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2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF PENNSYLVANIA

4 \_\_\_\_\_ )  
LIBERTY RESOURCES, INC. and )  
5 CONSUMER CONNECTION )

6 Plaintiff, )  
7 vs. )

8 SOUTHEASTERN PENNSYLVANIA )  
TRANSPORTATION AUTHORITY, )

9 Defendant. )  
\_\_\_\_\_ )

Civil Action Number 99-4837

10  
11 **Brief of United States of America as Amicus Curiae**

12 The United States of America as *amicus curiae* hereby submits this brief  
13 to this Honorable Court. Based upon its review and analysis of the undisputed  
14 material facts in this action, and the application of those facts to the law,  
15 the United States urges this Court to find that the Defendant Southeastern  
16 Pennsylvania Transportation Authority ("SEPTA") has discriminated against  
17 individuals with disabilities in the provision of complementary paratransit  
18 services in violation of Title II of the Americans with Disabilities Act of  
19 1990, 42 U.S.C. §§ 12132 and 12143, and the Department of Transportation's  
20 regulations implementing those statutes, 49 C.F.R. Part 37, Subpart F.

21 **I. INTEREST OF THE UNITED STATES**

22 This case involves the interpretation of Title II of the Americans with  
23 Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"),<sup>1</sup> which covers  
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25 \_\_\_\_\_  
26 <sup>1</sup> The Plaintiffs' allegations in this action arise from both Title II  
27 of the ADA and Section 504 of the Rehabilitation Act. When Congress passed  
28 the ADA in 1990, it instructed that these two statutes were to be construed  
consistently. Because Title II of the ADA amended Section 504 with respect to  
the transportation provisions, in the remainder of this brief when referring  
to the applicable statute, for the sake of economy, the United States will  
refer only to the ADA.

1 state and local government entities. Part A of Title II, 42 U.S.C. §§ 12131-  
2 12134, generally prohibits disability-based discrimination by state and local  
3 government entities, see 42 U.S.C. § 12132; while Part B of Title II, 42  
4 U.S.C. §§ 12141-12165, sets forth specific requirements governing public  
5 transportation services provided to individuals with disabilities. The United  
6 States Department of Justice (the "Department") is the federal agency with  
7 primary responsibility for enforcement of Title II of the ADA, including  
8 responsibility for coordinating the work of other federal agencies, such as  
9 the Department of Transportation ("DOT"), that have responsibility for certain  
10 limited aspects of ADA implementation. See 42 U.S.C. § 12133; 28 C.F.R.  
11 § 35.190(a). Moreover, the Department is the only federal agency authorized  
12 to file suit in federal court against a state or local government entity to  
13 enforce any provision of Title II of the ADA, including the provisions  
14 applicable to paratransit transportation systems, 42 U.S.C. §§ 12131 - 12150.  
15 See 42 U.S.C. § 12133; 28 C.F.R. § 35.174; 49 C.F.R. Part 37.11(b).

16 The Department of Transportation also has significant administrative and  
17 enforcement responsibilities regarding the Title II transportation provisions  
18 at issue in this action. Pursuant to statutory directive, Congress directed  
19 DOT to promulgate regulations implementing the transportation provisions of  
20 the ADA and Rehabilitation Act. See 49 U.S.C. §§ 12143(b), 12149. DOT also  
21 has significant administrative enforcement responsibilities to ensure  
22 compliance by state and local transit authorities with the implementing  
23 transportation regulations, including receiving, adjudicating and resolving  
24 complaints involving state or local transportation authorities. See 49 C.F.R.  
25 § 37.11(a); 49 C.F.R. Part 27, subpt. F.

26 Because of its responsibility for enforcing, and coordinating  
27 implementation of, Title II of the ADA, the federal government has an interest  
28 in ensuring that this statute and the regulations promulgated to implement it

1 are properly and consistently applied and construed. This Court's ruling on  
2 the correct interpretation of the relevant DOT regulations will have  
3 widespread impact for public transit entities nationwide seeking to comply  
4 with federal paratransit standards. Given the Department's expertise with  
5 regard to the legal issues before this Court, the government believes its  
6 views regarding the enforcement provisions of Title II will be of assistance.

## 7 **II. STATEMENT OF THE ISSUE**

8 In this brief, the United States will address the following issue:  
9 Whether SEPTA is in violation of Title II of the ADA and the Department of  
10 Transportation's implementing paratransit regulations by failing to comply  
11 with the "next-day response time" mandate, and by imposing "capacity  
12 constraints" on its provision of complementary paratransit services.<sup>2</sup>

## 13 **III. STANDARD FOR SUMMARY JUDGMENT**

14 As recognized in Pittston Co. Ultramar America v. Allianz Ins., 124 F.3d  
15 508, 515 (3<sup>rd</sup> Cir. 1997), a motion for summary judgment must be granted if  
16 there exist no genuine issues of material fact. The United States submits  
17 that, as set forth below, there is no dispute between the parties concerning  
18 any facts material to the claims and defenses in this action, thus rendering  
19 it appropriate for this Court to enter summary judgment.

## 20 **IV. APPLICABLE STATUTORY AND REGULATORY SCHEME**

### 21 **1. Federal Statutes**

22 Title II of the ADA, 42 U.S.C. § 12143, expressly provides that public  
23 entities that operate fixed route systems must provide complementary  
24 paratransit service comparable to their fixed route service. Specifically,  
25 Title II establishes that it is "considered discrimination" for an entity such  
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27 <sup>2</sup> Although the parties dispute whether the Plaintiffs have standing to  
28 pursue their claims against SEPTA in this action, the United States takes no  
position with respect to this issue.

1 as SEPTA:

2 to fail to operate with respect to the operations of its fixed route  
3 system, in accordance with this section, paratransit and other special  
4 transportation services to individuals with disabilities, including  
5 individuals who use wheelchairs, that are sufficient to provide to such  
6 individuals a level of service (1) which is comparable to the level of  
7 designated public transportation services provided to individuals  
8 without disabilities using such system; or (2) in the case of response  
9 time, which is comparable, to the extent practicable, to the level of  
10 designated public transportation services provided to individuals  
11 without using such system.

12 42 U.S.C. § 12143(a). See also Section 504 of the Rehabilitation Act, 29  
13 U.S.C. § 794.

14 In order to ensure the implementation of specific requirements defining  
15 comparability between fixed route and paratransit service, Congress mandated  
16 that the Secretary of the Department of Transportation issue final regulations  
17 establishing paratransit requirements, including standards that "shall  
18 establish minimum service criteria for determining the level of services to be  
19 required under this section." 42 U.S.C. § 12143(b)(3). To carry out the  
20 requirement that paratransit systems be comparable to fixed route systems -  
21 and, with respect to response time, that paratransit be comparable "to the  
22 extent practicable" with fixed route service - Congress delegated to DOT the  
23 authority to establish standards for public entities to provide the required  
24 level of paratransit comparability.

