eliminate all support for Paralympic athletes and those athletes would be without recourse under Section 504.

The district court did not, in any event, have the facts necessary to evaluate the support provided to Paralympic athletes. Largely due to the USOC's absolutist stance, there was no evidence before the district court concerning the actual level of support that the USOC provides to either Olympic or Paralympic athletes. Rather, the legal question was before the court in Shepherd precisely because the USOC -- based on its position that the relative levels of support between Olympic and Paralympic athletes were beyond scrutiny under Section 504 -- had refused to produce in discovery certain documents and information concerning the support provided its various categories of Amateur Athletes. To resolve the Athlete Plaintiffs' motion to compel this information, the parties stayed discovery, entered stipulations, and submitted the pure legal question to the Court. Those stipulations and the other limited evidence in the record in Shepherd, as well as the

allegations in Hollonbeck, demonstrate that there are a number of programs for which Paralympic athletes simply are not eligible at all.[6]

The USOC urged that the reasoning of John Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996), was more applicable than that of Rodde or Dreher Park. The district court agreed. (JA at 536.) In Does 1-5, the Ninth Circuit held that the state of Hawai'i could place a durational limit on a program providing benefits to needy persons with disabilities, despite the fact that a program providing benefits to needy families with dependent children was not so limited. Id. at 1155. This decision was based in part on the court's determination that the benefit programs were separate and should be analyzed separately, rather than as part of a unitary general assistance program. Id. This alone makes the case inapposite here, as the Athlete Support Programs for which Olympic and Pan-American athletes are

[6] Because of this, the district court also erred in relying on its perception that the "differences in perks and privileges" between Olympic and Paralympic teams are "premised on and defined by" the disabilities of Paralympic athletes and that differences in the allocation of resources may be based on the fact that the Paralympics are "smaller in scale" than the Olympics. (JA at 519-20.) Again, no such nuanced differences were before the district court and the only "premises" the USOC offered for denying benefits to Paralympic athletes was that they were not Olympic athletes. Similarly, the Athlete Plaintiffs are not complaining of the "quality" of the benefits provided them (see JA 519, 521, 534-36), but the fact that the Athlete Support Programs are not open to them at all.

eligible are not properly analyzed as separate from any benefits provided to Paralympic athletes.

The present case differs from Does 1-5 in another crucial respect: the favored program in Does 1-5 -- the one for needy families with dependant children -- was in fact open to all, that is, it did not exclude needy families with dependent children that included family members with disabilities. The category "families with dependent children" was in no way tantamount to or a proxy for[7] "non-disabled families," and the criterion of having dependent children does not have the effect of excluding individuals with disabilities.[8] The plaintiffs in Does 1-5 made no such arguments and it is simply common sense that many families with dependent children will have one or more members who have disabilities. This was essential to the court's approval of the differing durational limitations. Id. at 1155 (holding that "a program would not violate the ADA as long as disabled people with children were not excluded from full participation in the program.") In contrast, the Athlete Support Programs at issue here explicitly exclude the precise category of Amateur Athletes that Congress and the USOC define as elite disabled athletes.

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[7] See infra at 39-42.

[8] See infra at 46-49.

2. Cases Decided under Title IX Demonstrate That it Is Appropriate to Analyze Discrimination on an Institution-Wide Basis.

Precedent under Title IX -- especially in the arena of college athletics -- provides additional support for the principle that it is proper to compare separate programs of protected class and non-protected class participants within a single institution for purposes of an antidiscrimination analysis. Courts have widely interpreted Title IX to require equitable treatment of male and female athletes participating in separate teams and programs. See, e.g., Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 829-32 (10th Cir. 1993) (holding that university violated Title IX when it cut its women's softball team); Cohen v. Brown Univ., 991 F.2d 888, 903-04 (1st Cir. 1993) (holding that demoting two women's varsity teams to club status violated Title IX); Sternberg v. U.S.A. Nat'l Karate-Do Fed'n, Inc., 123 F. Supp. 2d 659, 661-62 (E.D.N.Y. 2000) (holding that female athlete stated cause of action against the NGB of karate for sex discrimination under Title IX based on the NGB's decision to withdraw a women's team from world championship competition while permitting the equivalent men's team to participate).

