IN THE

Supreme Court of Virginia

RECORD NO. 081477

ROGER WINBORNE, GREG MORRELL,
CHARLES HOLLIDAY, and JOHN DeHAVEN,
Appellants,

v.

THE VIRGINIA LOTTERY and the
EXECUTIVE DIRECTOR OF THE
VIRGINIA LOTTERY,
Appellees.

OPENING BRIEF OF APPELLANTS

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I. STATEMENT OF THE CASE

Petitioners-Appellants, four people with disabilities who use wheelchairs ("Petitioners"), respectfully assert that the trial Court misconstrued the sections of the Virginians with Disabilities Act ("VDA") and the Americans with Disabilities Act ("ADA") setting forth the obligations of state actors like Respondents-Appellees, The Virginia Lottery and its Executive Director ("Respondents"). VA. CODE ANN. §§ 51.5-1, 51.5-40 (VDA); 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b) (ADA). As a result, the trial Court erred when it denied Petitioners' Motion for Partial Summary Judgment, granted Respondents' Motion for Partial Summary Judgment and entered final Judgment on behalf of the Respondents.

While this Court has never addressed the issues presented in this case, Virginia and federal statutes, regulations and case law establish that the trial Court's ruling was incorrect as a matter of law. Therefore, this Court should reverse the trial Court's final Order and remand this case with instructions to grant Petitioners' Motion for Partial Summary Judgment.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

On 26 July 2005, Petitioners filed their Petition in Chancery in the Circuit Court for the City of Richmond. Joint Appendix ("JA") at 1-48. Petitioners allege that Respondents violated their rights under the ADA and

VDA by denying them equal access to Lottery tickets sold at Respondents' Lottery retailers - businesses that sell Lottery tickets to the public on behalf of the Respondents. *See*, JA at 2, ¶¶ 2-4.

In their Petition in Chancery, Petitioners identified sixteen of Respondents' Lottery retailers and allege that they have been denied access to Lottery tickets because those retailers are inaccessible - they lack basic and legally required accommodations such as accessible parking spaces, ramps and paths of travel. Because Petitioners use wheelchairs, they cannot enter Respondents' Lottery retailers to purchase Lottery tickets and, therefore, cannot win Respondents' Lottery prizes. JA at 11-29.

Petitioners contend that state and federal law requires Respondents to ensure that they can access tickets sold at Respondents' Lottery retailers. Petitioners allege that Respondents have failed and/or refused to do so, in violation of their rights under the ADA and VDA. JA at 35-43.

On 16 August 2005, Respondents filed their Demurrer and Plea of Sovereign Immunity alleging that they cannot be sued under the ADA and VDA and, *inter alia,* that they do not offer a "program, service or activity" within the meaning of the ADA or VDA. JA at 49-54.

On 15 November 2005, the trial Court, by the late Judge Randall G.

Johnson, Overruled Respondents' Demurrer and Plea of Sovereign Immunity in its entirety. JA at 71-72.

Respondents have admitted, "[t]here currently exists no procedure by which a person can purchase or access a single, one time Virginia Lottery product or game other than [by] visiting a Lottery retailer." JA at 225, ¶ (5).

Respondents have admitted that they found over 94% of their Lottery retailers to be inaccessible. In 1999-2000, Respondents conducted accessibility surveys of their Lottery retailers. After completing the surveys, Respondents wrote letters to their retailers reporting their findings. Over 94% of Respondents' letters informed their retailers that they were found to be inaccessible. JA at 230-267.

In discovery and at oral argument, Respondents could not identify a single Lottery retailer that is accessible to Petitioners. JA at 276-278; 136-137; 142, lines 8-11.

At oral argument on 27 July 2007, Respondents stated that their "primary position . . . has been and will continue to be" that they have no legal responsibility to ensure that Petitioners can access tickets sold at their Lottery retailers. JA at 133, lines 12-13. Respondents argued, "It's not our job" to ensure that retailers are accessible, JA at 133, 135, lines 17-22; "[I]t's not our responsibility to know" if retailers are accessible, JA at 136,

lines 6-8; and "We don't mandate" that retailers be accessible. JA at 136, lines 8-12.