## 25 **2. Federal Paratransit Regulations**

26 DOT promulgated regulations defining both the level of comparable  
27 paratransit service, as well as the minimum service criteria required to  
28 ensure comparability. See 49 C.F.R. Pt. 37, Subpt. F. The language of the  
ADA provides that, at a minimum, comparability in the level of service between  
paratransit and fixed route systems with respect to response time be achieved  
"to the extent practicable." 42 U.S.C. 12143(a). In furtherance of this  
mandate, the regulations specifically prohibit capacity constraints as an

1 unlawful impediment to achieving such comparability. Id.; see also 56 Fed.  
2 Reg. at 45, 608 (stating that capacity constraint mechanisms are incompatible  
3 with a comparable paratransit system and thus the rule is to prohibit them).

4 **a. Next-Day Response Time Mandate**

5 Response time refers to the time within which transit providers must  
6 respond to a request for service made the previous day. The criteria setting  
7 forth the general standard regarding next-day scheduling provides that:

8 Response time. The entity shall schedule and provide paratransit  
9 service to any ADA paratransit eligible person at any requested time on  
10 a particular day in response to a request for service made the previous  
11 day. Reservations may be taken by reservation agents or by mechanical  
12 means.

13 49 C.F.R. § 37.131(b). Insofar as the regulations require the provision of  
14 paratransit service "at any requested time on a particular day in response to  
15 a request for service made the previous day," 49 C.F.R. § 37.131(b), next-day  
16 service is mandatory when requested. See 49 C.F.R. Pt. 37, App. D. In  
17 enacting this requirement, DOT determined that next-day scheduling achieved  
18 "a good balance of minimizing inconvenience to users and allowing providers  
19 sufficient time to schedule trips to maximize efficiency." See 56 Fed. Reg.  
20 at 45,606. The flexibility necessary to assist the provider was provided by  
21 the so-called "two-hour window" requirement which allows providers to  
22 negotiate pick up and drop off times with riders within reasonable time  
23 limits. See 49 C.F.R. § 37.131(b)(2); see also 56 Fed. Reg. at 45,606-607.  
24 Accordingly, the response time mandate reflects DOT's determination that next-  
25 day scheduling was necessary to ensure that paratransit service be comparable  
26 "to the extent practicable" with response time for fixed route service.

27 **b. Unlawful Capacity Constraints**

28 In conjunction with the next-day service mandate, the regulations also  
prohibit a transit entity from imposing, or allowing to exist, a "capacity  
constraint" on the level of paratransit service required by the response time

1 standard. According to the regulations:

2 Capacity Constraints. The entity shall not limit the availability of  
3 complementary paratransit service to ADA paratransit eligible  
individuals by any of the following:...

- 4 (i) Any operational pattern or practice that significantly limits the  
5 availability of service to ADA paratransit eligible persons.
- 6 (ii) Such patterns or practices include, but are not limited to, the  
following: ... Substantial number of trip denials or missed trips.
- 7 (iii) Operational problems attributable to causes beyond the control of  
8 the entity (including, but not limited to, weather or traffic  
9 conditions affecting all vehicular traffic that were not  
anticipated at the time a trip was scheduled) shall not be a basis  
for determining that such a pattern or practice exists.

10 49 C.F.R. § 37.131(f). Like the response time mandate, the prohibition on  
11 capacity constraints reflects DOT's determination of the criteria necessary to  
12 ensure comparability between paratransit and fixed route service. In  
13 promulgating this rule, the Department made clear that an avoidable constraint  
14 on capacity which results in substantial numbers of trip denials unlawfully  
15 impedes complementary paratransit service comparable to that of a fixed route  
16 system.

17 Any type of capacity constraint that can be avoided by the provider,  
18 including a quota, waiting list, or lack of appropriate numbers of vehicles,  
19 vehicle space or drivers, is incompatible with providing a comparable system.  
20 See 49 C.F.R. Pt. 37, App. D. As DOT observed, "patterns or practices of this  
21 kind have the effect of limiting the availability of paratransit service to  
22 eligible persons in a way not contemplated by the ADA." 56 Fed. Reg. at  
23 45,608. With respect to trip denials, "a 'pattern or practice' involves  
24 regular, or repeated actions, not isolated, accidental, or singular incidents.  
25 A missed trip, late arrival or trip denial now and then does not trigger this  
26 provision." 49 C.F.R., App. D., 37.131. Conversely,

27 Operational problems outside the control of the entity do not count as  
28 part of a pattern or practice under this provision. ...[However] if the  
entity regularly does not maintain its vehicles well, such that frequent

1 mechanical breakdowns result in missed trips or late arrivals, a pattern  
2 or practice may exist. This is also true in a situation in which  
3 scheduling practices fail to take into account regularly occurring  
4 traffic conditions (e.g., rush hour traffic jams) resulting in frequent  
5 late arrivals. Id.

6 The plain language of the regulations, read consistently with DOT's  
7 comments, thus prohibit public entities from failing to provide complementary  
8 paratransit service to ADA-eligible riders by engaging in any operational  
9 pattern or practice resulting in substantial capacity trip denials.

### 10 **3. Department of Transportation Letters of Interpretation**

11 The Department of Transportation's Federal Transit Administration  
12 ("FTA") has issued four letters of interpretation which are highly instructive  
13 on the meaning and interpretation of its complementary paratransit  
14 regulations. Each of these letters identifies specific circumstances in which  
15 transit providers are determined to have violated the ADA due to capacity trip  
16 denials.

#### 17 **a. FTA Letter Dated March 23, 1999**

18 In a letter to counsel for the Plaintiffs in the instant action dated  
19 March 23, 1999, FTA made clear that comparability between paratransit and  
20 fixed route systems contemplates that providers maintain sufficient capacity  
21 to meet 100% of paratransit demand irrespective of swings in demand. See Ex.  
22 A attached hereto. FTA also concluded that transit agencies must deal with  
23 fluctuations in paratransit demand, just as they would for their fixed route  
24 service. Id. at 1.

#### 25 **b. FTA Letter Dated December 28, 1999**

26 The FTA reinforced this interpretation in a letter to SEPTA's Chief  
27 Operating Officer, dated December 28, 1999, in which it acknowledged the  
28 minimal service criteria reflected in the regulations as necessary to ensure  
paratransit service comparable to the fixed route system. See Ex. B attached  
hereto. According to FTA, the term "substantial number" as used in section

1 37.131 cannot be construed as permitting transit entities to make operational  
2 decisions that serve less than all ADA-eligible riders. FTA recognized that  
3 the paratransit regulations assume that forces outside an entity's control  
4 will result in an insubstantial number of trip denials; thus, denials  
5 resulting from forces outside the agency's control do not violate the ADA,  
6 whereas avoidable denials, *i.e.*, those resulting from operational decision  
7 making, violate the ADA. Id. at 3. FTA concluded that paratransit operators  
8 must monitor ADA paratransit usage, acquire additional resources based on  
9 projected demand, and maintain the ability to respond to surges in demand.