Several other courts have held that, under Title IX, male and female prisoners -- who are segregated by gender and often reside in different institutions

-- must be offered comparable educational opportunities. See, e.g., Klinger, 107 F.3d at 615-16 (holding that Title IX applied to segregated male and female prisoners, requiring "comparison of educational opportunities . . . within the entire system of institutions"); Jeldness v. Pearce, 30 F.3d 1220, 1229 (9th Cir. 1994) (holding that Title IX would prohibit, for example, "offering of educational programs only in the men's prisons, without offering equivalent programs in the women's prison.").

In each of these cases, the men's and women's programs were separate -- either involving separate teams playing different sports or segregated men's and women's prisons -- yet the courts recognized that Title IX prohibited actions that favored the men's program over the women's program. Furthermore, in none of these cases did the defendant eliminate the women's program entirely; rather, the conduct held to violate Title IX was the provision of certain opportunities or support to the men's program that were not provided to the women's program.

3. The District Court Erred In Rejecting The Relevance of Title IX Precedent.

Cases decided under Title IX are especially relevant to this Court's analysis of the Athlete Plaintiffs' claims because Section 504 was "'patterned after and is almost identical to the anti-discrimination language of'" Title IX and Title VI.

Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1379 (10th Cir. 1981) (quoting S. Rep. No. 93-1297, 1974 U.S.C.C.A.N. 6373, 6390); see also S. Rep. No. 100-64, at 5 (1987), reprinted in 1988 U.S.C.C.A.N. 3, 7 (Section 504 and Title IX were "modeled on Title VI with respect to both language and intended effect."). Of particular importance, as noted above, is the fact that the definition of "program or activity" is identical in both statutes. The legislative history of the bill that added these identical definitions stated that "[e]ach of [Title VI, Title IX, Section 504, and the Age Discrimination Act of 1975] employs the same careful language to describe coverage so that the same standards are used to interpret and enforce all four laws." S. Rep. No. 100-64, at 3, reprinted in 1988 U.S.C.C.A.N. 3, 5-6.

Many courts -- when interpreting one of these four statutes -- rely on precedents interpreting the other three to address a variety of different questions including: whether prohibited discrimination under the statute includes retaliation, Ryan v. Shawnee Mission U.S.D. No. 512, 437 F. Supp. 2d 1233, 1256 (D. Kan. 2006) (relying on Title IX precedent to interpret Section 504; citing Pushkin); what constitutes actionable harassment, Bryant v. Independent School District. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) (relying on Title IX precedent to interpret Title VI); what damages are available, Barnes v. Gorman,

536 U.S. 181, 185 (2002) (noting that the same standards apply to all four statutes); and what constitutes receipt of federal financial assistance, Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 n.3, 468 (1999) (same).

The district court refused to consider precedent under Title IX in analyzing the Athlete Plaintiffs' claims, stating that the Athlete Plaintiffs were attempting to "graft" or "infuse" the Title IX regulatory scheme onto or into the ADA. (JA at 513, 521, 541.) This is not so. There is no need to borrow the Title IX regulations as Section 504 already has regulations that prohibit the conduct challenged here. See, e.g., 28 C.F.R. § 41.51(b)(1)(i) (barring recipients of federal funding from denying participants with disabilities "the opportunity to participate in or benefit from" benefits offered by the recipient). Rather, Title IX precedents are instructive because they apply a statute this Court has recognized to be almost identical to Section 504 to a factual scenario similar to the one at issue here.

The "institution-wide application" that Congress intended by the current definition of "program or activity" -- which does not rely on Title IX regulations but rather identical statutory language -- does not permit the USOC's approach of limiting the analysis only to the Olympics. Rather, it requires analysis of the USOC's treatment of all of the Amateur Athletes for whom the USOC has responsibility. So analyzed, as set forth in greater detail below, it is clear that the

USOC discriminates against Amateur Athletes with disabilities in violation of Section 504.

