Written Testimony to the United States Senate Special Committee on Aging
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Good morning Mr. Chairman and members of the committee. My name is Eve Hill. I am a Partner at Brown Goldstein & Levy and was formerly a Deputy Assistant Attorney General at the U.S. Department of Justice, Civil Rights Division. I have spent my career implementing the laws protecting the rights of people with disabilities.

I have testified previously that the remarkable pace of technological change is bringing people with disabilities to a critical juncture. The advances of information and communication technology have been spurred even further by the pandemic, during which technology had to quickly replace nearly all of our day-to-day in-person interactions.

Emerging technologies open doors for many people with disabilities and provide them the means to achieve fully integrated and truly equal access to American life. Technology can make travel less necessary, provide flexibility in how communication occurs, and make the physical accessibility of streets, sidewalks, and buildings less impactful. But technology excludes people with disabilities if it is not made accessible.

In a world in which digital communications and services happen at the speed of light, people with disabilities must not be left to rely on slow, obsolete, and expensive analog technologies. If websites aren't accessible to people who are blind[1] or low-vision, if videos are not captioned for people who are deaf or hard of hearing, and if kiosks are not built to communicate flexibly, people with disabilities are not just inconvenienced – they are shut out.

[1] Many individuals with vision disabilities use screen reader software that can convert visually delivered Internet content into an audio or Braille form; however, the visually-delivered content must be properly formatted and structured for the screen reader to work effectively. For instance, a screen reader or similar assistive technology cannot "read" an image. Thus, when images appear on websites they must be paired with "alt-text" that describes the image for screen readers to read. In addition, individuals with vision and manual dexterity disabilities often cannot effectively use a mouse, so websites need to be coded to allow navigation using the keyboard.

Imagine trying to do your job without access to the internet, even though everyone else in your position—your boss, your coworkers, and all of your competitors—does. Picture yourself trying to keep up with your colleagues by calling the customer service line for each company, government agency, or office you need information from, while your colleagues get what they need with a click. Imagine waiting for a coworker to find the time to read a database or interpret a video for you, while your colleagues click, scroll, and go. Or traveling to a medical office and waiting for in-person help while everyone else completes their medical appointments through telehealth. This is the reality that individuals with disabilities face every day.

As the Court in *Robles v. Dominos Pizza, LLC,* explained, "Defendant contends that its phone line is an acceptable accessibility substitute for its webpage and App. This is not true; it is undisputed that Plaintiff waited over forty-five minutes before hanging up on at least two occasions. No person who has ever waited on hold with customer service – or ever been hungry for a pizza – would find this to be an acceptable substitute for ordering from a website."[2]

There is no reason digital technology should be inaccessible. There is nothing magical about accessible digital technology. It is a long-solved problem. The Web Content Accessibility Guidelines (WCAG) - international consensus standards for digital accessibility - have existed for a generation, that is, since 1999 when Mark Zuckerberg was 15 years old and his college project, "The Facebook" was still years in the future!

Nonetheless, in February 2022, 96.8% of the top one million home pages still had accessibility barriers.[3] Each page had an average of 50.8 accessibility errors. A user with a disability can expect to encounter one error in every 19 home page elements they use. And most of these errors are simple – low contrast text, missing alt-text for images, incorrectly labeled form inputs, empty links or buttons, and failure to identify the site's language. If these accessible elements had been

[2] *Robles v. Dominos Pizza, LLC*, CV 16-6599 (C.D. Cal., June 23, 2021)

[3] The WebAIM Million, The 2022 Report on the Accessibility of the Top 1,000,000 Home Pages, https://webaim.org/projects/million/.

incorporated as a matter of course in the design of the site, they would have added nothing to the complexity or cost of the site. In fact, they would have made the sites work better for everyone.

Digital Access and the Americans with Disabilities Act

The Department of Justice's upcoming web accessibility regulations under Title II of the Americans with Disabilities Act (ADA) will be a welcome addition to the tools available to assist in working toward an accessible digital world. And other agencies' announced plans to update their regulations under Section 504 of the Rehabilitation Act (Section 504) will also make a big difference in making health care, education, and state and local government services accessible to everyone. I hope those regulations will be effectively coordinated to ensure consistency across agencies, but encourage agencies to proceed expeditiously.

While issuing digital accessibility regulations for federal, state, and local governments and agencies is a good first step, it is also critical to issue regulations addressing the web accessibility obligations of public accommodations under Title III of the ADA. Private entities, including retail stores, restaurants, medical professionals, entertainment, schools, gyms, and service providers, play significant roles in our lives. Now that they have mostly moved their goods and services online, people with disabilities cannot afford to wait for equal digital access.

