
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RENEE LANGE,

Plaintiff-Appellant

v.

CITY OF OCONTO AND CITY OF OCONTO FALLS,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Case No. 1:18-cv-00821-WCG

The Honorable Judge William C. Griesbach

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF
PLAINTIFF-APPELLANT URGING THE COURT TO VACATE JUDGMENT
AND REMAND

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INTEREST OF THE UNITED STATES

This appeal concerns the proper interpretation and application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, and their implementing regulations, to public entities' treatment of individuals who are deaf.

The United States has considerable responsibility over the enforcement of these statutes and regulations. The Attorney General has authority to bring civil actions to enforce both Title II and Section 504. See 42 U.S.C. 12133; 29 U.S.C.

794(a). Congress gave the Department of Justice express authority to issue regulations implementing Title II, see 42 U.S.C. 12133-12134, and directed all federal agencies to issue regulations implementing Section 504 with respect to programs or activities to which they provide federal financial assistance, see 29 U.S.C. 794(a). And the Department is charged with coordinating executive agencies' implementation and enforcement of Section 504. See 28 C.F.R. Pt. 41; see also 45 Fed. Reg. 72,995 (Nov. 2, 1980). Accordingly, the United States has a strong interest in ensuring that the statutes and their accompanying regulations are properly interpreted and applied.

STATEMENT OF THE ISSUE

Plaintiff is a deaf woman whose preferred mode of communication is American Sign Language (ASL). During several encounters with the police, officers relied on her minor children to interpret rather than attempting to provide her with a sign language interpreter. Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, requires covered public entities to provide effective communication to persons with disabilities. The Department of Justice's regulations implementing Title II prohibit public entities from relying on minor children as interpreters unless there is an emergency and no other interpreter is available. 28 C.F.R. 35.160(c)(3). We address the following question:

Whether the district court erred in instructing the jury that, under Title II, “[p]olice need not interfere” in an individual’s “decision” to use “her own child to facilitate her communication.”

STATEMENT OF THE CASE

1. *Statutory And Regulatory Background – Providing Effective Communication*

Title II of the ADA prohibits public entities—including state and local government entities, see 42 U.S.C. 12131(1)—from engaging in discrimination on the basis of disability. It provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. 12132. Title II was modeled closely on Section 504, which prohibits discrimination on the basis of disability “under any program or activity receiving Federal financial assistance.” 29 U.S.C. 794(a). Because of this, “the elements of claims under the two provisions are nearly identical,” and courts generally “apply precedent under one statute to cases involving the other.” *Lacy v. Cook Cnty., Ill.*, 897 F.3d 847, 852 n.1 (7th Cir. 2018) (quoting *Washington v. Indiana High Sch. Athletic Ass’n*, 181 F.3d 840, 845 n.6 (7th Cir.), cert. denied, 528 U.S. 1046 (1999)); see also 42 U.S.C. 12201 (explaining that unless otherwise provided, the same standards apply to the ADA as to the Rehabilitation Act and its implementing regulations).

Because Congress intended that Title II simply extend the reach of Section 504 of the Rehabilitation Act to all state and local programs and services (regardless of whether they receive federal financial assistance), Title II sets forth only a general principle of antidiscrimination and instructs the Attorney General to flesh out the prohibition through regulations. See 42 U.S.C. 12132, 12134. The

Department of Justice has carried out Title II's "broad directive" through "implementing regulations, accessibility standards, and administrative guidance." *Lacy*, 897 F.3d at 852 (discussing 42 U.S.C. 12134(a)). The regulations, which are at the heart of the instant matter, were promulgated through notice-and-comment rulemaking. See 75 Fed. Reg. 56,165-56,166 (Sept. 15, 2010).¹

The regulations' general prohibitions against discrimination state that in providing benefits and services, a public entity must not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," or provide such persons "an aid, benefit, or service that is not as effective in affording equal opportunity" to gain the same result or benefit as that provided to others. 28 C.F.R. 35.130(b)(1)(ii)-(iii). In addition, they state that a public entity "shall make reasonable modifications in policies, practices, or procedures when the modifications are

¹ This Court has stated that the Department's Title II regulations at least "warrant respect" given that Congress directed the agency to implement Title II." See *Lacy*, 897 F.3d at 852 n.2 (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-598 (1999), which declined to decide whether the Department's Title II regulations are entitled to deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); see also, e.g., *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096 (9th Cir. 2013), cert. denied, 571 U.S. 1237 (2014) (Department's Title II regulations "should be given controlling weight" under *Chevron*) (citation omitted); *Shotz v. City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003) (same); *Frame v. City of Arlington*, 657 F.3d 215, 225 (5th Cir. 2011), cert. denied, 565 U.S. 1200 (2012) ("DOJ's views at least would 'warrant respect' and might be entitled to even more deference."). Indeed, as the Supreme Court noted in *Olmstead*, "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 527 U.S. at 598 (internal quotation marks omitted).

necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. 35.130(b)(7)(i).