10 Id.

11 **c. FTA Letter Dated August 15, 2000**

12 In a letter dated August 15, 2000, to the Chief Counsel and Vice  
13 President of Government Affairs of the American Public Transportation  
14 Association, FTA stated that a transit provider may escape liability for  
15 paratransit capacity constraints if they can demonstrate with empirical  
16 evidence that an equally high level of denials exists on both its fixed route  
17 system and paratransit. See Ex. C attached hereto. FTA concluded, however,  
18 that trip denials on a fixed route system would be comparable only if the  
19 injury sustained - the time passengers must wait until their demand is met -  
20 is the same as that experienced by paratransit users when denied service. Id.  
21 at 2.

22 **d. FTA Letter Dated April 15, 1996**

23 Finally, in a letter from FTA to a transit provider in Chicago,  
24 Illinois, dated April 15, 1996, FTA made clear that, notwithstanding a transit  
25 provider's ability to meet a high percentage of total demand for paratransit  
26 service, a discriminatory pattern or practice may still exist if ADA-eligible  
27 patrons consistently experience trip denials. See Ex. D attached hereto. FTA  
28 concluded that in considering the relationship between service capacity and



1 trip denials, the proper focus is on the number and nature of trip denials  
2 rather than the percentage of demand met. Id. at 1.

3 **V. SUMMARY OF ARGUMENT**

4 SEPTA has engaged in prohibited operational patterns and practices that  
5 significantly limit the availability of paratransit services to ADA-eligible  
6 persons in southeastern Pennsylvania. The stipulated facts alone demonstrate  
7 an operational pattern of substantial numbers of overall trip denials, next-  
8 day trip denials, peak hour trip denials and weekend trip denials.<sup>3</sup> During a  
9 thirteen-month period, SEPTA's daily capacity trip denials constituted 13.4%  
10 of next-day trip requests, with the monthly denial percentage ranging from  
11 8.9% to as high as 23.7%. Stip. No. 23. SEPTA also denied 9.1% of weekend  
12 trip requests, averaging 75 denials every weekend day of that period. Stip.  
13 No. 24. SEPTA's overall trip denials constituted 5% of paratransit demand<sup>4</sup>  
14 service requests, averaging 74 trip denials every single day of the thirteen-  
15 month period. Stip. Nos. 22 & 26. Moreover, SEPTA's operational practices  
16 not only perpetuate the capacity constraints responsible for such trip  
17 denials, but ignore mechanisms designed to eliminate those constraints.  
18 Finally, SEPTA's persistent noncompliance with the next-day response time  
19 mandate ensures that ADA-eligible riders are consistently denied paratransit  
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21 <sup>3</sup> Cites to Stipulations and Exhibits throughout this brief, when making  
22 reference to undisputed materials facts in this action, are the same as those  
23 referred to in the summary judgment briefs previously submitted to this Court  
by Plaintiffs and Defendant.

24 <sup>4</sup> An important distinction regarding SEPTA's paratransit system is that  
25 users must schedule either "standing order" trips or "demand service" trips.  
A standing request is an advance service request for trips scheduled to occur  
26 at fixed times several times per week on an ongoing basis, whereas a demand  
request is a request for service or a particular trip made the previous day as  
27 the requested trip. See Stip. No. 21. The most striking data regarding  
SEPTA's paratransit violations reflects the routine denial by SEPTA of demand  
28 trip requests which, unlike pre-arranged standing trips, require an immediate  
response.

1 service in violation of the ADA and implementing regulations.

2 SEPTA's substantial capacity denials, resulting from forces within  
3 SEPTA's control, seriously thwart the Congressional objective that paratransit  
4 systems be comparable to fixed route systems. Congress' purpose in enacting  
5 the ADA's transportation provisions was its recognition of reliable  
6 transportation as paramount to the full integration and mainstreaming of  
7 persons with disabilities into society. See H. Rep. No. 101-485, pt. 2, at 37  
8 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 319. Accord S. Rep. No. 101-116,  
9 at 13 (1989). Such integration is impossible if substantial numbers of ADA-  
10 eligible riders are routinely deprived of opportunities to hold jobs, keep  
11 medical appointments or attend social functions due to artificial capacity  
12 constraints. SEPTA's routine, repeated capacity denials effectively ensure  
13 that critical paratransit service is available to eligible riders only when  
14 enough users do not desire it. The United States thus respectfully submits  
15 that SEPTA's operational patterns and practices of substantial trip denials  
16 significantly limit the availability of paratransit services to ADA-eligible  
17 riders in southeastern Pennsylvania in violation of the ADA and federal  
18 paratransit regulations.

## 19 VI. ARGUMENT

### 20 **SEPTA's Artificial Capacity Constraints and Noncompliance with the Next-** 21 **Day Response Time Mandate Violate the ADA and Federal Paratransit** 22 **Regulations.**

23 The ADA and DOT implementing regulations prohibit "capacity constraints"  
24 by paratransit providers, including the existence of "[a]ny operational  
25 pattern or practice that significantly limits the availability of service"  
26 which includes, but is not limited to, "[s]ubstantial numbers of trip  
27 denials". 49 C.F.R. § 37.131(f)(3)(i)(B). A pattern or practice "involves  
28 regular, or repeated actions, not isolated, accidental, or singular incidents.  
A...trip denial now and then does not trigger this provision." 49 C.F.R. Pt.

1 37, App. D.

2 To further clarify what constitutes a prohibited pattern or practice,  
3 the paratransit regulations specifically exempt "[o]perational problems  
4 attributable to causes beyond the control of the entity," such as  
5 unforeseeable weather or traffic conditions affecting all vehicular traffic,  
6 from forming the basis of an unlawful pattern or practice. 49 C.F.R. § 37.131  
7 (f)(3)(ii). However, factors resulting in substantial trip denials that the  
8 entity can avoid or control but fails to constitute prohibited capacity  
9 constraints. Thus, for example, if an entity regularly fails to maintain its  
10 vehicles so that frequent mechanical breakdowns occur resulting in missed  
11 trips, an unlawful pattern or practice may exist. 49 C.F.R. Pt. 37, App. D.  
12 Similarly, frequent late arrivals resulting from scheduling practices which  
13 fail to take into account regularly occurring traffic conditions (*i.e.*, rush  
14 hour) may also so qualify. Id.