IV. The District Court Erred in Holding That the Athlete Plaintiffs Were Not Qualified for the Benefits at Issue Here.

The Athlete Plaintiffs are qualified for the benefits at issue here because they are "Amateur Athletes" -- the category of individual for which the USOC is responsible -- as that term is defined by statute. A person with a disability is "qualified" under the applicable regulations if he "meets the essential eligibility requirements for" for receiving the services in question. 28 C.F.R. § 41.32(b). Being an Amateur Athlete -- as defined by statute -- is an essential eligibility requirement for the USOC's Athlete Support Programs; being an Olympic athlete is not.

It is important to be clear which eligibility requirement the Athlete Plaintiffs challenge here. The Athlete Plaintiffs are not asking for any modification to the physical or athletic eligibility requirements for any Olympic or Pan-American sport. Rather, the eligibility requirement they challenge is a purely administrative one: that Olympic and Pan-American athletes are eligible to apply for a series of benefits -- completely unrelated to sport -- for which Paralympic athletes are not eligible. Amateur Athletes do not have to have any particular set of physical

abilities or athletic talents to make use of a cash grant, tuition support, or health insurance. This is best illustrated by the fact that all Olympic athletes -- ranging from weight lifters to figure skaters -- are eligible to apply for these benefits. Thus the question of whether the Athlete Plaintiffs are qualified physically or athletically to compete in the Olympics is completely irrelevant.

Instead, the question whether the Athlete Plaintiffs are qualified is simply this: Is the eligibility requirement restricting Athlete Support Programs such as grants, tuition assistance, and health insurance to Olympic and Pan-American athletes essential? It is certainly not essential to the benefits themselves: again, there is nothing inherent to cash grants and health insurance that limits their usability to Olympic and Pan-American athletes. Without changing any aspect of the grants or insurance, the USOC could open up eligibility for its Athlete Support Programs to Paralympic athletes.

The restriction is also not essential to the USOC's program as a whole. The USOC's purpose includes "obtain[ing] for the United States . . . the most competent amateur representation possible in each event of the Olympic Games, the Paralympic Games, and Pan-American Games." 36 U.S.C. § 220503(4). Restricting the Athlete Support Programs to two of these three categories is not essential to that purpose. In fact, eliminating that restriction and permitting

Paralympic athletes to be eligible for Athlete Support Programs will promote that purpose.

The district court erred by focusing its analysis only on the Olympics, concluding that the Athlete Plaintiffs failed to demonstrate that "these benefits are not 'necessary' to the maintenance of the Olympic team." (JA at 539.) As demonstrated above, the proper focus is institution-wide, so the question is necessity to the USOC's entire program, not just the Olympics. In addition, the question is not whether the benefits are necessary, but whether an eligibility requirement that excludes Paralympic athletes from those benefits is necessary. The USOC has presented no evidence that this is the case. In any event, so phrased, it is clear that this approach would be improper: if exclusion of a protected class could be excused on the grounds that it was necessary to reserve more benefits or resources for the non-protected class, the whole point of anti-discrimination laws would be defeated. Based on the necessity of reserving jobs for men, workplaces could not be integrated; in order to reserve slots for white students, schools could not be integrated.

The USOC argued below that the Athlete Plaintiffs were not qualified for what it calls "Olympic programming" simply because they were not Olympic

athletes. (See, e.g., JA at 87.) This is circular.[9] Defendants have defined the qualification in terms of the precise category the Athlete Plaintiffs challenge as discriminatory: The limitation of certain benefits to Olympic athletes. The Supreme Court has held, in interpreting Section 504, that "[t]he benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled . . ." Choate, 469 U.S. at 301 (1985); see also Clark v. Va. Bd. of Bar Exam'rs, 880 F. Supp. 430, 441 (E.D. Va. 1995) (noting, in addressing mental health question on bar application, that "[w]hile Defendant argues that [the plaintiff] is not an 'otherwise qualified individual' because she failed to answer [the mental health question], this argument begs the question of whether [the question] must be answered at all."). The USOC's argument is equivalent a college labeling its athletic benefits the "Men's Athletic Program," and then asserting that female college athletes are not "qualified" for the benefits because they are not men.

