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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

FAITH ACTION FOR COMMUNITY EQUITY, TOCHIRO KOCHIRO KOVAC, individually and on behalf of a class of persons in the State of Hawai'i who because of their national origins, have limited English proficiency;

Plaintiffs,

vs.

HAWAI'I DEP'T OF TRANSPORTATION; GLENN OKIMOTO, in his official capacity as the Director of the Hawai'i Department of Transportation,

Defendants.

Case No. 13-CV-00450 SOM RLP
Civil Rights Action

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest pursuant to 28 U.S.C. § 517[1] in order to ensure that the national origin nondiscrimination protections of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d through 2000d-7, and the United States Department of Transportation's Title VI implementing regulations, 49 C.F.R. Part 21, (hereinafter, Title VI) are properly applied.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 4 2 U.S.C. § 2000d. The non-discrimination provisions of Title VI apply in pr ivate cases alleging intentional discrimination by federally-funded recipients that fail to provide language assistance services to limited English proficient (LEP) individuals. *See Alexander v. Sandoval*, 532 U.S. 275, 279-280 (2001); *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977-78 (N.D. Cal. 2013).

[1] Under 28 U.S.C. § 517, "[A]ny officer of the Department of Justice[ ] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Pursuant to section 517, the United States filed a statement of interest on March 28, 2014 in order to address issues presented by Defendants' motion to dismiss, ECF No. 41.

The United States has a critical interest in ensuring that the Hawai'i Department of Transportation (HDOT) and other recipients of federal financial assistance provide LEP individuals with meaningful access to their programs and activities, including, in this case, examinations for a license to operate a personal motor vehicle.[2] In Hawai'i, the Director of HDOT approves the languages in which the written driver's license exams may be offered.[3] *See* Hawai'i Administrative Rules 19-122-10(h).

Here, HDOT and its Director (hereinafter "Defendants") have filed a motion for summary judgment that implicates the United States' interest in ensuring that recipients of federal financial assistance comply with Title VI. Accordingly, the United States submits this Statement of Interest to confirm four points: 1) recipients of federal financial assistance, such as HDOT, are on notice of their obligation under Title VI to provide LEP individuals with meaningful access to

[2] HDOT receives significant federal financial assistance, including from the U.S. Department of Transportation (U.S. DOT). The U.S. DOT's Federal Highway Administration alone has made available to HDOT nearly $110,000,000 in federal financial assistance for the period beginning October 1, 2014, and ending May 31, 2015. *See* U.S. Dep't. of Transportation, Federal Highway Administration, Apportionment of Funds for the Period Beginning on October 1, 2014, and Ending on May 31, 2015, Pursuant to the Highway and Transportation Funding Act of 2014, Notice 4510.778 (Oct. 1, 2014) available at https://www.fhwa.dot.gov/legsregs/directives/notices/n4510778.cfm.

[3] By "driver's license" we refer to a license to operate a personal vehicle and not a commercial motor vehicle. Commercial driver's licenses, unlike the licenses at issue here, are issued pursuant to federal regulations.

their programs and activities; 2) recipients of federal financial assistance must provide LEP individuals with timely, meaningful access; 3) evidence of a failure to provide timely language access services can constitute evidence of intentional discrimination in violation of Title VI; and 4) the Federal Transit Administration's 2010 Title VI compliance review of HDOT's public transit program did n ot address language services for driver's license examinations.

BACKGROUND

Plaintiffs in this action are Faith Action for Community Equity (FACE), a nonprofit organization, and Tochiro Kochiro Kovac, an LEP Chuukese citizen of the Federated States of Micronesia. Mr. Kovac lives in Hawai'i and, according to the complaint, could not read and pass the HDOT written driver's license examination because he is L EP and the exam at the time was not offered in Chuukese.

Prior to October 2008, the Hawai'i driver's license exam was translated into seven languages. In October 2008, HDOT and its Director ceased offering translated written driver's license exams and prohibited the use of interpreters who could verbally translate questions during the exam after a statutory change required the addition of a new question. *See* Defs.' Mem. Supp. Summ. J. 15; First Am. Compl. ¶¶ 2, 42-44, 46, 86 (alleging the practice began sometime around 2009). As a result, individuals who, on account of their national origin, were unable to

read the exam in English were unable to obtain a driver's license. First Am. Compl. ¶¶ 47, 71-87.