On 20 November 2007, Petitioners filed their Motion for Partial Summary Judgment. On 14 December 2007, Petitioners filed their Memorandum of Law in Support of their Motion. JA at 93-107. In their Motion and Memorandum, Petitioners argued that Respondents' "primary position" is incorrect as a matter of law. Petitioners asked the trial Court to rule that, under the VDA and ADA, Respondents must:

> (1) Mandate that their Lottery retailers be accessible to Petitioners and other people with disabilities;
>
> (2) Examine whether prospective Lottery retailers are accessible to Petitioners and other people with disabilities prior to granting them a license to sell The Lottery's products; and
>
> (3) Periodically examine whether existing Lottery retailers are and remain accessible to Petitioners and other people with disabilities.
>
> JA at 93.

Petitioners further stated that they only seek access to Lottery tickets and are not asking Respondents to ensure that their retailers have accessible "restrooms or other amenities unrelated to the purchase of Lottery tickets." JA at 96.

On 20 February 2008, Respondents filed their Motion for Partial Summary Judgment. Respondents argued that they do not provide a

"program, service or activity" under the VDA and ADA and that they have no legal responsibility to ensure that Petitioners can access tickets sold at their retailers. JA at 179-189.

On 4 April 2008, the trial Court, by the Hon. Margaret P. Spencer, announced that it would deny Petitioners' Motion and grant Respondents' Motion, holding:

(1) "[T]he Virginia Lottery does not offer a program, service or activity within the meaning of the ADA or VDA."

(2) "[T]he Virginia Lottery Commission does not provide funds to the retailers that will allow them to comply with the ADA."

(3) "[T]he Lottery Commission is not charged by law with the operation [and] maintenance of the . . . [Lottery] system . . ."

(4) "[T]hat it is the retailer that is responsible for selling lottery tickets to buyers."

JA at 333-335.

The trial Court stated that it relied upon *Bacon v. City of Richmond,* 475 F.3d 633 (4th Cir. 2007), in making its ruling. JA at 334.

The trial Court then held, with the agreement of counsel, that its rulings were dispositive of Petitioners' action and stated that it would enter final Judgment on behalf of Respondents. JA at 335.

On 5 May 2008, the trial Court entered its final Order denying

Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and granting final Judgment on behalf of Respondents. JA at 326-327.

On 21 May 2008, Petitioners filed their Notice of Appeal.

On 31 July 2008, Petitioners filed their Petition for Appeal.

On 24 October 2008, this Court awarded Petitioners an Appeal.

This Brief follows.

III. ASSIGNMENTS OF ERROR

1. The trial Court erred in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that "the Virginia Lottery does not offer a program, service or activity within the meaning of the ADA or the VDA." JA at 333.

The trial Court's ruling was incorrect because under the ADA, VDA and relevant case law, anything a state agency does is a "program, service or activity" of that entity. Therefore, under the ADA and VDA, Respondents must ensure that Petitioners can access Lottery tickets sold by their Lottery retailers.

2. The trial Court erred in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary

Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that the fact that "the Virginia Lottery Commission does not provide funds to the retailers that will allow them to comply with the ADA" was determinative of the Motions and compelled it to grant Respondents' Motion. JA at 334.

The trial Court's ruling was incorrect because under the VDA and ADA, Respondents have an obligation to ensure that Petitioners can access Lottery tickets sold at their Lottery retailers, whether or not they "provide funds to the retailers."

3. The trial Court erred in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that "the Lottery Commission is not charged by law with the operation, maintenance and operation [*sic*] of the [Lottery] system...." JA at 334-335.

The trial Court's ruling was incorrect because Virginia and federal law establishes that Respondents are legally responsible for operating the Lottery system and ensuring that Petitioners are able to access Lottery tickets sold at their Lottery retailers.

As a result, the trial Court's reliance on *Bacon v. City of Richmond*

was in error because the *Bacon* Court held that a public entity "charged by law" to operate a system "can be punished or enjoined" if it operates in a way that violates the ADA, as Respondents did in this case.