15 **A. SEPTA's Operational Patterns and Practices of Substantial**  
16 **Trip Denials Constitute Unlawful Capacity Constraints.**

17 The United States respectfully submits that the undisputed record  
18 evidence of SEPTA's next-day, weekend and peak hour trip denials clearly  
19 qualifies as "substantial" in the manner contemplated by the regulations.  
20 Between May 1999, and May 2000, inclusive, SEPTA's capacity trip denials  
21 constituted 13.4% of next-day trip requests during this period. Stip. No.23.  
22 SEPTA denied next-day trip requests every single day during this thirteen-  
23 month period, averaging 30 denials per day. Id. On a monthly basis, SEPTA's  
24 next-day trip denials ranged from 8.9% to as high as 23.7%. Id.

25 During this same period, SEPTA's capacity trip denials constituted 9.1%  
26 of weekend demand (non-standing) service requests. Stip. No. 24. Even though  
27 SEPTA receives more than 50% fewer trip requests on weekends than weekdays,  
28 SEPTA denied trip requests every single weekend day during this thirteen-month

1 period at an average of 75 denials per weekend day. Id. On a monthly basis,  
2 the percentage of weekend trip denials ranged from 2.6% to 19.8%. Id.  
3 Evidence of peak-hour trip denials during May 1999 and May 2000, inclusive,  
4 reveals that SEPTA's capacity denials constituted 6.4% of the total peak hour  
5 trip requests during the period. Stip. No. 25. SEPTA denied peak hour trip  
6 requests on all but one weekday during this thirteen-month period, averaging  
7 66 denials per day. Id. On a monthly basis, SEPTA denied 4.7% to 11.4% of  
8 peak hour trip requests. Id.

9 Even when viewed in the aggregate, SEPTA's overall trip denials  
10 significantly limit paratransit availability to eligible patrons who  
11 experience trip denials every single day. Between May 1999 and May 2000,  
12 inclusive, SEPTA denied 5% of the paratransit demand (non-standing) service  
13 requests, averaging 74 denials per day every day of this thirteen-month  
14 period. Stip. No. 22. On a monthly basis, the percentage of trip denials  
15 (compared only to demand service trips) ranged from 3.2% to 10.6%. Id. In  
16 addition to routine daily denials, on certain days SEPTA's denial rates are  
17 considerably higher. For instance, on Christmas Day 1999, 225 eligible riders  
18 - over 19% of the requests that day - were deprived of spending the holiday  
19 with friends or family because of existing capacity constraints. See  
20 Attachment 1 to Stips.

21 As discussed fully *infra*, the frequency and consistency of these  
22 capacity denials are not due to forces outside of SEPTA's control. The  
23 regulations make clear that the type of operational problems that excuse trip  
24 denials are limited to unforeseeable events at the time a trip is scheduled  
25 such as a snowstorm, accident or hazardous materials incident that prevent all  
26 vehicular traffic. See 49 C.F.R. § 37.131(f)(3)(ii); see also 49 C.F.R. Pt.  
27 37, App. D. As Plaintiffs correctly assert in their brief, although such  
28 unanticipated events may affect the number of missed trips or late arrivals,

1 they should not impact SEPTA's scheduling of paratransit trips. See Pl. Brief  
2 at 35. Paratransit scheduling, like all transit scheduling, requires an  
3 accurate assessment of the service demand, available inventory of vehicles and  
4 staff, and the effective deployment of those resources. As discussed below,  
5 SEPTA's substantial trip denials reflect a deliberate choice not to allocate  
6 sufficient resources to meet paratransit demand and are thus inexcusable under  
7 the ADA and implementing regulations.

8           Whether viewed categorically or in the aggregate, the stipulated data  
9 regarding SEPTA's paratransit trip denials unequivocally demonstrates an  
10 operational pattern in which eligible users are denied demand trip requests  
11 consistently every single day. That such denials constitute "regular or  
12 repeated actions" as opposed to "isolated, accidental or singular incidents"  
13 is clear. See 49 C.F.R. Pt. 37, App. D. In an attempt to avoid this  
14 conclusion, SEPTA argues, "[i]t is only when there is a pattern or practice of  
15 trip denials that a transportation authority would be in violation of this  
16 regulation. A transportation authority would not be in violation of the  
17 regulation each time that it is unable to provide a ride." Def. Brief at 23.  
18 See also id. at 25 ("[P]laintiffs take the position that even one denial is  
19 substantial.").

20           SEPTA's argument disingenuously advocates viewing each and every one of  
21 its denials separately as isolated occurrences. However, percentages of next-  
22 day trip denials ranging as high as 23.7%, and weekend trip denials ranging as  
23 high as 19.8%, hardly qualify as the type of "trip denial [occurring] now and  
24 then" that the regulations exempt in calculating whether substantial trip  
25 denials exist. No doubt SEPTA would prefer that each of the 74 daily trip  
26 denials, 30 daily next-day denials, 75 daily weekend denials and 66 daily peak  
27 hour denials be viewed as distinct, unrelated offenses. To do so, however,  
28 would overlook the very type of operational pattern that the regulations were

1 designed to prevent. Given the frequency and consistency with which thousands  
2 of SEPTA's paratransit patrons have been consistently denied trips on a daily  
3 basis, SEPTA's attempt to disguise this discriminatory pattern as  
4 insubstantial is wholly unupportable. When substantial numbers of ADA-  
5 eligible riders are daily prevented from holding jobs, voting or keeping  
6 medical appointments due to avoidable capacity denials, the existence of an  
7 unlawful operational pattern cannot seriously be disputed.

8           Moreover, the ability of a paratransit entity to meet a high percentage  
9 of demand in no way disproves the existence of substantial capacity denials.  
10 Although SEPTA acknowledges that it fails to meet total paratransit demand, it  
11 nevertheless contends that "such a failure to provide a ride to each eligible  
12 person who requests a ride is not a violation of the ADA or the regulations  
13 because there are not a substantial number of denials." Def. Brief at 24-25.  
14 SEPTA argues that because it is required to provide only a substantial number  
15 of paratransit reservation to ADA-eligible patrons, it meets its paratransit  
16 obligations. Id. at 1; see also id. at 23 ("Section 37.131 does not require a  
17 transportation authority to provide a paratransit ride to every patron who  
18 requests a ride. Rather, it requires SEPTA to offer and provide an  
19 unspecified number of rides.").