At the same time, the existing level of needless exclusion of people with disabilities from the digital world calls for serious enforcement of the ADA. While regulations are essential, it is also critical that the Justice Department not reduce its enforcement efforts. Enforcement and regulation involve different skill sets; addressing one should not require sacrificing the other. Congress should provide resources specifically for the Civil Rights Division to carry out its regulatory and guidance responsibilities regarding digital technology.

Digital Access and the Federal Government

The federal government should be a model of accessibility. As the world's largest buyer of goods and services, the federal government's $650 billion annual purchasing power has the potential to significantly impact the behavior of developers and suppliers – something virtually no other entity can do. Since 1998,

Section 508 of the Rehabilitation Act (Section 508) has required federal agencies to ensure all electronic and information technology they develop, procure, maintain, or use is accessible to people with disabilities. 29 U.S.C. § 794d. Prior to 2017, the Section 508 Standards adopted by the Access Board were based on WCAG 1.0. Since 2017, the Section 508 standards have been WCAG 2.0 Level A and AA. If the federal government insisted on its technology being accessible, it could increase the availability of accessible technology for everyone.

Yet, in 2021, the Information Technology & Innovation Foundation found that 30% of the most popular federal websites were not accessible and nearly half had access barriers on at least one of their most popular pages.[4] Sites for agencies such as the National Highway Traffic Safety Administration, Department of Housing and Urban Development, Administration for Community Living, National Weather Service, Immigration and Customs Enforcement, Federal Aviation Administration, Department of the Treasury, Drug Enforcement Administration, National Cancer Institute, and Federal Student Aid office all revealed significant accessibility barriers.

In one of my cases, the Office of Personnel Management failed to ensure that the health insurance plan information it provides online for federal employees was accessible. As a result, my client, a blind federal employee, who signed up for federal health insurance, could not even access the login page to see his own medical records.[5]

If this is the result for websites – the simplest form of information and communication technology to make accessible – one need not guess at the level of accessibility of other forms of technology, such as self-help kiosks, telehealth platforms, multimedia trainings, and office equipment.

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[4] Ashley Johnson & Daniel Castro, Info. Tech. & Innovation Found., Improving Accessibility of Federal Government Websites 4–11 (2021), https://www2.itif.org/2021-improving-accessibility-federal-government-websites.pdf

[5] Although OPM originally insisted that making such information was exclusively the obligation of the insurance plans, once the case was filed, to its credit, it agreed to make the plan information on the OPM website accessible and to consider accessibility of the plans' websites in determining their performance adjustments. *National Federation of the Blind, et al. v. U.S. Office of Personnel Management, et al*., Consent Decree, 1:19-cv-06249 (N.D. Ill., May 13, 2021).

In fact, the accessibility of those types of technology is dismal. Clients of my firm, alone, are currently dealing with trainings required by the Centers for Medicare and Medicaid Services that are totally unusable by screen readers, and intake kiosks used by the Social Security Administration that are not usable by blind people. In each case, people with disabilities are being forced to rely on third parties, and even to reveal private information to strangers, such as security guards, in order to receive service at all.

And federal employees with disabilities are dealing with inaccessible software programs that make it nearly impossible to do their jobs, not to mention the inaccessible timekeeping software, copy machines, and online trainings that make their jobs more difficult.

One might think that such inaccessible technology is a legacy of the past, but that is simply not true. For example, one blind employee of a large federal agency was forced to work for years on an inaccessible program that is central to her job. Recently, the agency replaced the program with a new one. **But it is still inaccessible**.

In each case, the federal agency responsible has been nonresponsive to requests to fix the problem. In one case, the agency has failed to act on the employee's formal Section 508 complaint **for eight years so far**. In another recent case, the agency sat on a Section 508 complaint for nearly five years and had to be sued under the Administrative Procedure Act to force it to take action. Despite numerous requests, the Social Security Administration refused to acknowledge the problem with its kiosks until after a lawsuit was filed. At that time, the agency agreed to replace all the inaccessible kiosks by the end of 2021. Unfortunately, the agency is now breaching that agreement and has reopened its field offices with the inaccessible kiosks still in place without even instructing staff how to accommodate individuals with disabilities.

The Social Security Administration has also, as a policy matter, refused to adopt accessible technology at all. For example, it insists on wet-ink signatures on various documents required to apply for Social Security Disability Insurance benefits, in spite of the wide availability, security, and accessibility of electronic

signature programs.[6] Although the agency began accepting e-signatures temporarily as a result of litigation during the pandemic, and did so successfully for nearly 18 months, it has refused to change its policy on a permanent basis.