4. The trial Court erred in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that Lottery retailers, and not the Respondents, are legally responsible for ensuring that Petitioners can access Lottery tickets. JA at 334-335.

The trial Court's ruling was incorrect because Virginia and federal law establishes that Respondents have a legal obligation to operate the Lottery system and ensure that Petitioners are able to access tickets sold at their Lottery retailers.

As a result, the trial Court's reliance on *Bacon v. City of Richmond* was in error because the *Bacon* Court held that a public entity "charged by law" to operate a system "can be punished or enjoined" if it operates in a way that violates the ADA, as Respondents did in this case. Additionally, under *Bacon,* a public entity cannot escape liability "by dividing operational control and funding authority" as Respondents did in this case.

IV. QUESTIONS PRESENTED

1. Did the trial Court err in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that "the Virginia Lottery does not offer a program, service or activity within the meaning of the ADA or the VDA"? This Question relates to Assignment of Error 1.

2. Did the trial Court err in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that the fact that "the Virginia Lottery Commission does not provide funds to the retailers that will allow them to comply with the ADA" was determinative of the Motions and compelled it to grant Respondents' Motion? This Question relates to Assignment of Error 2.

3. Did the trial Court err in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that "the Lottery Commission is not charged by law with the operation, maintenance and operation [*sic*] of the [Lottery] system" and, as a result, incorrectly relied upon *Bacon v. City of Richmond?* This

Question relates to Assignment of Error 3.

4. Did the trial Court err in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of Respondents because it incorrectly held that only Lottery retailers are legally responsible for ensuring that Petitioners can access Lottery tickets and, as a result, incorrectly relied upon *Bacon v. City of Richmond*? This Question relates to Assignment of Error 4.

V. ARGUMENT

Because the trial Court erred in denying Petitioners' Motion for Partial Summary Judgment, granting Respondents' Motion for Partial Summary Judgment and entering final Judgment on behalf of the Respondents, this Court should reverse the trial Court's final Order and remand this case to the trial Court with instructions to grant Petitioners' Motion for Partial Summary Judgment.

A. Standard of Review.

This Court should review the trial Court's ruling *de novo* because the parties' cross-Motions for Partial Summary Judgment presented only questions of law and the trial Court's ruling was based solely on its analysis

of the VDA, ADA and case law. *See, Virginia Polytechnic Inst. v. Interactive Return Serv.,* 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

When this Court reviews the trial Court's interpretation of the VDA and ADA, it should "ascertain and give effect to the intention of the legislature, which is usually self-evident from the statutory language. When the language in a statute is clear and unambiguous, [a Court should] apply the statute according to its plain language." *Id.* (internal quotation marks and citations omitted).

B. The trial Court erred in holding that "the Virginia Lottery does not offer a program, service or activity within the meaning of the ADA or the VDA."

The plain language of the ADA and VDA establishes that the trial Court erred in holding that "the Virginia Lottery does not offer a program, service or activity within the meaning of the ADA or the VDA." JA at 333, lines 23-25.

Because Respondents' sale of Lottery tickets through their Lottery retailers is a "program, service or activity," the VDA and ADA require Respondents to ensure that Petitioners have equal access to Respondents' Lottery tickets and prizes. VA. CODE ANN. §§ 51.5-1, 51.5-40 (VDA); 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(1) (ADA). Therefore, this Court should reverse the trial Court's final Order and remand this case with

instructions to grant Petitioners' Motion for Partial Summary Judgment.

1. Respondents offer a "program, service or activity within the meaning of . . . the VDA."

The plain language of the VDA establishes that the trial Court erred when it held that Respondents do not provide a "program, service or activity within the meaning of . . . the VDA." JA at 333, lines 23-25. Contrary to Respondents' "primary position" and the trial Court's ruling, the VDA requires Respondents to ensure that Petitioners can fully and equally access Lottery tickets sold through Respondents' Lottery retailers. VA. CODE ANN. § 51.5-40.

a. The VDA applies to all actions "conducted by or on behalf of" all Virginia state agencies.