A separate regulation more specifically addresses communications. See 28 C.F.R. 35.160. As a general matter, a public entity “shall take appropriate steps” to ensure that communications with individuals with disabilities are “as effective as communications with others.” 28 C.F.R. 35.160(a)(1). Public entities must also furnish “auxiliary aids and services” to ensure that individuals with disabilities have equal opportunities to enjoy public services. 28 C.F.R. 35.160(b)(1)-(2). The “type of auxiliary aid or service” a public entity must furnish varies based on the “method of communication” of an individual with a disability, the “nature, length, and complexity” of the communication, and “the context in which the communication is taking place.” 28 C.F.R. 35.160(b)(2).

Public entities must give “primary consideration to the request[]” of an individual with a disability in selecting the type of auxiliary aids or services to be used, which “must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.” 28 C.F.R. 35.160(b)(2). At the same time, when a plaintiff’s claim is premised on a public entity’s refusal to provide effective communication to an individual with a disability, including auxiliary aids or services to facilitate communication, she must establish that the public entity is on notice of the need for an auxiliary aid either because that need is obvious or because the individual

requests it. Cf. *Robertson v. Las Animas Cnty. Sherriff's Dep't*, 500 F.3d 1185, 1195-1198 (10th Cir. 2007) (discussing public entity's obligation to provide "reasonable modifications"); *Kiman v. New Hampshire Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) (same).

The communications regulation contains specific guidance for using interpreters as aids to effective communication. 28 C.F.R. 35.160(c). A public entity may not require an individual with a disability to provide his or her own interpreter. 28 C.F.R. 35.160(c)(1). Where an individual with a disability is accompanied by an adult, "[a] public entity shall not rely" on the accompanying adult to interpret unless there is "an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available" or where three conditions are met: (1) the disabled individual requests the accompanying adult to interpret; (2) the accompanying adult consents; and (3) reliance on that adult "is appropriate under the circumstances." 28 C.F.R. 35.160(c)(2).

The rule is even stricter when the person with a disability is accompanied by a minor child. In that situation, "[a] public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available." 28 C.F.R. 35.160(c)(3). That is the case even when the individual with a disability requests that the minor child interpret. There are several reasons for this: First, minor children can be easily pressured into

interpreting or facilitating communication, which makes difficult determining whether the minors consented voluntarily. 75 Fed. Reg. 56,224-56,255 (Sept. 15, 2010). Second, reliance on minors is inappropriate in many circumstances, including “those involving medical issues, domestic violence, or other situations involving the exchange of confidential or adult-related material.” *Id.* at 56,283. And third, minor children “lack[] the impartiality and specialized vocabulary needed to interpret effectively and accurately.” U.S. Dep’t of Justice, Civil Rights Div., Disability Rights Section, *ADA Requirements: Effective Communication* 5 (Jan. 2014) (*Effective Communication*), <https://www.ada.gov/effective-comm.htm>.

2. *Factual Background*

Plaintiff Renee Lange is a deaf woman who has lived in the cities of Oconto and Oconto Falls, Wisconsin. See generally Doc. 1.² Lange has been completely deaf since birth and her primary mode of communication is ASL. See Doc. 1, at 1; 1Tr.92-93. She sometimes procures the services of ASL interpreters via video, including through a video relay service set up on her television at home that she can use to contact the police. 1Tr.95-96. She has some ability to lip read and to communicate in writing, and she also can speak some words in English. See Doc. 1, at 6-7; 1Tr.94-97. During the periods of time relevant to this case, Lange lived with a boyfriend, Jeremy Parmer, who is hard of hearing. Doc. 1, at 4, 8-9, 11; 1Tr.92.