Plaintiffs allege that Defendants have attempted to justify this refusal with unsubstantiated and pretextual statements, including that drivers who cannot read and respond in English present safety concerns. *Id.* at ¶¶ 7, 68. Plaintiffs allege, for example, that in the face of its alleged safety concerns, HDOT allows illiterate individuals to take an oral exam, and permits non-English-speaking individuals to drive in Hawai'i for one year with a foreign driver's license. *Id.*

Plaintiffs further assert that HDOT is on notice of its obligation under federal civil rights law and federal funding agreements to provide translations of the driver's license exam, and is aware of the adverse impact of not providing translations or allowing interpreters during the exam. *Id.* at ¶¶ 70-76, 84-86, 90, 95. Plaintiffs also allege that HDOT is aware of the serious economic and other harm suffered by individuals who are unable to obtain driver's licenses in Hawai'i, and the low cost of translating the driver's license exams. *Id.*

Finally, Plaintiffs allege that, during a meeting on May 15, 2013 with HDOT, HDOT officials acted "disinterested and even hostile," and that the HDOT official responsible for the ultimate decision addressed inquiries from certain individuals, but never responded to questions from Chuukese and Marshallese

attendees. *Id.* at ¶¶ 60-62. An HDOT official also allegedly questioned why the Chuukese and Marshallese groups had moved to Hawai'i. *Id.* at ¶ 63.

In February 2014, Defendants moved to dismiss Plaintiffs' First Amended Complaint. The United States filed a statement of interest on March 28, 2014, ECF No. 70, to clarify that actions depriving people of the benefits of important programs and activities because of their inability to speak English can constitute intentional national origin discrimination. In April 2014, the Court denied Defendants' motion, holding that a Title VI intentional discrimination claim was properly alleged when it was based on the "foreseeable disparate impact of the English-only policy," a pretextual justification for the policy, and potentially derogatory comments by a state agency. *Faith Action for Cmty. Equity v. Hawai'i Dep't of Transp.*, No. 13-00450 SOM, 2014 WL 1691622 at *14 (D. Haw. Apr. 28, 2014).

On December 12, 2014, Defendants filed the instant motion for summary judgment, ECF No. 126, arguing that they had submitted affirmative evidence negating discriminatory intent, an essential element of Plaintiffs' claim. According to Defendants, Plaintiffs cannot demonstrate intent to discriminate for two reasons: (1) HDOT intended to re-translate the driver's license examinations once it collected reliable data to determine the required languages; and (2) because HDOT did not receive any complaints about the lack of translations, it was not on notice

of any foreseeable negative consequences of eliminating translation. Defendants also rely on a 2010 public transit system compliance review conducted by the Federal Transit Administration (FTA) as a defense.

To demonstrate that Defendants intended to re-translate the driver's license examinations, Defendants submit that, "[b]eginning in 2008, [the HDOT Office of Civil Rights] and the Motor Vehicle Safety Office for HDOT began the process of gathering the data to determine which languages met the criteria for translation of documents pursuant to the 4-factor § 602 test."[4] Defs.' Mem. Supp. Summ. J. 4. Defendants assert that HDOT believed that this data gathering would help determine which languages should be added to the list of the seven languages into which the test had previously been translated: Japanese, Chinese (Mandarin), Korean, Tagalog, Samoan, Tongan, and Vietnamese. *Id.*, Ex. C at 1 (HDOT Office of Civil Rights July 24, 2013 Memorandum); Haneberg Decl. ¶ 6.

According to Defendants, the data gathering occurred between October 2012 and April 2013, over four years after HDOT stopped translating the exams, when the Department of Motor Vehicles (DMV) in various counties surveyed LEP individuals who were applying for personal driver's licenses. Defs.' Mem. Supp.

[4] The United States interprets Defendants' repeated references to a "4-factor § 602 test" to refer to guidance provided by the U.S. DOT. *See* U.S. Department of Transportation Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient Persons, 70 Fed. Reg. 74,087, 74,091 (Dec. 14, 2005) (hereinafter "U.S. DOT LEP Guidance").

Summ. J. 4, 7, Ex. C at 1; Haneberg Decl. ¶ 7, 8, Lee Decl. at ¶ 4. The survey yielded limited information and, ultimately, HDOT did not base any of its final determinations on its results. Defs.' Mem. Supp. Summ. J., Ex. C at 1. Nonetheless, the HDOT Office of Civil Rights (OCR) cited to Title VI and federal guidance when it recommended on June 24, 2013 that HDOT reinstate the exam in eleven languages (the original seven and Spanish, Ilocano, Chuukese, and Marshallese). *Id.* at 2, 6-9.

ARGUMENT

In this Statement of Interest, the United States makes four points of clarification regarding evidence put forth in Defendants' Motion for Summary Judgment. The United States did not participate in discovery in this case and bases the following points on the evidence presented in Defendants' motion. In all four instances, the United States asserts that Defendants have not provided the evidence necessary to negate, as a matter of law, Plaintiffs' showing of intentional discrimination. First, Defendants, as recipients of federal financial assistance, had notice of their obligation to provide meaningful language access. Second, Defendants' failure to provide any translated driver's license examinations between 2008 and 2014 constitutes a failure to timely provide meaningful language services. Third, the facts Defendants rely upon to negate intent actually provide circumstantial evidence of intentional discrimination. Fourth, Defendants

misconstrue the purpose and scope of a 2010 FTA compliance review, which did not address driver's license exams. Because Defendants have not negated an essential element of the Plaintiffs' claim, summary judgment should be denied.