The trial Court's ruling was incorrect because the express language of the VDA states that the Act applies to any action "conducted by or on behalf of a state agency." VA. CODE ANN. § 51.5-40. Therefore, Respondents provide a "program, service or activity" for the purposes of the VDA when they sell Lottery tickets to the public through their Lottery retailers.

The VDA's mandate is set forth in its first section: "It is the policy of this Commonwealth to encourage and enable persons with disabilities to participate **fully and equally** in the social and economic life of the

Commonwealth." VA. CODE ANN. § 51.5-1 (emphasis added). To effectuate this policy, the VDA requires that Virginia state agencies make their programs and activities accessible to people with disabilities, stating:

> No otherwise qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under . . . **any program or activity conducted by or on behalf of any state agency.**
> VA. CODE ANN. § 51.5-40 (emphasis added).

It is undisputed that Petitioners are otherwise qualified people with disabilities for purposes of the VDA. JA at 4-5, ¶¶ 10-13; 35, ¶ 184. It is also undisputed that The Virginia Lottery is a Virginia state agency. JA at 75, ¶ 7.

It is indisputable that Respondents' Lottery retailers sell tickets to the public "on behalf of" the Respondents. Virginia law sets forth how retailers are licensed to sell tickets on behalf of Respondents, how they must sell tickets to the public on behalf of the Respondents and how they must return the proceeds to Respondents. *See, e.g.,* VA. CODE ANN. § 58.1-4009; 11 VA. ADMIN CODE 5-31-40; 11 VA. ADMIN CODE 5-31-130(A); 11 VA. ADMIN. CODE 5-31-60.

Hence, contrary to the trial Court's ruling, Respondents do "offer a program, service or activity within the meaning of . . . the VDA" when they sell Lottery tickets to the public through their Lottery retailers. VA. CODE

ANN. § 51.5-40. While this Court has never interpreted § 51.5-40, the plain meaning of the General Assembly's words - particularly the word "any" - shows that the trial Court's ruling was incorrect.

"Any is defined as 'one no matter what one: every - used . . . to indicate one that is selected without restriction or limitation.'" *Herrell v. Commonwealth,* 28 Va. JA 579, 585, 507 S.E.2d 633, 636 (1998) (quoting *Webster's Third New International Dictionary* 1555 (1981)). Thus, when the General Assembly mandated that people with disabilities cannot be excluded from "<u>any</u> program or activity conducted by or on behalf of <u>any</u> state agency," it meant that people with disabilities must be given full and equal access to <u>all</u> programs and activities of <u>all</u> state agencies, necessarily including Respondents' sale of tickets to the public through their Lottery retailers.

Furthermore, the plain meaning of the words "program" and "activity" prove that Respondents provide a "program or activity" for purposes of the VDA. The relevant definition of "program" is "a plan or system under which action may be taken toward a goal." *Merriam Webster's Collegiate Dictionary* 931 (10th ed. 1996). Respondents' goal, assigned by the General Assembly, is to "produce revenue consonant with the probity of the Commonwealth." VA. CODE ANN. § 58.1-4001. Because Respondents

have chosen to produce revenue by selling Lottery tickets to the public through their retailers, those sales are a "program" - the "plan or system under which action may be taken toward" Respondents' goal of raising revenue.

Similarly, the relevant definitions of "activity" are "natural and normal function" and "an organizational unit for performing a specific function." *Merriam Webster's* at 12. Respondents' "natural and normal function" is raising revenue through the sale of Lottery tickets. *See*, VA. CODE ANN. § 58.1-4000, *et seq.*. Because Respondents have chosen to fulfill this function by selling tickets through their Lottery retailers, these sales are an "activity" - the "organizational unit for performing [the] specific function" of raising revenue.

b. Virginia law disproves Respondents' "primary position" that they are not legally responsible for ensuring that Petitioners can access Lottery tickets sold through their Lottery retailers.

The trial Court erred when it denied Petitioners' Motion for Partial Summary Judgment and affirmed Respondents' "primary position" that they have no legal responsibility to ensure that Petitioners can access Lottery tickets sold through their Lottery retailers.