[9] It is also arguably a pretext, because Pan American athletes are also eligible for what the USOC calls "Olympic Programming" for purposes of this case -- but "Athletic Support Programs" in its non-litigation documentation -- without, apparently, being Olympic athletes. (See JA at 110.)

V. The District Court Erred In Holding That Exclusion of Paralympic Athletes from Athlete Support Programs Was Not Discriminatory.

Once it is clear that Amateur Athletes competing in Paralympic Games are qualified for the USOC's Athlete Support Programs, it becomes equally clear that excluding those athletes from the Athlete Support Programs constitutes facial discrimination on the basis of disability, whether outright or by proxy.

A. Exclusion of Paralympic Athletes from the Athlete Support Programs is Facial Disability Discrimination.

The USOC discriminates against Amateur Athletes with disabilities by excluding Paralympic athletes from eligibility for Athlete Support Programs, and denying them benefits such as grants, tuition assistance, and health insurance that it provides to Olympic and Pan-American athletes. This policy thereby denies Paralympic athletes -- who are, by definition, disabled -- "the opportunity to participate in or benefit from" the Athlete Support Programs, including grants, assistance, and health insurance, and thereby provides benefits that are not equal to that afforded Olympic athletes, in violation of Section 504. See 28 C.F.R. § 41.51(b)(1)(i), (ii).

The exclusion of Paralympic athletes from the Athlete Support Programs constitutes intentional disability discrimination. "By showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory --

treatment" the Athlete Plaintiffs demonstrate intentional discrimination. Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). Providing benefits to Amateur Athletes competing in the Olympic and Pan American Games but denying eligibility to Amateur Athletes competing in the Paralympic Games subjects the protected group of athletes with disabilities to explicitly differential treatment. Plaintiffs have thus demonstrated intentional disability discrimination.

B. "Paralympic Athlete" Is a Proxy for Disabled Amateur Athlete, Making Discrimination Against the Former Facial Discrimination Against the Latter.

The fact that the USOC's discrimination is against Paralympic athletes rather than against disabled athletes per se is not to the contrary. In the present case, the USOC has recognized that the Paralympics are "the equivalent of the Olympic Games for the physically challenged" (JA at 167, see also JA at 302), and Congress has described the Paralympics as "the Olympics for disabled amateur athletes," S. Rep. 105-325 at 2 (1998), 1998 WL 604018. Using such a "proxy" for a protected class constitutes facial discrimination. Thus, by excluding Paralympic athletes from its Athlete Support Programs, the USOC engages in facial disability discrimination.

In McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992), for example, the plaintiff, who was infertile due to a disability, asserted a claim under section 501

of the Rehabilitation Act, 29 U.S.C. § 791,[10] based on the fact that her employer set terms for maternity leave -- including, for example, specifying a date certain on which it would begin -- that were more favorable to women bearing children naturally than those adopting children. Id. at 224. The district court had dismissed on the grounds that the policy of advance notice for maternity leave did not appear to be intentional discrimination on the basis of disability. The Seventh Circuit reversed, observing that

> discrimination "because of" handicap is frequently directed at an effect or manifestation of a handicap rather than being literally aimed at the handicap itself. Thus, a school's exclusion of a service dog has been held to be discrimination "because of" handicap, and no doubt a policy excluding wheelchairs would be such discrimination . . ..

Id. at 228 (citing Sullivan v. Vallejo City Unified Sch. Dist., 731 F.Supp. 947, 958 (E.D. Cal.1990)). The Seventh Circuit stressed that the fit did not have to be perfect: "An example is using 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.; see also Erie County Retirees Ass'n v. County of Erie, 220 F.3d 193, 211 (3d Cir.