Summary judgment can only be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court "must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002) (citing *Abdul–Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996)).

When, as here, a plaintiff opts to rely on the factors articulated by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), to demonstrate discriminatory intent through direct or circumstantial evidence, the plaintiff need provide "very little such evidence . . . to raise a genuine issue of fact . . .; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder." *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)); *see also Schechner v. KPIX–TV*, 686 F.3d 1018, 1022 (9th Cir. 2012) ("As a general matter, the plaintiff in an employment

discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment."); *Lalau v. City & Cnty. of Honolulu*, 938 F. Supp. 2d 1000, 1012 (D. Haw. 2013) (even "slight evidence is sufficient to defeat [a] summary judgment motion" in a discrimination case).

A. Defendants Had Notice of Their Obligation to Provide Language Services

Defendants claim that they lacked notice of their obligation to provide meaningful access to LEP individuals because they were unaware of complaints. In this instance, however, Defendants were put on notice when they applied for and received federal funds. It is the acceptance of federal financial assistance, not the receipt of complaints, that triggers the Title VI prohibition against discrimination on the basis of race, color, or national origin. *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-606 (1986); *see also Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (observing that Title VI invokes Congress's power under the Spending Clause and that Title VI has been characterized by the Supreme Court as contractual in nature: recipients of federal financial assistance agree to comply with federally-imposed conditions); *Lau v. Nichols*, 414 U.S. 563, 569 (1974) ("The Federal Government has power to fix the terms on which its money allotments . . . shall be disbursed." (citation omitted)).

As a condition of the award of federal financial assistance, prospective recipients must enter into a written contract assuring their compliance with Title VI

and agreeing to comply with the nondiscrimination requirements imposed by the agency awarding the funds. *See* 49 C.F.R. § 21.7 (Department of Transportation) (requiring assurances); Certificate and Assurances for Highway Safety Grants, Fiscal Year 2014, Standard Assurances (*cited in* U.S. Statement of Interest, Ex. A (Mar. 28, 2014), ECF No. 70). These assurances include providing LEP individuals with meaningful access to recipients' programs. *See Lau*, 414 U.S. at 568; *see also United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (citing *Lau*, 414 U.S. at 568); *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116-17 (9th Cir. 2009) (noting that *Lau* concluded that "discrimination against LEP individuals was discrimination based on national origin in violation of Title VI"); *Nat'l Multi Housing Council v. Jackson*, 539 F. Supp. 2d 425, 430 (D.D.C. 2008) (noting "[l]ongstanding Justice Department regulations also expressly require communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance"). T hus, because Defendants received federal financial assistance from U.S. DOT, Defendants were on notice of their obligation to provide LEP individuals with meaningful access to driver's license exams.

Defendants' statement that they "can only be made aware" of the need for the translations for driver's license exams if someone complains and their repeated references to a lack of complaints received regarding the lack of translated tests are

inapposite. *See* Defs.' Mem. Supp. Summ. J. 14-17. The presence or absence of complaints neither alters Defendants' Title VI obligation nor negates notice of the obligation. Defendants knew that, from October 2008 to March 2014, the state's driver's license exams were offered only in English. Defendants simultaneously understood that, by virtue of their acceptance of federal financial assistance, they were required to provide LEP individuals with meaningful access to their benefits and services.

This knowledge is further evidenced in Defendants' 2009 Language Access Plan. Defs.' Mem. Supp. Summ. J., Ex. B (Hawai'i Dep't of Trans., OCR, Title VI Program, *State of Hawai'i Dep't of Transp. Language Access Plan* (2009)). The 2009 HDOT Language Access Plan repeatedly references Title VI requirements that HDOT must follow, how those requirements cover LEP individuals, the content of U.S. DOT LEP Guidance, and the need to translate vital documents. *Id.* at 3-9. Defendants did not need complaints to know that they could not discriminate or that, by failing to provide any language services for driver's license exams, they were failing to provide meaningful access to LEP individuals.

B. Meaningful Access Must be Timely

HDOT's failure to provide any translated written driver's license examinations between 2008 and 2014 constitutes a failure to provide timely and meaningful language access. A five and a half year process to conduct the four-

factor analysis described in U.S. DOT Guidance in order to determine into which languages to translate the exam cannot excuse this failure. Recipients of federal funds must provide language assistance services for LEP individuals in a timely manner in order to ensure meaningful access. *See* U.S. DOT LEP Guidance, 70 Fed. Reg. at 74,093. To be timely, a "recipient should provide language assistance at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person." *Id*.

While there is no single definition of "timely" access, a timeliness inquiry should focus on the importance of the services being offered. *See id.* at 74,093. Translation of vital documents such as "driver's license […] forms" and important "[w]ritten tests that do not assess English-language competency, but test competency for a particular license … for which knowing English is not required" must be more timely than translation of non-vital documents such as "applications for bicycle safety courses." *Id.* at 74,094-74,095.