Respondents identified their "primary position" at oral argument on 27 July 2007. JA at 133, lines 12-13. They defended their position by stating "It's not our job" to ensure that retailers are accessible, JA at 133, 135, lines 17-22; "[I]t's not our responsibility to know" if retailers are accessible, JA at 136, lines 6-8; and "We don't mandate" that retailers be accessible, JA at 136, lines 8-12.

The plain language of the VDA belies Respondents' "primary position" and establishes that the trial Court erred in affirming it. Because the VDA expressly covers actions carried out "on behalf of" state agencies, Petitioners must not be "excluded from" or "denied the benefits of" tickets sold by Lottery retailers "on behalf of" the Respondents. VA. CODE ANN. § 51.5-40. Hence, Respondents have "a responsibility to know" if their retailers are inaccessible and must "mandate" that they be accessible to ensure that Petitioners are not "excluded from" Lottery tickets or "denied the benefits of" Lottery prizes.

Put simply, if Petitioners cannot buy Lottery tickets because the Lottery retailers they go to are inaccessible - if, for example, they lack legally required accessible parking, ramps or paths of travel - Petitioners will be excluded from Lottery tickets and prizes: they cannot win because they cannot play. This is especially true because, as Respondents have

admitted, "[t]here currently exists no procedure by which a person can purchase or access a single, one time Virginia Lottery product or game other than [by] visiting a Lottery retailer." JA at 225, ¶ (5).

Virginia laws and regulations effectuating the VDA also set forth Respondents' obligations and disprove their "primary position." First, Respondents' own statute and regulations state that they must examine "the accessibility of" prospective Lottery retailers prior to granting them a license to sell Lottery tickets. VA. CODE ANN. § 58.1-4009(A), 11 VA. ADMIN CODE 5-31-40(A). Therefore, Respondents have a statutory "responsibility to know" if their retailers are inaccessible.

Respondents are well aware of their "responsibility to know" and have created a policy intended to implement it. Under Respondents' policy, they must complete a "Retailer Location Form" before they grant any business a license to sell Lottery tickets. JA at 227. To complete the "Retailer On Site Evaluation" section of the form, Respondents must examine the prospective Lottery retailer and determine whether it is "accessible to . . . people with disabilities." JA at 227.

Unfortunately, as Respondents' "primary position" and the evidence in this case have shown, they have chosen to ignore their policy and the Virginia laws underlying it. Respondents have admitted that, with the

exception of one "accessibility survey" in 1999-2000, they have never examined whether their current or prospective retailers are accessible to people with disabilities. JA at 269-274. Moreover, Respondents admitted that they have never denied a license to sell Lottery tickets to any prospective retailer because it was inaccessible. JA at 81, ¶ 48-92, ¶ 184.

Also contrary to their "primary position," Respondents' own regulations require them to "mandate" that their Lottery retailers be accessible. Respondents' regulations state that every Lottery retailer must "comply with all applicable state and federal laws and regulations." 11 VA. ADMIN CODE 5-31-130(A). If Lottery retailers violate "applicable laws," Respondents can deny, suspend or revoke their license to sell Lottery tickets. 11 VA. ADMIN. CODE 5-31-160.

The VDA and ADA are "applicable laws" because both require businesses to be accessible and Respondents must examine whether businesses are accessible before granting them a license to sell Lottery tickets. *See,* VA. CODE ANN. § 51.5-44 (VDA section requiring businesses to be accessible); 42 U.S.C. § 12182 (ADA section requiring businesses to be accessible); VA. CODE ANN. § 58.1-4009(A), 11 VA. ADMIN CODE 5-31-40(A) (Virginia statute and regulation requiring Respondents to examine whether prospective retailers are accessible); Respondents' "Retailer

Location Form," JA at 227. In particular, the ADA expressly requires businesses to have accessible parking, ramps and pathways. *See,* 28 C.F.R. § 36 App. A (Americans with Disabilities Act Accessibility Guidelines).