² “Doc. __, at __” refers to the document recorded on the district court docket sheet and page number. “_Tr. __” refers to the volume and page number of the trial transcript. “Br. __” refers to the Appellant’s opening brief by page number. “App. A_” and “App. B_” refer, respectively, to Appellant’s Short Appendix and Separate Appendix by page number.

Lange has three hearing children, two of whom were minors during the relevant encounters with the police. Doc. 1, at 1, 4-5, 8-12; App. A2-A3. Lange's daughter, who was 17, uses ASL to communicate with her mother. App. A2; 1Tr.97. Lange testified that her daughter had a drug-use problem. 1Tr.97. Lange's son, who was 14, has some ability to use ASL but relies in part on "finger-spelling" words rather than signing, which, according to Lange and her son, is slower and can cause words to run together. App. A2; 1Tr.97-99; 3Tr.324. Lange's son has a learning disability and was enrolled in special education classes. 1Tr.98. Lange testified that she did not want her children to interpret in adult situations and that both children sometimes were unreliable and unable to be impartial when interpreting for her. 1Tr.97-98, 100-102, 106-107.

This case arises from four interactions in 2016 and 2017 in which police from the City of Oconto or the City of Oconto Falls used Lange's minor children as interpreters to communicate with her. See generally Doc. 1; App. A2-A5; App. B73. The first interaction arose when City of Oconto police went to Lange's home to investigate a noise complaint. 1Tr.99-104; 2Tr.168-169, 174-180; 3Tr.359-360. Officers knew from prior interactions that Lange was deaf. See App. A3; 2Tr.165, 171. They did not obtain an interpreter before engaging with her and instead attempted to communicate with Lange using her daughter (whom Lange claims was intoxicated) as well as through written notes and lip reading. 1Tr.100, 136; 2Tr.165-168. Officers departed the property after issuing a warning, then returned and arrested Lange for disorderly conduct. 1Tr.100, 136; 2Tr.168, 179-180. Lange

testified that she felt upset, did not understand the officers, and did not want her daughter to interpret. 1Tr.100-102. The parties disputed whether Lange requested an interpreter during initial discussions, but it was uncontested that she requested an interpreter at the time she was arrested. 1Tr.100-101; 2Tr.170-171.

Lange then moved to the City of Oconto Falls, where the remaining three encounters with local police occurred. App. B77-B80. In the first of these incidents, officers came to Lange's home based on a report of a fight between Lange and her boyfriend, Parmer, and possible danger to Lange's minor son (a claim that the parties disputed). 1Tr.104-107; 2Tr.212-216; 3Tr.326-327, 333-334. An involved officer testified that Lange was uncooperative and volatile and that he had difficulty communicating with her, but he neither asked if she needed an interpreter nor sought one out. 2Tr.208-209, 214-215, 218. Instead, the police used Lange's son to interpret for her, which Lange and her son testified was against her wishes and in spite of her request for an interpreter. 1Tr.106-107; 3Tr.326. Lange's son also testified that he was unable to interpret everything that was being said and that he would have been better able to tell his own story to the police had he not been required to interpret. 3Tr.327, 338. The police ultimately arrested Parmer. 1Tr.108.

The second incident occurred approximately three months later when the police went to Lange's home to arrest Parmer in connection with an assault. 1Tr.107-109; 2Tr.236-238. Here, too, the police were aware that Lange and Parmer had hearing disabilities prior to going to Lange's home. 2Tr.229. An officer

involved testified that she relied on Lange's son to interpret her communications with Lange because she had done so in the past, and she believed Lange consented to her son translating in this instance by nodding her head—despite acknowledging that the nod could have been misinterpreted. 2Tr.229-230. Lange, however, testified (as did her son) that she requested an interpreter, and that she was upset and did not understand what was going on. 1Tr.107-109; 3Tr.329.

The final incident occurred the next day when the police returned to Lange's home to execute a search warrant for a hat and electronic devices implicated in the assault. 1Tr.109-113; 2Tr.261-262. Again, even though officers were aware that Lange was deaf before arriving at her home, they did not attempt to engage an interpreter in advance and instead used Lange's son to interpret. 2Tr.255. Lange testified that she could not understand the warrant or what was transpiring, that she requested an interpreter—including by directing officers to view messages that two of her friends displayed by video on her television—and that she told her son not to interpret. 1Tr.109-113, 145-146. Her son testified that he communicated Lange's requests to the officers. 3Tr.330-331.