20           SEPTA's argument that meeting nearly all, rather than all, paratransit  
21 demand is sufficient to satisfy its paratransit obligations not only misstates  
22 the law, but fundamentally misconstrues the statutory intent behind the  
23 enactment of the ADA and implementing DOT regulations. The plain language of  
24 Section 37.131 does not require that paratransit entities provide a  
25 *substantial number of reservations*, but rather prohibits an entity from  
26 engaging in any operational pattern resulting in a *substantial number of trip*  
27 *denials*. As the former FTA Administrator, Gordon Linton, explained in a  
28 Department of Transportation letter dated April 15, 1996 interpreting Section

1 37.131,<sup>5</sup> "[i]n considering the relationship between service capacity and trip  
2 denials, it is probably more useful to focus on the number and nature of trip  
3 denials rather than the percentage of demand met." See Ex. D at 1. Indeed,  
4 focusing on the percentage of demand met rather than the number of denials  
5 obscures an accurate assessment of whether an entity's paratransit service is  
6 functioning at a level comparable to its fixed route service as contemplated  
7 by the ADA. As Mr. Linton explained, "[a]n operator may be capable of meeting  
8 a very high percentage of total demand for its paratransit service and still  
9 have an ADA-eligible rider who experiences substantial trip denials." Id.  
10 Indeed, SEPTA's denial rates of 13.4% of next-day requests, 9.1% of weekend  
11 requests, 6.4% of peak hour requests and 5% of overall requests, demonstrate  
12 the precise situation described by Mr. Linton in which substantial numbers of  
13 eligible riders are denied service notwithstanding SEPTA's ability to meet a  
14 high percentage of demand. As Mr. Linton correctly concluded, such an  
15 operational pattern constitutes discrimination in violation of ADA or, at the  
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17 <sup>5</sup> The United States respectfully submits that DOT's interpretive  
18 letters wholly support Plaintiffs' position in this case. In its brief, SEPTA  
19 challenges the persuasive authority of these letters, arguing that while the  
20 interpretations are "interesting and informative, they are entitled to no more  
21 weight than the views set forth in the memoranda of law of the parties in this  
22 action." Def. Brief at 24. SEPTA's contention seriously understates the  
23 persuasive authority of an agency's interpretations of its own regulations.  
24 As this Court aptly observed, "[w]hen an agency's interpretation of its own  
25 regulation is at issue, the deference owed to that agency is [] vast."  
26 Advanced Career Training v. Riley, 1997 WL 476275 at \* 7 (E.D.Pa.); see also  
27 Director of Workers' Compensation Programs v. Eastern Assoc. Coal Corp., 54  
28 F.3d 141, 147 (3d Cir. 1995); and Connecticut General Life Ins. Co. v.  
Commissioner of Internal Revenue, 177 F.3d 136 (3d Cir. 1999)("[A]n agency's  
consistent interpretation of its own regulation will be accorded substantial  
deference...and [courts] must defer to the [agency's] interpretation unless an  
'alternative reading is compelled by the regulation's plain language or by  
other indications of the [agency's] intent at the time of the regulation's  
promulgation.'")(internal citation omitted). Under the Supreme Court's recent  
decision in Christensen v. Harris County, 120 S.Ct. 1655, 1663 (May 1,2000),  
DOT's letters are also "entitled to respect" to the extent the interpretations  
have the "power to persuade."

1 very least, evidences an unlawful capacity constraint. See id.

2 SEPTA's assumption that a certain percentage of regularly occurring trip  
3 denials does not violate the law also overlooks the regulatory requirement  
4 that trip denials must result from forces outside the provider's control in  
5 order to be excused. SEPTA relies heavily on language from Mr. Linton's April  
6 15, 1996 letter stating that "[t]he Department's ADA regulation does not  
7 require that all trip requests (from eligible riders) must be served in order  
8 for an operator to be in full compliance, neither does it provide a number or  
9 percentage of trip denials that is considered to be acceptable." Def. Brief  
10 at 23 (quoting Ex. D at 1). SEPTA's reliance on this isolated statement  
11 fundamentally misapprehends the way in which the "substantial denials"  
12 requirement is qualified by the exemption for operational problems outside the  
13 provider's control. As the FTA's Chief Counsel, Patrick Reilly, explained in  
14 a subsequent DOT interpretive letter, dated December 28, 1999,

15 **the term 'substantial number' as used in Section 37.131 cannot be read**  
16 **to allow a transit agency to make operational decisions to serve less**  
17 **than all eligible riders.** The assumption of section 37.131 is that  
18 operational decisions designed to serve all eligible riders will lead to  
19 an insubstantial number of denials because of elements beyond the  
20 transit agency's control.

21 Ex. B at 2(emphasis added). Indeed, denials resulting from forces outside the  
22 entity's control will likely be insubstantial precisely because of the  
23 infrequency of such forces. That entities are not held to an unconditional  
24 rule of compliance does not, as SEPTA contends, reflect lack of concern for  
25 providing paratransit service to 100% of eligible riders, but rather DOT's  
26 common sense recognition that forces outside the provider's control will  
27 sometimes prevent it from doing so. SEPTA's repeated substantial trip  
28 denials, due to forces within its control, are thus inexcusable under the  
established regulatory scheme.

**B. The Factors Responsible for SEPTA's Operational Patterns and  
Practices of Substantial Trip Denials Are Within Its**



1 **Control.**

2 The undisputed facts in this action reveal that there are no forces  
3 outside SEPTA's control responsible for its routine capacity trip denials, and  
4 nothing in the record demonstrates that SEPTA is unable to remedy this  
5 operational pattern. See, e.g., Deposition of Cheryl Spicer, at 144-145; 161-  
6 162. On the contrary, SEPTA's substantial trip denials reflect deliberate  
7 choices not to allocate sufficient resources to meet paratransit demand and,  
8 as such, constitute unlawful operational practices which substantially limit  
9 the availability of paratransit service to ADA-eligible riders throughout  
10 southeastern Pennsylvania.

11 According to the stipulations, SEPTA owns 321 paratransit vehicles which  
12 it leases to three carriers. Stip. No. 14. It is SEPTA's prerogative to  
13 choose the number of vehicles dispatched on any given day. Deposition of  
14 Warren Montague at 27; Spicer Dep. at 188, 125. Notwithstanding the  
15 considerable weekday paratransit demand, on an average weekday SEPTA uses only  
16 278 of its 371 paratransit vehicles, with 6 to 30 of the remaining vehicles  
17 routinely out of service due to mechanical problems or preventative  
18 maintenance. Stip. No. 16. Rather than use the remaining vehicles to  
19 decrease trip denials, they are set aside as part of a "spare ratio."  
20 Montague Dep. at 26-27. Prior to January 2000, SEPTA only used approximately  
21 250 vehicles on average for daily paratransit trips, Stip. No. 17, but  
22 subsequently increased its trips from 250 to 270. Id. at 26. SEPTA could  
23 still increase the number of vehicles used on a daily basis to 290 within its  
24 current contract. Id.