On its face, a five and a half year delay in providing translation of a vital document such as driver's license exam results in an "effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person." *See id.* at 74,093.

This is particularly true, as in this case, where, during the delay, Defendants completely stopped all translations and forbade the use of interpreters.

C. The Facts on which Defendants Rely to Negate Intent Actually Support the Existence of Intentional Discrimination

Defendants argue that they should be granted summary judgment because they have demonstrated that no employee of HDOT acted with an intent or purpose to discriminate. Defs.' Mem. Supp. Summ. J. 1. Ac cording to Defendants, Plaintiffs can never prove intentional discrimination because "it was always the intent of HDOT and its employees to re-offer translated [driver's license] tests." *Id.* at 18. The evidence identified in Defendants' motion, however, actually serves as circumstantial evidence in support of Plaintiffs' case.

As this Court has previously recognized, *Faith Action for Cmty. Equity*, 2014 WL 1691622 at *10-*11, *Arlington Heights* articulates several methods to demonstrate discriminatory intent through circumstantial evidence, 429 U.S. at 266-68. Under *Arlington Heights*, a facially neutral policy or practice having a disproportionate impact on an identifiable group may serve as evidence of intentional discrimination. 429 U.S. at 266-68.

Other factors indicating evidence of intent to discriminate include the historical background of the action, the sequence of events leading up to the action as compared to other actions on comparable matters, including sudden substantive or procedural departures, and relevant legislative or administrative history. *Id.* at

267–68. Another form of circumstantial evidence that is probative of intentional discrimination is the demonstration that a defendant's explanation for its behavior is "unworthy of credence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

When a plaintiff opts to rely on the *Arlington Heights* factors to demonstrate discriminatory intent through direct or circumstantial evidence, the plaintiff need provide "very little such evidence . . . to raise a genuine issue of fact . . . ; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder." *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 1996); *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985)). Such evidence of discriminatory motive raises questions that should be resolved at trial. *Pacific Shores*, 730 F.3d at 1158.

Several facts Defendants rely on are properly categorized as circumstantial evidence under *Arlington Heights*. Here, for example, the evidence provided by Defendants demonstrates that they recognized their obligation to provide translated driver's license examinations and knew the foreseeable discriminatory impact of the lack of translations. Second, Hawai'i state law and Defendants' own analysis and language access policy mandated translation of eleven different languages.

Third, Defendants' efforts to justify their delay of five and half years appear pretextual.

1. Defendants' Evidence Shows Knowledge and Foreseeability of Negative Consequences to LEP Individuals

Defendants admit that they had explicit and longstanding knowledge of their obligation to provide LEP individuals with meaningful access to language services.[5] According to Defendants' brief, HDOT affirmatively recognized in 2008 its Title VI obligation to translate its driver's license exam from English into at least the seven languages of the original translations plus any additional languages that met the criteria for translation.[6] Yet, that same year, Defendants

[5] Defs.' Mem. Supp. Summ. J. 4 ("Beginning in 2008, OCR and the Motor Vehicle Safety Office (MVSO) began the process of gathering data to determine which languages met the criteria for translation of documents."); 4 ("OCR was also working on the 2009 HDOT Language Access Plan."); 5 (in 2010, "OCR spent more time refining the HDOT Language Access Plan by ensuring that the four factor analysis was adequately supported with pertinent analysis and a uniform methodology"); 10 (in 2013, "Harty addressed FACE's demands explaining HDOT was required to follow the 4-factor test for determining whether the driver's license test had to be translated into a language"); 11 (in 2013, Harty explained "HDOT had not yet engaged in [the 4-factor analysis], he refused to commit to any demands"); *see also*, Defs.' Mem. Supp. Summ. J., Ex. B (Hawai'i Dep't of Trans., OCR, Title VI Program, *State of Hawai'i Dep't of Transp. Language Access Plan* (2009)).

[6] Defs.' Mem. Supp. Summ. J. 6 ("At no time from 2008 until 2012 was there ever a decision made not to translate driver's license examinations. HDOT was already in the process of working with the Counties to determine how best to reinstate translated driver's license tests."); 7 ("the State wanted to comprehensively determine which languages (beyond the original seven languages) needed to be represented when the State updated the translated versions of its driver's license test"); 15 ("[i]t was always the intention of HDOT personnel to translate the tests

ceased providing any examinations in languages other than English and did not decide to do so for five and half years.[7]

Defendants also recognized the impact their failure to translate the driver's license exams would have on national origin minorities. In 2009, Defendants issued a Title VI language access plan that outlined their obligation to provide LEP individuals with meaningful access to HDOT's programs. At that time, Defendants recognized that "[l]anguage for individuals with LEP can be a barrier to accessing important benefits or services, understanding and exercising important rights, complying with applicable responsibilities, or understanding other information" and that "[t]he national origin protected category under Title VI gives the statutory authority for nondiscrimination in the provision of services to individuals with LEP."[8] Defendants' language access plan includes regular citations to U.S. DOT's LEP Guidance, which identifies driver's license exams as vital documents because of the important consequences for those who do not have access to them.[9] *See* U.S. DOT LEP Guidance at 74,096.