Transparency

It is notable that the only publicly available information we have about the level of federal compliance with Section 508 is from a private foundation. Section 508, itself, requires the Justice Department to conduct a study and issue a report every two years on federal compliance, but the Department has not done so since 2012. Similar to its regulatory work, discussed above, this work should not take resources away from the Department's enforcement efforts. Therefore, Congress should provide specific staff resources to accomplish this goal without reducing its enforcement work.

Much of the information needed to assess the progress of federal agencies toward accessible technology is presumably already being gathered. The Office of Management and Budget's (OMB) 2013 Strategic Plan for Improving Management of Section 508 of the Rehabilitation Act tasks the General Services Administration (GSA) with collecting information on accessibility metrics from agencies government-wide, assessing agency compliance, and tracking progress. This information should be shared with the Justice Department for its Section 508 report, to avoid forcing the Department to reinvent the wheel.

Moreover, the information collected and analyzed by GSA should be made available to the public and Congress. OMB's own Strategic Plan highlighted the need for transparency in Section 508 compliance, but did little to achieve that goal. Transparency will incentivize agencies to ensure technology is accessible from the beginning, when it is inexpensive and simple, rather than waiting to remediate inaccessible technology when they receive a complaint. This will save taxpayer money as compared to remediation efforts, which may be more difficult and costly. Such up-front accessibility will also improve customer service, allowing taxpayers

[6] The wet-ink signature policy is also in violation of the Government Paperwork Elimination Act, the Electronic Signatures in Global and National Commerce (ESIGN) Act, the 21st Century Integrated Digital Experience Act, and Executive Order 14058 (2021).

with disabilities to count on being able to access government services without jumping through additional hoops.

Testing

For Section 508 to be effective, the federal government needs to stop the inflow of inaccessible technology into its agencies. This requires agencies to pay attention to accessibility at the beginning of a procurement or development. Agencies often rely on Voluntary Accessibility Product Template forms or other statements from vendors made during the procurement process to support their assumptions that selected products meet the Section 508 standards. Unfortunately, these statements are often aspirational, misleading, or confusing and too often do not ensure accessibility. This is particularly problematic when agencies such as the Treasury Department or GSA purchase technology that is then used across the government.

The government must have its own resources to test the accessibility of technology obtained from third parties prior to product selection and implementation. These testing resources must include both automated and user testing. Certain agencies have on-staff Trusted Testers available, but others do not. As the Information Technology and Innovation Foundation recommended, providing a centralized resource for testing would ensure all agencies have access to the needed resources and would ensure consistency of results.

Similarly, government-developed technology, such as websites or web content, needs to be tested and certified for accessibility prior to posting or implementation. Dedicated in-house or outside accessibility experts could serve this role. Alternatively, the staff developing websites and content could be required to certify its accessibility and be held responsible for improper certifications through the performance review process.

Remediation

Given the extent of inaccessible technology across the federal government, a substantial remediation effort will be necessary. Effective remediation requires prioritization, responsibility, deadlines, and monitoring. Remediation may mean correcting the barrier, updating the technology to be accessible, or replacing the technology with an accessible one.

- Remediation begins with a thorough understanding of the problem – generally identified through an audit that identifies existing barriers, as well as by reviewing complaints received.
- Once the barriers are identified, priorities can be established based on the frequency of encounters with the inaccessible technology by members of the public or employees, the importance of the function provided by the technology, the severity of the barrier, and the ripple effect of the remediation.
- A schedule should be established for the remediation of barriers based on their priority, responsibility for the remediation should be assigned, along with adequate resources in terms of money, expertise, and staff, and progress should be closely tracked and reported.
- In the interim, while remediation is being carried out, alternative methods of access should be provided and publicized to ensure the public and employees are not harmed by the delay.
- In addition, audits should be conducted periodically to ensure progress is being made, and priorities and schedules should be periodically reviewed and updated to reflect changed circumstances.
- Finally regular feedback should be sought from taxpayers and employees, both on progress and on the established priorities. This feedback, as well as complaints received, should be considered when establishing or changing priorities.

Oversight

We have learned a great deal about how to incorporate accessibility into technology development and deployment over the last 24 years. Much like accessible buildings, accessible technology does not happen without oversight. Section 508 provides a mandate, exceptions, standards, and a reporting mechanism. It does not provide for oversight, either internally or externally.