3. *District Court Proceedings*

Plaintiff filed a two-count complaint against the City of Oconto and the City of Oconto Falls in the U.S. District Court for the Eastern District of Wisconsin, alleging that the police departments violated Title II of the ADA and Section 504 of the Rehabilitation Act by failing to provide her a qualified interpreter during these four interactions with the police. Doc. 1. She sought declaratory and injunctive

relief, compensatory damages, and attorney's fees. Doc. 1, at 18-20. Following discovery, defendants filed a motion for summary judgment arguing, as relevant here, that Lange's requests for an ASL interpreter were unreasonable and that the police nevertheless provided her an effective means of communication. Docs. 19 & 34. The district court denied the motion. App. B73.

The district court held a three-day jury trial. Lange offered her own testimony, as well as the testimony of several police officers and her son. See generally 1Tr. & 2Tr. At the close of plaintiff's case, Lange moved for judgment as a matter of law, and the court took the motion under advisement. 3Tr.352-356. Following defendants' case, the court conducted a jury charge conference, during which the court and parties addressed the court's proposed instructions and plaintiff's requested revisions, which were submitted in writing prior to the conference. App. B17-B19; 3Tr.399-416. In relevant part, the judge proposed the following language in the instruction addressing the use of interpreters to provide effective communication:

Police officers should not rely on a minor child to interpret or facilitate communication, except in an emergency situation involving an imminent threat to the safety or welfare of an individual or the public where there is no other interpreter readily available. *Police need not interfere, however, in the decision of a private citizen to use his or her own child to facilitate her communication.*

App. B10-B11 (emphasis added); see also 3Tr.430-431.

Plaintiff objected to this instruction, arguing that the Department's regulation does not recognize an exception for an individual's decision to use a minor child as an interpreter (3Tr.406-408, 418), and offered several proposed

revisions.³ See App. B17. The district court overruled the objection and declined to adopt any of plaintiff's proposed revisions to the jury instructions, concluding that its instruction was consistent with 28 C.F.R. 35.160(c)(3). 3Tr.402-404, 409-411. The court relied primarily on two factors: (1) deference to an individual's chosen method of communication, seemingly in reference to 28 C.F.R. 35.160(b)(2)'s provision of "primary consideration" to the request of a person with a disability; and (2) the judge's own intuition that a "person [who] has learned to communicate with their mother through 18 or 14 years is probably a pretty good interpreter." 3Tr.400-403. The court noted its disagreement with plaintiff on the law and gave the proposed instruction unaltered. See 3Tr.403-408, 431.⁴

³ Most relevant here, Lange proposed the following: "Even if a citizen prefers to use his or her own child to facilitate communication, police must still provide competent interpreter services to the citizen in place of the citizen's child." App. B17-B18 (citing 28 C.F.R. 35.160(c); *Effective Communication* 5; 68 Fed. Reg. 47,318 (Aug. 8, 2003)). She also proposed an instruction further explaining a public entity's obligation to provide an interpreter upon request, including an admonition that "[d]efendants cannot use [p]laintiff's minor children to provide primary consideration." App. B18.

⁴ Plaintiff also proposed an instruction, based on language in the Department of Justice's Final Rule discussion of the Title II regulations, that "[a]n emergency situation involving an imminent threat requires truly exigent circumstances—for example, where any delay in providing immediate services to the individual could have life-altering or life-ending consequences." App. B17 (citing 75 Fed. Reg. 56,225 (Sept. 15, 2010) (Final Rule)). The court declined to adopt this instruction, reasoning that it was "inconsistent with the regulation" because an imminent threat to "[s]afety and welfare" (the language of the regulation) "is broader than life altering or life ending consequences" (the language plaintiff extracted from the regulation's explanatory text). 3Tr.401. Thus, the court used the language of the regulation but added the term "readily," which the court described as "the key": "an emergency situation involving an imminent threat to the safety or welfare of an individual or the public where there is no other

(continued...)

The district court instructed the jury accordingly (3Tr.431) and in closing argument defense counsel emphasized the objected to instruction (3Tr.435) informing the jury that “the judge has just told you what the law is, and it’s not” that “you can’t use kids.” 3Tr.454. Defense counsel then argued that “[a]t all times here Ms. Lange chose the method of communication. She used her children to interpret. * * * She’s the one that’s offering and initiating the kids as an interpreter.” 3Tr.454-455. The jury found for defendants on all four incidents. Doc. 83.