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once it was determined which languages met the criteria for translation pursuant to the 4-part test set forth in § 602 of Title VI.").

[7] Defs.' Mem. Supp. Summ. J. 15-16.

[8] Defs.' Mem. Supp. Summ. J., Ex. B at 2-3 (Hawai'i Dep't of Trans., OCR, Title VI Program, *State of Hawai'i Dep't of Transp. Language Access Plan* (2009)).

[9] *See, e.g.*, *id.* at 5 (referring to U.S. DOT LEP Guidance in identifying "[p]ersons who apply for a driver's license at a state department of motor vehicles" as a population to be considered when planning language services).

This evidence of knowledge and foreseeability fits squarely into well-established categories of circumstantial evidence of intentional discrimination. *See Arlington Heights*, 429 U.S. at 266-68; *Almendares v. Palmer*, 284 F. Supp. 2d 799, 806-08 (N.D. Ohio 2003) (holding in Title VI language services case that "disparate impact, history of the state action, and foreseeability and knowledge of the discriminatory onus placed upon the complainants" is the type of circumstantial evidence upon which a case of intentional discrimination is often based); *see also Columbus v. Penick*, 443 U.S. 449, 464-65 (1979) ("[A]ctions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose [and are] . . . one of the several kinds of proofs from which an inference of segregative intent may be properly drawn.") (internal citations omitted); *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009) (finding, in a voting rights context, that part of the intent showing may include "normal inferences to be drawn from the foreseeability of defendant's actions"); *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 819 (4th Cir. 1995) (adding to the *Arlington Heights* factors evidence of a "consistent pattern" of actions by decision makers that disparately impacts members of a particular class); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1186 (11th Cir. 1983) (discussing, in the context of the Equal Protection Clause and Title VI, foreseeable outcome of town's expenditure decisions on non-white members of the community).

Here, Defendants' "intent to translate" the driver's license exam demonstrates long-standing knowledge of their federal obligation under Title VI to provide LEP individuals with meaningful access and the negative consequences to LEP individuals that would result from a failure to act.

2. The Historical Background and Sequence of Events Offered by Defendants Provide Further Evidence of Intentional Discrimination

The history and sequence of events in this case provide further evidence of intentional discrimination under the *Arlington Heights* factors. Sudden substantive or procedural departures from the status quo or established policy, such as Defendants' departure from state law translation requirements and its own translation policy embodied in its 2009 language access plan, can also "afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267.

Defendants admit that only one additional question was added to the exam in 2008.[10] Rather than immediately translating that one question into at least the seven languages for which translated examinations were already offered, Defendants opted to cease offering any translated examinations at all.

The abrupt decision in 2008 to cease providing translated examinations was contrary to Hawai'i law. By state law, Hawai'ian state agencies must translate

[10] Defs.' Mem. Supp. Summ. J. 15.

vital documents for each eligible LEP group that constitutes five per cent of the population or one thousand persons, whichever is less, of those eligible to be served or likely to be affected or encountered. [11] Defendants admit, as they must, that they are bound to follow state law.[12] Defendants also admit that the original seven languages had been determined, prior to 2008, to meet the statutory threshold.[13] Yet, in this case, HDOT chose not to follow its own law, but, rather, to suddenly completely change the status quo and treat groups that had previously been entitled to translations as no longer being entitled to them.[14] Defendants do not deny knowledge of this statutory translation mandate; indeed, their 2009 Language Access Plan cites to this provision of Hawai'i law as well as the federal safe harbor analysis.[15]

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[11] Hawai'i Revised Statute §321C-3 (2012); previously codified at §371-33 (2006).

[12] Defs.' Mem. Supp. Summ. J. at 4.

[13] *See* Defs.' Mem. Supp. Summ. J., Ex. C at 3 (HDOT Office of Civil Rights July 24, 2013 Memorandum).

[14] The Hawai'i statute is based on U.S. DOT LEP Guidance, which offers certain optional methods that provide recipients a "safe harbor" to demonstrate "strong evidence of compliance with recipient's written translation obligations under Title VI." U.S. DOT LEP Guidance, 70 Fed. Reg. at 74,095. While federal guidance makes this safe harbor analysis optional, Hawai'i state law mandates translation of vital documents for any languages that meet the threshold in the safe harbor. Hawai'i Revised Statute §321C-3.

[15] Defendants' 2009 Language Access Plan, Defs.' Mem. Supp. Summ. J., Ex. B at 4 (Hawai'i Dep't of Trans., OCR, Title VI Program, *State of Hawai'i Dep't of Transp. Language Access Plan* (2009)).