The federal government faced a similar problem in implementing the Architectural Barriers Act (ABA), which was passed in 1968 to require federal buildings to be accessible. Similar to digital accessibility, physical accessibility costs are negligible when incorporated in the design phase but can be costly to retrofit. But similar to Section 508, the General Accounting Office (now the Government

Accountability Office) (GAO) repeatedly found that agencies were not complying. In 1980, the GAO recommended that the Access Board be made the principal authority to provide leadership and ensure compliance with the ABA.[7] The Access Board could serve a similar role under Section 508, providing individuals a complaint mechanism that does not rely solely on the agencies policing themselves and serving as an expert to approve or reject requests for exceptions to the accessibility requirements.

If the Access Board is given enforcement responsibility, it must also be given appropriate authority to respond to complaints, to conduct compliance reviews, to engage in informal enforcement activities, such as public notices of violation, and to engage in formal enforcement, such as administrative compliance orders.

Of course, with a staff of fewer than 30, the Access Board does not currently have the resources to meet its current responsibilities and add responsibility for oversight of federal government digital offerings.

Accountability

In litigation challenging Section 508 violations, the Justice Department has sometimes taken the position that federal employees have no private right of action to enforce Section 508. Rather, federal employees must rely on the federal EEO process to provide accommodations. Unfortunately, those accommodations rarely, if ever, correct the source of the problem – the illegally inaccessible technology itself. Despite Section 508's explicit referral to "Civil Actions," a few district courts have agreed, finding that because Section 508 – a law applicable only to *federally conducted* activities – adopted the Section 504 remedies applicable to *federally funded* activities, Section 508 can only be privately enforced against *federally funded* entities, to whom it does not apply.[8] This nonsensical

[7] GAO, Making Public Buildings Accessible to the Handicapped: More Can Be Done (June 6, 1980), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjXzaamo5T5AhX3ElkFHSJqDmEQFnoECDMQAQ&url=https%3A%2F%2Fwww.gao.gov%2Fassets%2F130%2F129576.pdf&usg=AOvVaw0MXCVykcYfm7EpuKZyT4L4.

[8] *Clark v. Vilsack*, Civ. Action No. 19-394, 2021 WL 2156500 (D.D.C., May 27, 2021); *Orozco v. Garland*, Civ. Action No. 19-3336, 2021 WL 4502072 (D.D.C. Oct. 1, 2021).

interpretation, if upheld, threatens to negate Congress' intent for Section 508 to be effective.

Congress should amend Section 508 to make clear that both taxpayers and federal employees have a private right of action to enforce the law. In addition, Congress should explicitly waive the government's sovereign immunity to such suits – another argument that has been raised by the government but not decided by the courts. It would make no sense, in a statute governing federal agencies' actions and providing for "Civil Actions," to maintain sovereign immunity to thwart such actions.

There is no publicly available information about agencies rejecting or canceling contracts when the technology being purchased turns out to be inaccessible, or even requiring the vendor to provide an accessible version. I fear this is because agencies are not doing so. This lets vendors off the hook for their violations of procurement requirements and even allows them to benefit from violating the law. Ironically, it forces people with disabilities – the intended *beneficiaries* of Section 508 – to suffer the consequences of vendors' and agencies' violations.

Congress should ensure that agencies have strong tools to hold their vendors accountable – including contract recission, liquidated damages, indemnification, and specific performance. Congress should insist that agencies actually use those tools and requiring regular reporting on technology products that were found to be inaccessible, the vendor responsible, and the action taken to remedy the breach.

Standards

Technology develops quickly and its proliferation is exponentially more rapid now than it was just a few years ago. So far, regulations have not been able to keep up. For example, WCAG 2.0 was released in 2008, but was not adopted by the Access Board as the Section 508 Standard until 2017. WCAG 2.1 was released in 2018 and the Access Board's Unified Agenda shows no movement to update the Section 508 Standards. With its current resources, the Access Board simply cannot keep up.

If this is not addressed, technology and accessibility will continue to outpace the legal requirements, leaving the federal government behind private entities and

other countries. Delay hurts the federal government, as often developments in accessible technology and guidelines make compliance easier, address new technologies (such as mobile apps), and address new means of meeting the needs of additional populations (such as those with cognitive disabilities, including those associated with aging). Congress should ensure the Access Board has sufficient resources to meet its regulatory obligations under Section 508 in a timely manner.

In summary, Section 508 has the potential to be an important tool to make access to federal services and employment equally accessible to people with disabilities. In addition, because of the government's leverage with suppliers and developers, Section 508 has the potential to encourage technology to be accessible as a matter of course, thus benefiting private companies, state and local governments, and, ultimately, all people with disabilities. But without careful attention, transparency, pre-purchase and pre-posting testing, active remediation, oversight, accountability, and up-to-date standards, Section 508 will not meet its goals and the United States will fall behind other countries in ensuring equality for all.