The district court later orally denied Lange’s motion for judgment as a matter of law. App. A2. In a written order, the court reasoned, first, that there was sufficient evidence from which the jury could have inferred that the police departments “did not so much rely on [p]laintiff’s children to interpret as acquiesce in [p]laintiff’s use of her children to interpret for her.” App. A3. The court also reasoned there was sufficient evidence for the jury to find that the departments enabled Lange to communicate effectively in spite of the failure to provide her an ASL interpreter. App. A4. Finally, the court concluded that to the extent plaintiff claimed that the police officers’ use of her minor children as interpreters absent an emergency per se violated the ADA, the jury could have concluded that at least three of the four incidents in question met the emergency exception. App. A4-A5.

(...continued)

interpreter *readily* available.” 3Tr.401, 431 (emphasis added). The United States takes no position on whether the discrepancy between the district court’s instruction and the regulation constitutes reversible error.

The district court entered judgment for defendants (App. A1) and Lange timely filed a notice of appeal (Doc. 89). On appeal, Lange challenges, in relevant part, the court's denial of her motion for judgment as a matter of law, arguing that the court erred in instructing the jury. Br. 13, 20-24, 27-34.

SUMMARY OF ARGUMENT

The jury instructions on using minor children to interpret for their parents were incorrect under Title II and prejudicial. Specifically, the district court erred by stating that, even absent an emergency situation, “[p]olice need not interfere * * * in the decision of a private citizen to use his or her own child to facilitate her communication.” App. B11; 3Tr.431. This instruction is at odds with the Department of Justice’s regulations implementing Title II of the ADA. These regulations permit using an accompanying minor child to interpret for an individual with a disability only where there is an emergency and no interpreter is available. 28 C.F.R. 35.160(c)(3). Even though the regulations are designed to insulate children from the responsibility of interpreting for adults—while adults, in contrast, may interpret in a broader set of circumstances—the district court’s instruction had the effect of imposing *fewer* limitations on using a minor child than an adult as an interpreter. In imposing the erroneous instruction, the district court misunderstood the structure and purpose of the governing regulations. The regulations provide that a public entity shall give “primary consideration” to the preference of an individual with a disability in selecting the type of auxiliary aid or service to facilitate communication. 28 C.F.R. 35.160(b)(2). But that regulation does not

override 28 C.F.R. 35.160(c)'s limitation on using accompanying individuals as interpreters, as the district court concluded.

ARGUMENT

THE JURY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL BECAUSE THE TITLE II REGULATIONS PROHIBIT RELIANCE ON A MINOR CHILD TO INTERPRET FOR AN INDIVIDUAL WITH A DISABILITY ABSENT AN EMERGENCY IN WHICH NO INTERPRETER IS AVAILABLE

A. *The Jury Instructions, Which Conflict With The Department's Title II Regulations, Were Erroneous And Prejudicial*

In addressing a challenge to jury instructions, the Seventh Circuit reviews “de novo whether the jury instructions fairly and accurately summarized the law,” considers “the district court’s decision whether to give a particular jury instruction for abuse of discretion,” and reverses “only if the instructions in their entirety so thoroughly misled the jury that they prejudiced [a party].” *Clarett v. Roberts*, 657 F.3d 664, 672 (7th Cir. 2011). The district court’s instruction here was legally incorrect on a public entity’s obligations under Title II to ensure effective communication through using interpreters, and it was sufficiently misleading to cause prejudice to plaintiff. Vacatur and remand is necessary.⁵

Title II sets forth only a general principle of antidiscrimination, leaving it to the Attorney General to flesh out this prohibition through regulations. The

⁵ Plaintiff presented claims under both Title II and ADA and Section 504. The elements of claims under the two statutes are essentially the same and the district court provided a single set of instructions on the law for both statutes. App. B8-B11; 3Tr.428-432. Accordingly, this brief focuses on the specific requirements of Title II.

Department of Justice’s regulations implementing Title II, which were issued through notice-and-comment rulemaking, “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance” and, at the very least, the Department’s views “warrant respect.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-598 (1999) (internal quotation marks omitted); see also, e.g., *Lacy v. Cook Cnty., Ill.*, 897 F.3d 847, 852 n.2 (7th Cir. 2018). These regulations provide that a public entity does not meet its obligation to provide effective communication if it uses a minor child as an interpreter absent exigent circumstances. Specifically, the regulations state that “[a] public entity *shall not rely on a minor child to interpret or facilitate communication*, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.” 28 C.F.R. 35.160(c)(3) (emphasis added).