Notwithstanding state law mandating translation of vital documents such as driver's license exams, HDOT discontinued providing translations into the original seven languages. Defendants point to no evidence indicating a belief, or any reason to believe, that the original seven languages no longer met the statutory threshold. In fact, in its June 24, 2013 memorandum that ultimately determined into which languages to translate the exam, Defendants noted that HDOT did not have "to reanalyze the need for translation of these [seven] languages" because the pre-2008 analysis had concluded that the languages qualified for translation.[16] The memorandum determined that Title VI required the translation of the exam into these original seven plus four others. By their own analysis, Defendants never should have discontinued offering the exam in these languages.

Regarding the additional four languages eventually added to the list of available translations, there was also no basis for a five and a half year delay in complying with state law. The June 24, 2013 memorandum determined that HDOT would translate the exam into Spanish, Ilocano, Chuukese, and Marshallese. Defendants made this determination based on data from the U.S. Census Bureau's American Community Survey[17]; the importance of the driver's

[16] *See* Defs.' Mem. Supp. Summ. J., Ex. C at 3 (HDOT Office of Civil Rights July 24, 2013 Memorandum).

[17] Defendant's 2009 language access plan identifies Chuukese and Marshallese as top languages spoken by Hawai'i's LEP population. Defendants' 2009 Language Access Plan, Defs.' Mem. Supp. Summ. J., Ex. B at 17 (Hawai'i Dep't of Trans.,

license exam; the low cost of translation; and an analysis of a federal "safe harbor" guidance provided in the U.S. DOT LEP Guidance.[18] The memorandum makes no reference to the Hawai'i state law safe harbor mandate, however, even though the information provided in the memorandum made clear that under state law HDOT was obligated to translate the exam into Spanish, Ilocano, Chuukese, and Marshallese under the safe harbor analysis. The memorandum only applies the *federal* safe harbor analysis to two languages, Chuukese and Marshallese. However, according to the information provided in the memorandum, translations of the exam were mandated under Hawai'i state law for Spanish, Ilocano, Chuukese, and Marshallese.[19]

OCR, Title VI Program, *State of Hawai'i Dep't of Transp. Language Access Plan* (2009)). The United States did not participate in discovery and therefore does not know which specific resources Defendants relied on for the conclusions in their June 24, 2013 memorandum. Possible resources include those regularly available from state education, labor, and health agencies or the State of Hawai'i's Office of Language Access.

[18] *Id*.

[19] *See* Defs' Mem. Supp. Summ. J., Ex. C at 2-9 (HDOT Office of Civil Rights July 24, 2013 Memorandum). Although the memo did not expressly state that these latter two languages would not otherwise require translations outside of the safe harbor, in his December 2014 declaration, Clifton Harty, Acting Civil Rights Coordinator for HDOT's Office of Civil Rights, claims that Chuukese and Marshallese did not meet the four factor analysis. He states that he recommended that these languages be translated because he "felt that helping Chuukese and Marshallese speakers in Hawai'i was good for the general public." Harty Decl. ¶ 9. This was not reflected in the June 2013 memo. Nevertheless, because the safe harbor analysis is required under Hawai'i law, and because Chuukese and Marshallese appear to satisfy that analysis, this distinction is irrelevant.

Thus, from 2008 until present, Defendants have disregarded a state law that mandated translation of four new languages. When coupled with the sudden decision to cease all translations in 2008, despite the acknowledgement that the HDOT possessed the information needed to justify translation into at least the initial seven languages, this history and sequence of events provides evidence of intentional discrimination.

3. Defendants' Explanations for the Five and a Half Year Absence of Translated Examinations Appear Pretextual

Defendants' summary judgment motion provides a variety of excuses for their five and half year delay in translating the driver's license exams. Because these differing explanations suggest that none of the reasons was the true reason, and because the explanations appear unsupported by the facts, they should be viewed as evidence of pretext and unworthy of credence.

First, Defendants claim that they spent the entire five and a half year period working on the four-factor analysis set forth in U.S. DOT's LEP Guidance in order to determine into which languages to translate the exam. Defs.' Mem. Supp. Summ. J. 4.[20] While it is true that U.S. DOT's LEP Guidance sets forth a four-

[20] The four-factor analysis "balances the following four factors: (1) the number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs." U.S. DOT LEP Guidance at 74,091.

factor analysis designed to assist recipients in identifying appropriate language assistance services, the Guidance does *not* state that the four-factor analysis negates the timeliness requirement set forth in the very same Guidance (discussed in B above). In other words, conducting the U.S. DOT's LEP Guidance four-factor analysis does not provide recipients, such as Defendants, with an excuse for an extended delay in providing meaningful language access.