25 SEPTA has never endeavored to dispatch additional available vehicles  
26 within its spare ratio in order to decrease capacity trip denials. Stip. Nos.  
27 18 and 19. Nor has SEPTA calculated how many vehicles within its spare ratio  
28 are actually used on a daily basis to replace in-service vehicles that break

1 down. See Spicer Dep. at 147. With respect to weekend trip denials, SEPTA  
2 uses only 85 of its vehicles on Saturdays and 67 on Sundays (approximately 25%  
3 of its total 253 vehicles), even though doing so consistently results in an  
4 average of 75 denials each weekend day. Stip. No. 20.

5 Despite SEPTA's awareness that it daily deprives ADA-eligible riders of  
6 transportation, it has not expanded its capacity. Moreover, it has not even  
7 attempted to determine the feasibility of alternate transit mechanisms that  
8 might allow it to meet full paratransit demand. As plaintiffs correctly argue  
9 in their brief:

10 SEPTA has undertaken no studies to determine how many additional tours,  
11 vehicles or staff are necessary to meet full paratransit demand and  
12 eliminate capacity denials. Spicer Dep. at 28, 29, 103-104; Pl. Brief  
at 16;

13 SEPTA has undertaken no studies to determine the feasibility of  
14 providing alternative transportation such as taxicabs as a back-up  
system to meet excess paratransit demand and eliminate capacity denials.  
Spicer Dep. at 25; Pl. Brief at 17;

15 SEPTA has undertaken no studies to determine whether reducing the time  
16 for advance reservations, thereby potentially reducing cancellations and  
17 no-shows, would enhance its ability to meet full paratransit demand and  
eliminate capacity denials. Stip. No. 32; Pl. Brief at 17;

18 SEPTA has not evaluated the budgetary cost increase of eliminating  
19 capacity trip denials and meeting full paratransit demand. Stip. No.  
33; Pl. Brief at 17;

20 SEPTA's budgets are designed to meet its current, inadequate level of  
21 paratransit service rather than the entire projected increase in  
paratransit demand. Spicer Dep. at 82; Pl. Brief at 17.

22 Of considerable importance, in March 2000, the FTA reviewed and reported  
23 on SEPTA's paratransit budget and operations. Stip. No. 34. Prior to the FTA  
24 report's release, SEPTA based its paratransit budgetary requests solely on the  
25 number of paratransit trips actually provided, excluding capacity trip  
26 denials. Id. FTA concluded that this budgetary approach was flawed, and  
27 recommended that SEPTA henceforth include its capacity denials in its budget  
28 calculations in order to more accurately estimate paratransit volume. Id.

1 Despite this recommendation, SEPTA's paratransit budgetary requests for the  
2 upcoming year continue to assume a 2-3% trip denial rate. Stip. No. 35.  
3 Furthermore, when asked during a deposition whether providing service in those  
4 instances when SEPTA issued capacity denials would result in an increase of  
5 SEPTA's budget request, SEPTA's President and CEO responded, "I don't know.  
6 That's something we have to work out. I don't know those numbers." Spicer  
7 Dep. at 32.

8 SEPTA's failure to maximize use of existing capacity in order to  
9 ameliorate its daily, consistent capacity denials clearly contravenes its  
10 regulatory paratransit obligations.<sup>6</sup> As a Title II public paratransit  
11 provider, it is SEPTA's legal responsibility to gauge the number of vehicles,  
12 drivers and routes necessary to meet full demand, as well as to maintain the  
13 necessary flexibility to accommodate changing demand. Such flexibility may  
14 require that, for a substantial period of a given year, a significant number  
15 of vehicles or drivers are unused in order to ensure the capability to deal  
16 with contingencies that might otherwise prevent meeting full demand. SEPTA,  
17 in clear disregard of its legal obligations, argues that "[s]uggesting that  
18 SEPTA use more of its vehicles is misguided. SEPTA follows a prudent policy  
19 of keeping a reasonable number of vehicles out of service on the streets each  
20 day." Def. Brief at 26.

21 \_\_\_\_\_  
22 <sup>6</sup> The parties have stipulated that approximately 50-55% of all  
23 paratransit rides scheduled serve elderly patrons who participate in a program  
24 called the "shared ride program." Stip. No. 9. Despite the specific  
25 requirements related to complementary paratransit, SEPTA does not give  
26 priority to ADA-eligible riders over those participating in the shared ride  
27 program, since service is provided on a first-come, first-served basis.  
28 Deposition of June Smith at 16; Spicer Dep. at 96; Stip. No. 10. Although it  
certainly is commendable that SEPTA has endeavored to provide assistance to  
the elderly community, it does not excuse non-compliance with the specific  
requirements of complementary paratransit for ADA-eligible patrons. If SEPTA  
desires, in its discretion, to continue its shared ride program for elderly  
patrons, it cannot do so at the expense of those patrons legally entitled to  
paratransit service.

1           Implicit in SEPTA's argument is the assumption that it would make bad  
2 business sense to encroach into its spare ratio in order to reduce or  
3 eliminate capacity denials. Not surprisingly, this argument mirrors those  
4 proffered by transit authorities in opposing the regulations during the  
5 commentary period prior to DOT's final enactment of the regulations.  
6 Providers similarly complained that stringent paratransit requirements would  
7 force them to purchase or maintain excess capacity, thereby increasing costs.  
8 See 56 Fed. Reg. at 45,608. In rejecting this argument, DOT made clear that  
9 in order to ensure comparability between fixed route and paratransit systems,  
10 providers must maintain adequate capacity to avoid the type of systemic  
11 denials of service that constitute capacity constraints. See id.; see also 61  
12 Fed. Reg. 25, 409, 25, 412-13. Indeed, the undisputed data demonstrates that  
13 SEPTA could eliminate its weekend capacity denials simply by maximizing use of  
14 its existing fleet to accommodate weekend demand. See Stip. No. 20. The  
15 United States respectfully submits that SEPTA cannot continue to employ a  
16 deficient paratransit system that underutilizes existing resources to achieve  
17 minimal compliance with the law, while simultaneously relying upon those  
18 inadequacies to excuse such noncompliance.

19           Insofar as SEPTA's existing resources are insufficient to meet full  
20 paratransit demand, its failure to expand current capacity likewise violates  
21 the ADA. As FTA's Chief Counsel has explained, "those matters which the  
22 transit agency controls, such as decisions on resources for paratransit  
23 services, must be designed to meet the demand by all eligible riders, rather  
24 than some subset of total demand." Ex. B at 2. Accordingly, as the FTA made  
25 clear, capacity denials due to lack of vehicles violate the ADA. Id. at 3.  
26 As Mr. Reilly concluded, "Operators must monitor current ADA complementary  
27 paratransit usage, acquire additional service based on projected demand, and  
28 maintain the ability to respond to surges in demand." Id.