The regulation purposefully treats minor children differently from adults for serving as interpreters and providing effective communication. A public entity may use an accompanying adult to interpret for an individual with a disability not just when there is an emergency and no interpreter is available, but also when the disabled individual has requested the assistance, the accompanying adult consents, and the circumstances are appropriate. 28 C.F.R. 35.160(c)(2)(i)-(ii). No such consent-based option appears in Subsection (c)(3)’s provision relating to minors. The Department’s guidance on “effective communication” under Title II states

expressly that “[t]his exception does *not* apply to minor children.” *Effective Communication* 5.⁶

There are at least two reasons for this distinction expressed in the appendix to the Title II regulations: (1) to prevent minor children from becoming embroiled in adult situations like medical issues and domestic violence; and (2) to avoid putting minor children in an inappropriate position vis-à-vis their adult relatives. See 75 Fed. Reg. 56,224-56,225 (Sept. 15, 2010).⁷ The Department’s guidance elaborates on this rationale, explaining that it has been “particularly problematic [for public entities] to use people’s children as interpreters,” even beyond a general concern that accompanying family members or friends may “lack[] the impartiality and specialized vocabulary needed to interpret effectively and accurately.” *Effective Communication* 5.

The district court’s instruction, in effect, created a second exception for using minors as interpreters: where “a private citizen” makes a “decision” to “use his or her own child to facilitate her communication.” App. B11. This addition is at odds

⁶ Although the Department’s regulation directly and authoritatively addresses the question at issue, the Department’s guidance on “effective communication” further undercuts the district court’s instruction.

⁷ This explanation reflects the Department’s “authoritative, expertise-based, fair, [and] considered judgment” about the antidiscrimination obligation that Title II imposes on public entities. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), and quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). In these circumstances, courts should defer to the Department’s interpretation of its own regulation. *Ibid.*; see also *id.* at 2410, 2413 (using the Department’s concurrent regulatory guidance to the ADA as an example of where *Auer* deference applies).

with the Department's regulation and created an alternative, non-existent basis for the jury to conclude the police provided effective communication. The instruction also conflicts with the regulation's rationales, creating a lower bar for minor children than for adults to interpret, *i.e.*, simply when parents "decide" to use their minor child to facilitate communication, as opposed to also requiring the accompanying individual to agree to provide the assistance and for such assistance to be appropriate under the circumstances.

Indeed, in this case, allowing a minor to interpret led to the very result the regulation was designed to avoid. Lange and her son both testified that they did not want for him to interpret for Lange during the police encounters. 1Tr.106-113; 3Tr.326, 329-331. Not only was Lange's son unable to convey everything that was said, but, in the instance when police came to the Lange residence because Lange's son reported to a relative that he was fearful about a knife in the home, he felt that interpreting for Lange hindered his ability to communicate with police about his own concerns. 3Tr.327, 338. Lange's son also testified that these incidents with law enforcement caused anger and frustration in his relationship with his mother. 3Tr.332. One of the responding officers who testified at trial even agreed with the proposition that using an interpreter rather than relying on Lange's son would have allowed police "to concentrate on [Lange's son's] concerns in greater depth." 2Tr.221.

Finally, it bears noting that the court's instruction would not have been correct even under the more flexible rule for using an accompanying *adult* as an

interpreter. In those circumstances—absent an emergency in which no interpreter is available—the individual with a disability must “specifically request[]” that the accompanying adult interpret, the accompanying adult must agree, and reliance on that adult must be “appropriate under the circumstances.” 28 C.F.R. 35.160(c)(2). Here, the court’s instruction that “[p]olice need not interfere” in a parent’s “decision” to “use his or her own child to facilitate her communication” omits two requirements that would apply to accompanying adults: that the accompanying individual consents to serve as an interpreter, and that using this individual to interpret is “appropriate under the circumstances.” Those safeguards are meant to ensure consent and effective communication even in situations where an individual with a disability is accompanied by a companion who may be capable of interpreting.

In sum, the district court’s instruction erroneously expanded the circumstances in which it is permissible for a public entity to rely on a minor child as an interpreter in order to meet Title II’s “effective communication” obligation. This misstatement of the law misled the jury on a key aspect of plaintiff’s claim and was prejudicial.