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[10] Section 501 prohibits employment discrimination on the basis of disability by federal agencies. 29 U.S.C. § 791. The Seventh Circuit stated that the plaintiff's intentional discrimination claim "might as easily come under § 504 as under § 501." McWright, 982 F.2d at 227.

2000) (holding that offering Medicare-eligible retirees different benefits than non-Medicare-eligible retirees constitutes age discrimination because "Medicare status is a direct proxy for age"); Sharpvisions v. Borough of Plum, 475 F. Supp. 2d 514 (W.D. Pa. 2007) (holding that definition of "group home" as up to ten persons "plus staff" was a proxy for persons with disabilities) (no pinpoint cite available).

The district court did not address the Athlete Plaintiffs' proxy discrimination argument, but rather appeared to confuse it with what that court called the separate benefit analysis. (See JA at 536.) The Athlete Plaintiffs address that issue below. See infra at 45-46.

The USOC relied below on Community Services, Inc. v. Wind Gap Municipal Authority, 421 F.3d 170 (3d Cir. 2005). This case is not, however, contrary to the Athlete Plaintiffs' proxy discrimination argument. In fact, the Wind Gap case reconfirmed that proxy discrimination constitutes intentional discrimination. Id. at 177-178 (citing McWright and Erie County). However, the Third Circuit concluded that the "fit" at issue was not close enough to constitute a proxy. The plaintiff in Wind Gap was a for-profit home for individuals with disabilities. The city of Wind Gap had classified it as a "commercial facility" which invoked a more burdensome permitting process than that for residential facilities. Id. at 173. The Third Circuit focused on the fact that the designation

"commercial facility" included many non-disability-related facilities such as hotels, motels, and restaurants. Id. at 181. Thus, the excluded classification was in no way a proxy for persons with disabilities. Here, in contrast, it is only Paralympic athletes -- those the USOC and Congress equate with elite disabled athletes -- who are excluded from the Athlete Support Programs, for which both Olympic and Pan-American athletes are eligible. The "fit" is sufficiently close between Paralympic athletes and Amateur Athletes with disabilities to make facial discrimination against the former a proxy for facial discrimination against the latter.

C. It Is Irrelevant That the Occasional Olympic Athlete May Have a Disability.

The district court erred when it relied on the fact that some athletes whose disabilities (for example, deafness) do not impact their ability to play Olympic sports may qualify for the Athlete Support Programs from which Paralympic athletes are excluded. (JA at 519.) It is irrelevant that the occasional Olympic athlete with a disability may be entitled to the benefits at issue here. "The . . . appropriate treatment of some disabled persons does not permit [the defendant] to discriminate against other disabled people . . .." Lovell v. Chandler, 303 F.3d 1039, 1054 (9th Cir. 2002) (rejecting the argument that a healthcare benefit

program for the working poor that categorically excluded individuals with disabilities did not violate section 504 because some individuals with disabilities were poor enough to receive benefits under Medicaid); Hargrave v. Vermont, 340 F.3d 27, 30, 36-37 (2d Cir. 2003) (holding that statute affecting individuals with mental illness who were civilly committed or in prison violated Title II of the ADA despite the fact that it only affected a subset of individuals with mental illness); Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1496 n.8 (W.D. Wash. 1997) ("That a law may not burden all members of the protected class does not remove its facially discriminatory character.").

The USOC's argument is essentially equivalent to that of a city park that bars people who use wheelchairs, but asserts that the rule is not discriminatory because deaf and blind people can still use the park. The categorical denial of benefits to Paralympic athletes constitutes discrimination even if the occasional athlete with a non-sport-related disability competes in the Olympics.