Hence, if current or prospective Lottery retailers are inaccessible, Respondents can deny them licenses to sell Lottery tickets. 11 VA. ADMIN. CODE 5-31-160. Indeed, Respondents must do so in order to comply with the VDA and ensure that Petitioners can "fully and equally" access Lottery tickets. VA. CODE ANN. §§ 51.5-1, 51.5-40. Therefore, contrary to their "primary position," Respondents must "mandate" that their Lottery retailers be accessible to Petitioners and other people with disabilities.

Furthermore, Respondents' regulations give them a "responsibility to know" if their Lottery retailers are accessible and in compliance with the ADA and VDA. Under their regulations, Respondents must periodically examine their retailers to determine if they are complying with all Lottery regulations and requirements. 11 VA. ADMIN CODE 5-31-70(A). Thus, Respondents have a "responsibility to know" if their retailers are complying with 11 VA. ADMIN CODE 5-31-130(A), which mandates that Lottery retailers comply with all "applicable laws."

These statutes and regulations effectuate the VDA because they

were enacted after the Act and involve the accessibility of Lottery retailers. *See, e.g., Gillespie v. Commonwealth,* 272 Va. 753, 758-759, 636 S.E.2d 430, 432 (2006) (The General Assembly is presumed to be "fully aware of the state of existing law relating to the same general subject."). Hence, to comply with the VDA, Respondents must also comply with their own statutes and regulations addressing the accessibility of their Lottery tickets and retailers. *See, Department of Medical Assistance Services v. Beverly Healthcare of Fredericksburg,* 41 Va. App. 468, 484, 585 S.E.2d 858, 866 (2003) (A state agency is "bound by the plain language of its own regulation.").

Because this case involves Respondents' obligations under Virginia law, this Court need not determine whether the actions or inaction of Lottery retailers are "fairly attributable" to the Respondents, as it would have to in a Fourteenth Amendment case. *See, e.g., Mentavlos v. Anderson,* 249 F.3d 301, 311-313 (4th Cir. 2001). Instead, this Court need only review the express language of the VDA and the statutes and regulations effectuating it to conclude that Respondents' "primary position" is incorrect. Contrary to Respondents' position and the trial Court's ruling, Virginia law requires Respondents to: (1) ensure that their retailers are accessible prior to granting them a license; (2) mandate that their retailers

be accessible as a condition of maintaining their licenses; and (3) periodically examine whether their retailers are accessible.

Accordingly, if Respondents contend that their "primary position" is correct because they do not or cannot "control" whether their Lottery retailers make their premises accessible, this argument, even if true, is irrelevant. Respondents need not "control" their Lottery retailers' actions or premises in order to comply with the VDA. Rather, they must control their own actions; specifically, the way they grant and renew their retailers' licenses to sell Lottery tickets.

Under Virginia law, Respondents can deny licenses to any prospective or current Lottery retailer. *See*, VA. CODE ANN. § 58.1-4009(A); 11 VA. ADMIN. CODE 5-31-40(A); 11 VA. ADMIN. CODE 5-31-160. Thus, if Respondents' Lottery retailers are inaccessible, Respondents have the absolute authority to deny them a license to sell Lottery tickets. Respondents must exercise that authority in order to comply with the VDA. By doing so, they will ensure that only accessible businesses have licenses to sell Lottery tickets and, as a result, that Petitioners can fully and equally access those tickets - without Respondents having to "control" the premises of their Lottery retailers.

2. Respondents offer "a program, service or activity within the meaning of the ADA."

Because Respondents' sale of Lottery tickets to the public through their Lottery retailers is a "program, service or activity" for purposes of the ADA, the trial Court erred when it granted Respondents' Motion for Partial Summary Judgment. Contrary to the trial Court's ruling and Respondents' "primary position," the ADA requires Respondents to ensure that Petitioners can access Lottery tickets sold through their retailers. *See,* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b).

a. The ADA applies to anything a public entity does.

The plain language of the ADA, its regulations and the case law interpreting it establish that the Act applies to all actions taken by or on behalf of a public entity. Therefore, Respondents provide a "service, program or activity" for the purposes of the ADA when they sell tickets to the public through their Lottery retailers.

The ADA states:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of services, programs or activities of a public entity. 42 U.S.C. § 12132.