1 SEPTA's argument that uncontrollable fluctuations in paratransit demand  
2 prevent it from fully complying with its legal obligations is equally  
3 unsupportable. See Def. Brief at 7, ftnt. 9 ("[T]he greatest force outside of  
4 SEPTA's control that is responsible for SEPTA not being able to provide a  
5 reservation to every ADA-eligible person is the ever-changing demand for  
6 paratransit services."). Inability to predict fluctuating demand and  
7 inadequate resources cannot excuse an operational pattern or practice of  
8 substantial capacity denials. Were it otherwise, paratransit providers could  
9 easily eschew their legal obligations by choosing to meet a minimal level of  
10 paratransit demand, and justifying their refusal to increase capacity to meet  
11 full demand as an unavoidable consequence of unpredictable demand fluctuation.  
12 As FTA's Chief Counsel has explained, however, a transit entity's failure to  
13 maintain adequate capacity to respond to 100% of paratransit demand at all  
14 times denies ADA complementary paratransit service in violation of ADA:

15 **A transit agency must be able to deal with the swings in demand when**  
16 **administering its ADA complementary paratransit service, just as it**  
17 **would on its fixed routes.** How a transit agency deals with these swings  
18 in demand is its prerogative. For instance, it can have an extra  
19 contractor available for times when demand exceeds the transit agency's  
20 own fleet, or it may simply increase the size of its fleet, or any other  
21 method it chooses that works to accommodate any peaks in demand.  
22 However, if a transit agency has not adequately dealt with this issue,  
23 and the transit agency denies ADA complementary paratransit service to a  
24 qualified individual with a disability because it does not have the  
25 capacity to respond to demand, the denial of ADA complementary  
26 paratransit service is discrimination within section 202 of the ADA.

27 Ex. A at 1.

28 This position is entirely consistent with the Department of  
Transportation's previous interpretation reflected by its amendments to the  
paratransit regulations. In 1996, DOT rescinded the 14-day advance  
reservation requirement which mandated that paratransit entities permit  
patrons to schedule reservations up to two weeks in advance of a requested  
ride. 61 Fed. Reg. 25,409; 25,412-13 (1996). DOT repealed this requirement,

1 explaining:

2 It should be emphasized that, in order to meet Part 37 requirements, all  
3 paratransit systems must provide at least one-day advance reservations  
4 at all times. One of the apparent reasons that users take advantage of  
5 existing advance reservation systems in large numbers is their  
6 apprehension that, if they wait until the day before travel, the  
7 capacity of the system to serve them will have been exhausted. This can  
8 lead, in turn, to the scheduling, no-show, and cancellation problems  
9 cited in many comments. **To make a short-term reservation or real time  
10 scheduling system work properly, transit providers need to make sure  
11 that adequate vehicle capacity is available, such that systematic  
12 denials of service do not exist to an extent that would constitute a  
13 capacity constraint.**

14 Id. at 25,413 (citation omitted; emphasis added). As Plaintiffs correctly  
15 point out, DOT recognized that while transit entities required greater  
16 flexibility in scheduling in order to meet paratransit demand, it was their  
17 responsibility to maintain sufficient capacity to respond to next-day service  
18 requests. There can thus be no question that repeated trip denials due to  
19 lack of adequate vehicles was considered both preventable and unlawful under  
20 the revised regulatory scheme.

21 Furthermore, not all trip denials resulting from fluctuating demand  
22 violate the regulations. Occurrences which cause an unanticipated increase in  
23 demand, such as unique sporting or entertainment events, may result in  
24 intermittent trip denials for which transit providers are not held  
25 accountable. See 49 C.F.R. Pt. 37, App. D. SEPTA, however, appears not to be  
26 claiming incapacity or inadequate resources to meet demand, but rather the  
27 inconvenience of accommodating vagaries in demand. Nothing cited by SEPTA nor  
28 stipulated to in the record indicates that any such swings are so drastic as  
to genuinely deprive SEPTA of its ability to provide full service in such  
situations. Moreover, SEPTA not only maintains inadequate capacity to serve  
full paratransit demand, but refuses to assess the additional resources  
necessary to do so. As Plaintiffs point out, SEPTA has not considered the  
feasibility of back-up transportation methods to assist in meeting excess

1 demand, see Spicer Dep. at 25, nor has it evaluated the volume of additional  
2 vehicles or drivers required to meet demand. Id. at 28, 29, 103-104. Despite  
3 FTA's clear recommendation, SEPTA has not revised its budgetary requests to  
4 account for the increased paratransit demand of which it is clearly aware, see  
5 Stip. No. 33; to the contrary, SEPTA's budget continues to assume a 2-3%  
6 denial rate of paratransit service requests. See Spicer Dep. at 82. Nowhere  
7 in its brief does SEPTA explain or otherwise account for these failures.

8 Finally, SEPTA's refusal to even consider the steps necessary to  
9 ameliorate its existing capacity constraints indicates blatant disregard for  
10 compliance with regulations with which it disagrees. The federal paratransit  
11 regulations clearly forbid transit providers from providing anything less than  
12 full service and meeting full demand except under circumstances outside the  
13 provider's control. Although it consistently deprives its patrons of  
14 paratransit service every single day, "SEPTA believes that it is in compliance  
15 with the law and, therefore, does not need to try to determine what steps need  
16 to be taken to meet 100 percent of demand." Def. Brief at 26. SEPTA's  
17 apparent indifference to the masses of disabled individuals unable to hold  
18 jobs, keep medical appointments or otherwise participate in society due to its  
19 own systemic inadequacies is particularly troublesome in light of the  
20 feasibility of eliminating many, if not all, of its capacity constraints.  
21 More importantly, SEPTA's refusal to do so is legally indefensible under the  
22 ADA and federal paratransit regulations.

23 **C. SEPTA's Chronic Failure to Provide Next-Day Service Violates**  
24 **the Next-Day Response Time Mandate of the Federal**  
25 **Paratransit Regulations.**

26 The response time mandate of the ADA and federal paratransit regulations  
27 requires public transit entities "to schedule and provide paratransit service  
28 to any ADA paratransit eligible person at any requested time on a particular  
day in response to a request for service made the previous date." 49 C.F.R.

1 § 37.131(b). Also referred to as "next-day scheduling," this mandate compels  
2 entities to provide next-day service without scheduling a trip more than one  
3 hour earlier or later than the time requested. See 49 C.F.R. Pt. 37, App. D.  
4 Thus, just as riders cannot demand immediate service upon request, providers  
5 cannot deny a requested trip made the previous day. Id.; see also Pl. Brief  
6 at 34.