Further, the actions that Defendants described taking did not, in fact, justify a five and a half year failure to provide language services. Defendants claim that "[n]ear the end of 2010," HDOT's OCR and the Motor Vehicle Safety Office "began gathering the data to determine which languages met the criteria for translations of documents under [the four-factor analysis]."[21] However, this appears not to be true: a review of Defendants' submissions reveals that this data collection actually began two years later, in 2012, when county DMVs surveyed

[21] Defs.' Mem. Supp. Summ. J. 7; Haneberg Decl. ¶ 7. Note that Defendants' witnesses contradict each other as to this timeline. *Compare* Haneberg Decl. ¶ 7 ("Towards the end of 2010, the Office of Civil Rights and the Motor Vehicle Safety Office for HDOT began the process of gathering the data required to determine which languages met the criteria for translations of documents pursuant to the 4-factor test utilized under § 602 of Title VI") *with* Lee Decl. ¶ 7 ("Beginning in 2008, the Office of Civil Rights and the Motor Vehicle Safety Office for HDOT began the process of gathering the data required to determine which languages met the criteria for translations of documents pursuant to the 4-factor test utilized under § 602 of Title VI"). Because the Haneberg declaration describes the steps taken to disseminate the survey to the counties, the United States will rely on his date for the purposes of this statement of interest. *See* Haneberg Decl. ¶ 8.

LEP individuals.[22] The four-year gap between the end of translated examinations and the start of the four-factor data collection shows that Defendants did not need five and a half years to arrange for translation of the driver's license exam. Defendants' June 24, 2013 memorandum also notes that the five and a half year data collection and analysis was unnecessary for, and unrelated to, the original seven languages.[23]

Further, Defendants provide no evidence or explanation as to why the one additional question was not translated into the seven original languages in 2008. When discussing the possible addition of two more questions in 2010, one of Defendants' declarations argues that: "[t]he prevailing consensus was that all necessary or desired translations should be done at one time, in order to limit resources expended to accomplish the effort."[24] Yet, Defendants do not provide any evidence to support this statement. The possibility that additional translations may have to be done in the future, in and of itself, does not justify delay. If that were the case, a recipient could delay their language access obligations indefinitely. Further, the evidence Defendants provided demonstrates that the cost for translating the entire test – not just one question – was only $600 per language,

[22] Defs.' Mem. Supp. Summ. J. 4, 7, Ex. C at 1; Haneberg Decl. ¶ 7, 8, Lee Decl. at ¶ 4.

[23] *See* Defs.' Mem. Supp. Summ. J., Ex. C at 3 (HDOT Office of Civil Rights July 24, 2013 Memorandum).

[24] Haneberg Decl. ¶ 6.

and did not vary depending on how many languages were translated.[25] Moreover, HDOT acknowledged that, for the initial seven languages, "[t]he cost of translating the few additional questions is minimal and creates no burden to HDOT."[26]

Thus, Defendants have failed to support their contention that limited resources justified their delay in translating the exam into the initial seven languages. *See*, *e.g.*, *Sandoval v. Hagen*, 7 F. Supp. 2d 1234, 1312 (M.D. Ala. 1998) (finding defendant's cost argument unsupported by the evidence because translation services at issue could be obtained by alternative cost-effective means), *rev'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 741-42 (8th Cir. 2005) (affirming district court decision that cost arguments were pretextual because defendant's records indicated it was financially stable, had multiple sources of untapped funding, and elected to pay down a loan, which "belied its claim of severe financial constraints").

Defendants claim their delay in translating the exam into any languages beyond the initial seven was because "[u]nfortunately[,] the data required to make the determination as to which languages should be translated to comply with Title VI was not within HDOT's knowledge, nor was it readily available without

[25] *See* Defs.' Mem. Supp. Summ. J., Ex. C at 4, 5, 7, 8 (HDOT Office of Civil Rights July 24, 2013 Memorandum).

[26] *Id.* at 3.

enlisting the cooperation of the various Counties."[27] In fact, because they recognized in 2008 that it was "not necessary to reanalyze the need for translation of these [seven] languages," the only reason they began the data collection and analysis was because they knew they needed to add additional languages as early as 2008. Yet, the "required" data collection didn't begin until four years later, when county DMVs surveyed LEP individuals in 2012.[28]

In 2013, HDOT decided to translate the driver's license exam without the "required" information from this data collection. The survey, which Defendants maintain prevented them from taking action, ultimately provided "limited value to the overall analysis of whether translation of additional languages is required under HDOT's language access plan."[29] It was only after the meeting with Plaintiffs in 2013 that Defendants began to draft the analysis that recommended the languages for translation.[30]

Thus, while Defendants' brief and declarations offer varying explanations for the five and a half year delay – from waiting for the counties' surveys,[31] to a

[27] Defs' Mem. Supp. Summ. J. at 16.

[28] Defs.' Mem. Supp. Summ. J. 4, 7, Ex. C at 1; Haneberg Decl. ¶ 7, 8, Lee Decl. at ¶ 4.

[29] *See* Defs.' Mem. Supp. Summ. J., Ex. C at 1 (HDOT Office of Civil Rights July 24, 2013 Memorandum).

[30] Harty Decl. ¶ 8., Young Decl. ¶ 12.

[31] Defs' Mem. Supp. Summ. J. at 16.