D. The District Court Erred In Concluding that The Mere Existence of the Paralympics Satisfied Section 504.

Ultimately, Section 504 requires that Paralympic athletes have "meaningful access" to the USOC's Athlete Support Programs. Choate, 469 U.S. at 301. The district court, while not alluding to that standard, held that it was sufficient that

"the participation opportunity for wheelchair athletes is . . . provided through a separate (Paralympic) program." (JA at 534.) This, again, misconstrues the nature of the discrimination the Athlete Plaintiffs challenge here. They do not argue that there are no, or restricted, opportunities for athletic participation. Rather, they argue that it constitutes discrimination under Section 504 that the one category of Amateur Athlete consisting of disabled athletes has no access whatsoever to specific non-athletic benefits.

The bare existence of a Paralympic program within the USOC does not, in any event, constitute "meaningful access" to that organization's program. In Chaffin, this Court held that "[a] violation of Title II does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. . ." 348 F.3d at 861 (quoting Shotz v. Cates, 256 F.3d 1077, 1080 (11th Cir. 2001)). Again, the evidence before the district court in Shepherd was that Paralympic athletes were excluded completely from the Athlete Support Programs. (JA at 110; 173-74.) In Hollonbeck, the plaintiffs properly alleged a number of benefits for which Olympic athletes were eligible but Paralympic athletes were not. (JA at 307-08.) There were no allegations or evidence before the court sufficient to sustain the conclusion -- under Rule 12(b)(6) or 56(b) -- that the USOC provided meaningful access to its programs for Paralympic athletes.

E. The So-Called "Separate Benefit" Provision Is Irrelevant Here and Is, in Any Event, an Affirmative Defense Not Pleaded or Proved by the USOC.

The district court repeatedly noted that the Athlete Plaintiffs did not rely on what it called the "separate benefit" provision. (See, e.g., JA at 511, 519, 536-37.) This provision states that a recipient of federal funding may not

> [p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

28 C.F.R. 41.51(b)(1)(iv).[11] This provision is not relevant here for the simple reason that the USOC does not provide separate benefits. Olympic and Paralympic athletes may compete in separate sports on separate teams, but there is one set of benefits: the Athlete Support Programs -- including grants, tuition support, and insurance -- from which Paralympic athletes are excluded.

In any event, this "separate benefit provision" is an affirmative defense as to which the USOC has the burden of proof: benefits "may not" be separate "unless [it] is necessary" to ensure effectiveness, 28 C.F.R. 41.51(b)(1)(iv). See Colo.

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[11] Because the district court was reviewing the Athlete Plaintiffs' ADA claim as well as their Section 504 claim, it referred throughout to the ADA's separate benefit provision. (See, e.g., JA at 511 (citing 42 U.S.C. § 12182(b)(1)(A)(iii)).) The language of that provision is virtually identical to that of the regulation cited in text.

Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1003 (10th Cir. 2001) (stating that three provisions of Title III that impose requirements on covered entities "unless" certain conditions apply establish affirmative defenses on which the defendant has the burden of proof); N.L.R.B. v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711 (2001) (Discussing "'the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits.'" (Internal citations omitted).) Thus the benefits at issue here -- grants, tuition assistance, insurance -- may not be provided to Paralympic athletes in a separate benefit program unless the USOC can show that such separation is necessary. The USOC -- which has the burden of proof -- has provided no evidence that this is the case.

VI. The District Court Erred in Rejecting the Athlete Plaintiffs' Claim That the Challenged Criterion Had the Effect of Screening Out Amateur Athletes with Disabilities.

Section 504 prohibits "criteria or methods of administration . . . that have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 41.51(b)(3)(i); see also Choate, 469 U.S. at 299; Chaffin, 348 F.3d at 859-60 (Section 504 was intended "to remedy . . . disparate impact discrimination.").

The USOC's criterion requiring that Amateur Athletes be eligible to compete in the Olympics or Pan-American games to qualify for Athlete Support Programs has the effect of subjecting Amateur Athletes with disabilities to discrimination. Congress stated that the analogous provision in Title III of the ADA "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation." H. R. Rep. No. 101-485, pt. 2, at 105 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 388. Given that no Paralympic athletes are eligible for the Athlete Support Programs, the chances of most Amateur Athletes with disabilities receiving such benefits are close to zero.