The regulations to the ADA state that the Act applies to actions taken by a public entity "directly or through contractual, licensing or other

arrangements." 28 C.F.R. § 35.130(b)(1).

It is undisputed that Petitioners are qualified people with disabilities for the purposes of the ADA. JA at 4-5; 39, ¶ 195. It is undisputed that Respondents are a "public entity" for the purposes of the ADA. *See,* 42 U.S.C. § 12131 ("public entity" includes any "agency . . . or other instrumentality of a State"). JA at 75, ¶ 7. As shown, *supra,* Respondents' retailers sell Lottery tickets through "contractual, licensing or other arrangements" with the Respondents. *See, e.g.,* VA. CODE ANN. § 58.1-4009(A); 11 VA. ADMIN CODE 5-31-40(A); 11 VA. ADMIN CODE 5-31-130(A); 11 VA. ADMIN CODE 5-31-60.

Hence, contrary to the trial Court's ruling, Respondents "offer a program, service or activity within the meaning of the ADA" when they sell Lottery tickets to the public through their Lottery retailers. The plain language of the ADA establishes that the Act applies to "anything a public entity does." *Yeskey v. Com. of Pa. Dept. of Corrections,* 118 F.3d 168, 171 (3rd Cir. 1997) (citations omitted). Therefore, Respondents' sale of tickets through their retailers is a "service, program or activity" because that phrase is a "catch-all . . . that prohibits all discrimination by a public entity, regardless of the context." *Bircoll v. Miami-Dade County,* 480 F.3d 1072, 1084-1085 (11th Cir. 2007).

The regulations to the ADA echo the plain language of the Act, stating that the ADA "applies to anything a public entity does. . . ." 28 C.F.R. pt. 35, App. A at 456 (1996). Therefore, the term "services, programs and activities of a public entity" encompasses all actions of a state agency, necessarily including Respondents' sale of Lottery tickets to the public through their Lottery retailers. This broad application was intended to "avoid the very type of hair-splitting arguments [Respondents and the trial Court] attempt to make here." *Innovative Health Systems Inc. v. City of White Plains,* 117 F.3d 27, 44-45 (2nd Cir. 1997), *superseded on other grounds by Zervos v. Verizon New York,* 252 F.3d 163, 171 n. 7 (2nd Cir. 2001).

Additionally, case law directly on point has held that the ADA applies to a state Lottery agency's sale of Lottery tickets through its retailers. In *Paxton v. Department of Tax and Revenue*, the plaintiff alleged that West Virginia's state Lottery agency violated his ADA rights because its licensed retailers were inaccessible. 192 W.Va. 213, 451 S.E.2d 779 (1994). The Court held for the plaintiff, stating "the lottery is the service provided by the Lottery Commission. . . . When the Lottery Commission allows this service to be provided on premises which are inaccessible to individuals with disabilities, it violates its obligations" under the ADA. *Id.* at 219. *See also,*

Tyler v. The Kansas Lottery, 14 F. Supp. 2d 1220, 1228 (D. Kan. 1998) (a plaintiff "could prove a violation of the ADA" by the state Lottery agency if Lottery retailers are inaccessible).

b. Federal law disproves Respondents' "primary position" that they are not legally responsible for ensuring that Petitioners can access Lottery tickets sold through their Lottery retailers.

Because Respondents' sale of Lottery tickets through their Lottery retailers is a "program, service or activity" for the purposes of the ADA, Respondents must ensure that Petitioners can access tickets sold through their Lottery retailers. *See,* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b). Therefore, the trial Court erred in denying Petitioners' Motion for Partial Summary Judgment.

The regulations to the ADA set forth a public entity's specific responsibilities under the Act, stating:

> A public entity, in providing any aid, benefit or service may not, directly or through contractual, licensing or other arrangements, on the basis of disability -
>
> (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit or service;
> (ii) Afford 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;
> (iii) Provide a qualified individual with a disability with an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result . . . as that provided to

others; . . . .

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization or person that discriminates on the basis of disability . . . .

A public entity may not, in determining the site or location of a facility, make selections -

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination....