"[c]oncern there would be additional questions to be added to the tests[,] and decision made to have translations done on a final set of tests,"[32] to lack of complaints from LEP individuals,[33] to competing obligations and lack of staff[34] – these excuses are not supported by the facts and appear pretextual. *See, e.g.*, *Lindahl v. Air France*, 930 F.2d 1434, 1438-39 (9th Cir. 1991) (reasons for discharge not credible where they were vague, unsupported by the facts, and not articulated until the litigation commenced). In addition, the mere fact that Defendants' summary judgment submissions offer multiple and differing justifications suggests that none of the reasons offered was the true reason. *See, e.g.*, *Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993) (noting that "such fundamentally different justifications for an employer's action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason").

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[32] *Id.* at 15; *see also* Haneberg Decl. ¶ 6.

[33] Defs.' Mem. Supp. Summ. J. 4 ("Given the lack of complaints regarding translated tests, OCR concentrated on the Language Access Plan, which was completed in August 2009.").

[34] *See* Defs.' Mem. Supp. Summ. J. 4 (only one Title VI specialist in OCR and two trained employees), 6 (shortage of personnel and immediacy of other projects), 16 ("[T]here were (and still are) manpower constraints at OCR. OCR was required to make decisions as to which projects to concentrate on."); Young Decl. ¶ 3 (Title VI Specialist Position at the Office of Civil Rights was vacant for a "number of months" in 2012).

In sum, Defendants' explanations for the five and a half year delay to translate the exam into any languages appear "unworthy of credence" and serve as circumstantial evidence of discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination."); *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1170 (9th Cir. 2007).

D. The Federal Transit Administration's Title VI Compliance Review Did Not Address Language Services for Driver's License Examinations

In their motion for summary judgment, Defendants misconstrue the scope and findings of a 2010 Federal Transit Administration (FTA) compliance review. Defendants state that "[a]lthough the U.S. DOT reviewed HDOT's compliance with its regulations, the U.S. DOT did not find HDOT was out of compliance with respect to not offering driver's license examinations in languages other than English." Defs.' Mem. Supp. Summ. J. 17. This statement is incorrect. U.S. DOT never conducted a review of Hawai'i's driver's license examination accessibility for LEP individuals. Rather, the FTA, a component of U.S. DOT, conducted the 2010 compliance review pursuant to its mandate to address public transit systems.[35]

[35] The National Highway Traffic Safety Administration, a component of the U.S. DOT, has jurisdiction over Title VI issues related to personal driver's licenses.

More importantly, the FTA's 2010 compliance review did not examine whether HDOT was out of compliance with respect to providing access for LEP individuals taking driver's license exams. Instead, as FTA made clear in its Initiation Letter, its Title VI review of HDOT focused on "the Title VI compliance areas that are contained in FTA circular 4702.1A."[36] The FTA circular did not address driver licensing programs.[37] As a result, the FTA did not engage in the type of compliance review now claimed by Defendants.

Furthermore, FTA did not find HDOT in compliance with Title VI. Instead, FTA identified deficiencies in seven of the twelve areas examined.[38] One of the seven areas of deficiencies was "Language Access to LEP persons," and FTA noted that deficiencies remained in this area even after the site visit and HDOT's efforts to make corrective actions.[39] If anything, the FTA's 2010 review put HDOT on notice of its Title VI obligation to ensure meaningful access to language

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[36] Initiation Letter from Cheryl L. Hershey, Director, FTA Office of Civil Rights, to Brennon T. Morioka, Director of Transportation, HDOT (Jan. 4, 2010) (attached hereto as Exhibit A).

[37] Then Title VI Specialist for HDOT's Office of Civil Rights, Tammy Lee, confirmed that the deficiencies identified by FTA related to frequency of contact with LEP persons only as it related to bus ridership, and the remedial steps created involved a survey for bus drivers to administer. Lee Decl. ¶ 9.

[38] Title VI Compliance Review of the Hawai'i Department of Transportation (HDOT), Final Report, Federal Transit Administration (Nov. 2010) (attached hereto as Exhibit B).

[39] *Id.*

services for all of its programs and activities, including exams for personal driver's licenses.

CONCLUSION

Defendants have not provided sufficient evidence to negate an allegation of intentional discrimination. Defendants, as recipients of federal financial assistance, had notice of their obligation to provide LEP individuals with language services to ensure meaningful access to the driver's license exam. Despite this notice, Defendants failed to provide the services in a timely fashion. Further, rather than negate evidence of intent, the facts on which Defendants rely actually provide circumstantial evidence of intentional discrimination. Finally, Defendants misconstrue the purpose and scope of the 2010 FTA compliance review, which was unrelated to driver's license exams. Because Defendants did not provide evidence that negates an essential element of the Plaintiffs' claim, summary judgment should be denied and these issues should be addressed at trial.

For the foregoing reasons, the Court should deny Defendants' motion for summary judgment.

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