B. Prohibiting Using Minors To Interpret For An Individual With A Disability Absent Exigent Circumstances Does Not Conflict With The Obligation To Give Primary Consideration To The Individual’s Requested Type Of Auxiliary Aid Or Service

The district court erred in thinking that its instruction was consistent with—or even compelled by—the regulation requiring a public entity to give primary consideration to the individual’s choice of auxiliary aid or service. The district court

seemed to confuse an individual's "decision" to "use" a minor to interpret or facilitate communication (App. B11) with that individual's "wish" to communicate that way. 3Tr.403; see, e.g., 3Tr.409 (the court reasoning that "the fact * * * that [Lange] is signing to her children i[s] a clear intent to use them to communicate with the police, is an indication that it has been her choice"). And the court understood the regulations to require public entities to honor that choice because of 28 C.F.R. 35.160(b)(2)'s requirement that a public entity give "primary consideration" to an individual's request. But that understanding incorrectly suggests that affording "primary consideration" to the request of an individual with a disability about type of auxiliary aid or service, as provided in 28 C.F.R. 35.160(b)(2), overrides the limitations on using an accompanying individual to provide effective communication in 28 C.F.R. 35.160(c). 3Tr.402-403. The judge explained, "I think the statement permitting a minor child to interpret, I don't think the police should be preventing a deaf person from communicating with them in the manner they choose. I think that's also part of the regulation." 3Tr.403. Under this reading of the regulation, the plaintiff's "choice" to use her children as interpreters would trump the regulations' restriction on using minors for this purpose. 3Tr.402-403. It does not.

First, an individual's decision to communicate through her minor children does not equate to a preference to do so. Like here, when a police officer arrives at a deaf individual's home without an ASL interpreter, the deaf individual may have no other option to communication with the police other than relying on her minor

children. In that instance, the deaf individual's reliance on the children hardly demonstrates a desire or wish to use them. The court erroneously concluded that an individual's "decision" to "use" a minor child (App. B11) sufficed as a "request[]" to do so, 28 C.F.R. 35.160(b)(2).

Second, even if a deaf individual requested use of a minor child as an interpreter, the court's instruction is still inconsistent with the regulations. Subsections (a)(1) and (a)(2) of the regulation impose an obligation to ensure communications with individuals with disabilities that are "as effective as communications with others." See 28 C.F.R. 35.160(a)(1)-(2). The regulations at 28 C.F.R. 35.160(b)(1)-(2) then address how a public entity is to determine the "type" of auxiliary aid or service necessary to facilitate effective communication with a person with a disability, *e.g.*, an interpreter versus written notes. In identifying the type of auxiliary aid or service to be used, therefore, the public entity is to give "primary consideration" to the request of an individual with a disability. 28 C.F.R. 35.160(b)(2).

When an interpreter is the appropriate type of aid or service selected pursuant to 28 C.F.R. 35.160(b)(1)-(2), then Subsections (c)(1)-(3) create parameters for determining who may serve as an interpreter to ensure effective communication. Subsection (c)(1) bars a public entity from "requir[ing]" an individual with a disability to provide an interpreter. Subsections (c)(2) and (c)(3) identify the limited circumstances in which an accompanying adult or minor may interpret, which, as discussed above, protect the interests of both the individual who requires the

interpreter and those of an accompanying individual who is asked to interpret (with greater restrictions on use of minors versus adults). Subsections (c)(1), (c)(2) and (c)(3) thus constitute caveats to the type of aid or service identified pursuant to Subsections (b)(1) and (b)(2), rather than the other way around. See also *RadLAX Gateway Hotel v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (explaining that when two statutory provisions conflict, “the specific governs the general”) (citation omitted).

For this reason, as well, the district court’s jury instruction was erroneous and misleading, and was prejudicial to plaintiff by stating that the “decision” or choice of an individual with a disability to rely on a minor child to interpret may abrogate the express limitations set forth in 28 C.F.R. 35.160(c)(1)-(3) for effective communication when an accompanying individual interprets. See *O’Donnell v. Caine Weiner Co.*, 935 F.3d 549, 552 (7th Cir. 2019) (explaining that “[t]o win a new trial based on an incorrect jury instruction,” the appellant must show that “the error likely confused or misled the jury *causing prejudice to the appellant*”) (citation omitted).

CONCLUSION

This Court should vacate the judgment of the district court and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT URGING THE COURT TO VACATE JUDGMENT AND REMAND:

(1) complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5726 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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