The district court rejected this theory[12] on the grounds that the criterion of being an Olympic athlete was "necessary" to the maintenance of the Olympic team and that "it is irrelevant that the USOC chooses to provide Olympic programming only to Olympic athletes as long as the gateway to that program operates in a nondiscriminatory manner." (JA at 539-40.)[13] The Athlete Plaintiffs addressed

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[12] Because the district court was focusing on the Athlete Plaintiffs' claims under Title III, it analyzed a similar provision in that statute. (See JA at 538 (citing 42 U.S.C. § 12182(b)(2)(A)(i)).)

[13] The district court's analysis of the disparate impact question was somewhat entwined with its rejection of the USOC as a "place of public

(continued...)

the former point above, in their discussion of "essential eligibility requirements." See supra at 34-37. The criterion of being an Olympic athlete to be eligible for Athlete Support Programs -- in fact, both Olympic and Pan-American athletes are eligible -- is only "necessary" if the purpose of those programs is improperly constrained to the maintenance of a subset -- the non-protected class subset -- of the Amateur Athletes for which the USOC has responsibility. Again, this is equivalent to excluding female athletes from insurance and grants provided to male athletes, and justifying on the grounds that doing so is necessary to maintain the men's teams.

The district court's second grounds for rejecting the Athlete Plaintiffs' argument misses the point of the regulation barring criteria that have the effect of discriminating on the basis of disability. If the statement that the "gateway . . . operates in a nondiscriminatory manner" means that the criterion requiring eligibility for the Olympics to qualify for Athlete Support Programs is facially neutral, that makes it precisely the type of criterion that is appropriate for analysis under this regulation. As the Department of Justice stated, in interpreting almost identical language in the regulations implementing Title II, the provision

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[13](...continued)
accommodation" under Title III. (JA at 539-40.) Because the Athlete Plaintiffs do not proceed under Title III, that discussion is not relevant here.

> prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate.

28 C.F.R. pt. 35, app. A at 550 (2006). If, on the other hand, the district court's phrasing was intended to indicate that the "gateway" does not have a discriminatory effect, it is patently wrong: the criterion of having to be an Olympic athlete excludes all Paralympic athletes, the vast majority of Amateur Athletes with disabilities. This criterion has "the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap" in violation of Section 504. 28 C.F.R. § 41.51(b)(3)(i).

CONCLUSION

For the reasons set forth above, 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.

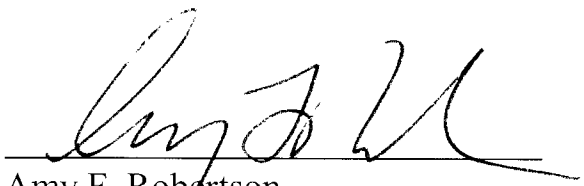
STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because this case involves questions that this Circuit has not yet addressed, including the "program or activity" that is the proper focus of an antidiscrimination analysis under Section 504.

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 10,863 words. Counsel relied on the word count of WordPerfect X3, which was used to prepare this brief.

Respectfully submitted this 2d day of May, 2007.



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Certificate of Service and Digital Submission

The undersigned hereby certifies that,

1. Appellants' Consolidated Opening Brief including the Addendum thereto and Volumes I and II of the Joint Appendix 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 May 2, 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 May 2, 2007, copies of Appellants' Consolidated Opening Brief including the Addendum thereto, and Volumes I and II of the Joint Appendix were sent on a compact disc and in hard copy, by first-class mail, postage prepaid, to:

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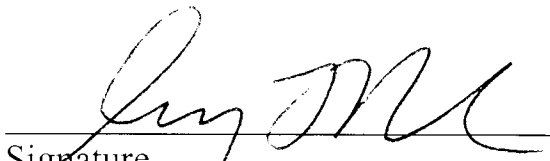

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