7 SEPTA's routine, substantial trip denials not only violate the  
8 regulatory prohibition against capacity constraints, see § 37.131(f)(3)(i)(B),  
9 but violate the next-day response time requirement contained in Section  
10 37.131(b) and, as such, constitute a separate actionable offense. As  
11 discussed *supra*, the undisputed data reveals that SEPTA denied next-day trip  
12 requests every single day for a thirteen-month period, constituting 13.4% of  
13 all next-day trip requests. See Stip. No. 23. SEPTA's President and CEO  
14 conceded in deposition that these denials do not result from forces outside of  
15 its control. See Spicer Dep. At 144-45. Furthermore, SEPTA's next-day  
16 service performance deteriorated even further from March 2000 through May  
17 2000, such that 13.7% of all next-day trip requests were denied during that  
18 period averaging 37 denials per day. See Stip. No. 23 and Attachment 3 to Pl.  
19 Brief.

20 The United States respectfully submits that SEPTA's interpretation of  
21 its legal obligations under the next-day scheduling requirement fundamentally  
22 misconstrues the regulation's plain language and legislative intent. In its  
23 brief, SEPTA argues that next-day scheduling does not unconditionally require  
24 next-day service for each ride requested, but only that transit entities make  
25 reservation services available during the hours its administrative offices are  
26 open. Def. Brief at 20-21 (citing 49 C.F.R. Pt. 37, App. D). By its very  
27 language, however, the regulation unambiguously mandates that entities  
28 "schedule and provide paratransit service" to any ADA-eligible rider for a



1 trip requested the previous day. 49 C.F.R. § 37.131(b). SEPTA's  
2 interpretation thus erroneously conflates this requirement regarding the  
3 mandatory *provision of requested rides*, see § 37.131(b), with the separate  
4 requirement regarding *availability of reservation services* to schedule such  
5 rides, see § 37.131(b)(1). Moreover, SEPTA's interpretation would render  
6 meaningless the prohibition against substantial trip denials if entities were  
7 required only to ensure the availability of reservations without the  
8 concomitant obligation to actually provide the requested rides.

9 SEPTA continuously deprives ADA-eligible users from the type of reliable  
10 transportation necessary to hold jobs, keep medical appointments and attend  
11 social functions. As Plaintiffs aptly observe in their brief, paratransit  
12 users are already disadvantaged by their inability to obtain immediate  
13 transportation if needed, see Pl. Brief at 37; this disadvantage is compounded  
14 when they are unable even to secure rides in advance due to avoidable capacity  
15 constraints. SEPTA's routine, repeated capacity denials thus effectively  
16 ensure that critical paratransit service is available to eligible riders only  
17 when enough patrons do not desire it. This point is underscored by SEPTA's  
18 own argument that some ADA-eligible patrons who experienced capacity denials  
19 may have ultimately secured a requested ride if they made multiple requests to  
20 secure the ride or if cancellations occurred. Def. Brief at 4; see also  
21 Richman Dep. at 89-90 (stating that paratransit riders avoided scheduling  
22 next-day trips at peak hours because of the probability of being denied  
23 service). Such a result not only directly contravenes the comparability  
24 requirement between paratransit and fixed route service, but effectively  
25 eliminates Congress' stated objective of ensuring that persons with  
26 disabilities be integrated and mainstreamed into American society.

27 **D. Potential Deficiencies in its Fixed Route System Do Not**  
28 **Excuse SEPTA's Noncompliance with its Paratransit**  
**Obligations.**

1           Finally, the United States submits that inadequacies in SEPTA's fixed  
2 route system does not relieve it of its legal paratransit obligations. In its  
3 brief, SEPTA argues that Plaintiffs have the burden of demonstrating that  
4 SEPTA's fixed route system meets 100% of demand. Def. Brief at 26. This  
5 assertion is incorrect. As FTA Chief Counsel made clear in a letter dated  
6 August 15, 2000, a transit entity may avoid liability under the ADA if "the  
7 transit entity can demonstrate with empirical evidence that it has equally  
8 high level[s] of denials on both its fixed route system and its ADA  
9 Complementary Paratransit System." Ex. C at 1 (emphasis in original).  
10 However, the entity cannot merely rely on the fact that both systems are  
11 equally inadequate in meeting demand, but would also have to demonstrate that  
12 it does not plan to increase the capacity of its fixed route system, *i.e.*, by  
13 acquiring additional or larger vehicles, more efficient scheduling, or  
14 contracting for additional service, without employing the same measures to  
15 increase its paratransit capacity. *Id.* at 2. Since Plaintiffs have provided  
16 evidence of SEPTA's operational patterns and practices of substantial trip  
17 denials, SEPTA has the burden of proving that its fixed route system generates  
18 an equal (or greater) number of denials. Even if SEPTA met this burden, it  
19 would also have to prove that it does not intend to employ steps to expand its  
20 fixed route capacity without using the same steps to increase capacity on its  
21 paratransit system. SEPTA has made no such showings.

22           Even assuming that SEPTA could demonstrate comparable deficiencies  
23 between its fixed route and paratransit systems, the injury sustained by its  
24 users is still not commensurate with that experienced by its paratransit  
25 users. As the Department of Transportation observed, fixed route users forced  
26 to forego a ride due to overcrowding need only catch a subsequent bus, whereas  
27 paratransit users faced with the same situation may be altogether prevented  
28

1 from obtaining transit service. According to DOT,

2 Certainly no system administrator tells a [nondisabled] passenger that  
3 he can forget about traveling that day because he has already ridden the  
4 bus 20 times that month or that he needs to work his way to the top of a  
5 waiting list before he can elbow his way onto a train. If the  
6 administrator of a paratransit system tells a similar story to a  
7 passenger, it is not a story about a comparable system.

8 56 Fed. Reg. at 45,608. Similarly, as FTA's Chief Counsel explained:

9 [T]he effect of denials on the fixed route system would have to be the  
10 same as the effect of the denials on the paratransit system. For  
11 instance, an able-bodied passenger who is passed by a bus need only wait  
12 for the next bus, which usually entails a wait of some minutes. A  
13 passenger with a disability who is dependent on ADA Complementary  
14 Paratransit system and who is denied a ride, however, typically has to  
15 wait one or more **days** to have their needs met. Therefore, **'trip  
16 denials' on the fixed route system would be comparable only if the  
17 injury (the time a passenger must wait until her demand is met) is the  
18 same. As a practical matter, however, a trip denial on the ADA  
19 Complementary system inflicts a much more serious injury than does a  
20 trip denial on the fixed route system.**

21 Ex. C at 2 (first emphasis in original; second emphasis added). Accordingly,  
22 SEPTA cannot escape liability for its paratransit service violations on this  
23 ground.

#### 24 VII. CONCLUSION

25 Based on the above, it is clear that SEPTA is in violation of Title II  
26 the ADA and implementing Department of Transportation implementing paratransit  
27 regulations as alleged by the Plaintiffs. The United States respectfully  
28 requests that this Honorable Court grant summary judgment in favor of  
Plaintiffs, and deny Defendant's motion for summary judgment.

**Respectfully Submitted,**

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