28 C.F.R. § 35.130(b)(1)-(4).

The ADA and its regulations disprove Respondents' "primary position" and establish that the trial Court erred in affirming it. Under the ADA, Respondents must ensure that their retailers are accessible to Petitioners, so Petitioners are not excluded from participating in or benefiting from Lottery tickets. *See,* 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(1); 28 C.F.R. § 35.130(b)(4); *Paxton,* 192 W.Va. at 219, 451 S.E.2d at 785; *Tyler,* 14 F. Supp. 2d at 1228. Therefore, Respondents have a "responsibility to know" if their retailers are inaccessible to Petitioners and must "mandate" that they be accessible.

The ADA also makes it Respondents' "job" and "responsibility" to know if their Lottery retailers are inaccessible because the Act forbids them from choosing retailer locations that "have the effect of excluding individuals with disabilities." 42 U.S.C. § 12132; 28 C.F.R.

§ 35.130(b)(4). Put simply, inaccessible retailers "have the effect of excluding" the Petitioners from Respondents' Lottery tickets and prizes: if Petitioners cannot buy Lottery tickets, they cannot win Lottery prizes. Therefore, Respondents have a "responsibility to know" if their retailers are inaccessible and must "mandate" that they be accessible. *Id.*

Moreover, because the ADA forbids Respondents from providing "significant assistance" to businesses that exclude Petitioners, 28 C.F.R. § 35.130(b)(1)(v), Respondents have a "responsibility to know" if their retailers are inaccessible and must "mandate" that they be accessible. Respondents provide "significant assistance" to their Lottery retailers by paying each retailer a 5% commission based on "net ticket sales" and "1% of the cash value of all prizes which the retailer paid." 11 VA. ADMIN CODE 5-31-150(A).

The evidence in this case establishes that Respondents have provided far more than "significant assistance" to their Lottery retailers. Respondents have admitted that, from 2000-2006, they paid over one million dollars ($1,000,000.00) just to the sixteen Lottery retailers identified in the Petition in Chancery. JA at 152-153. Respondents also admitted that they have paid over one billion dollars ($1,000,000,000.00) to their Lottery retailers since 1989. JA at 280-282.

Because Respondents provide such significant assistance to their Lottery retailers, they must ensure that those retailers are accessible to the Petitioners. 28 C.F.R. § 35.130(b)(1)(v). If Respondents refuse to do so and, as here, their Lottery retailers are inaccessible, Petitioners will be excluded from participating in or benefiting from Respondents' Lottery tickets and prizes. This is especially true because, if Petitioners wish to purchase a Lottery ticket, they must go to a Lottery retailer.
JA at 225, ¶ (5). Thus, Respondents have a "responsibility to know" if their retailers are inaccessible and must "mandate" that they be accessible.

As stated, *supra,* this Court need not consider whether the actions or inaction of Lottery retailers are "fairly attributable" to the Respondents. Respondents' legal obligations to the Petitioners spring directly from the ADA and its regulations, which have given Respondents a "responsibility to know" if their retailers are inaccessible and a duty to "mandate" that they be accessible for almost seventeen years. *See,* § 205, Pub.L.No. 101-336 (effective date of the ADA was January, 1992).

As with the VDA, Respondents can comply with the ADA and its regulations without "controlling" the actions or premises of their Lottery retailers. To do so, Respondents need only control their own actions and ensure that only accessible retailers receive licenses to sell Lottery tickets

by: (1) ensuring that prospective retailers are accessible prior to granting them a license; (2) mandating that their retailers be accessible as a condition of maintaining a license; and (3) periodically examining whether their retailers are accessible. If Respondents take these legally-required steps, they will comply with the ADA and ensure that Petitioners can equally access Lottery tickets regardless of whether they "control" their Lottery retailers.

C. The trial Court erred in ruling that the fact that "the Virginia Lottery Commission does not provide funds to the retailers that will allow them to comply with the ADA" compelled it to grant Respondents' Motion.

The trial Court erred when it held that Respondents do not have a responsibility to ensure that Petitioners can access Lottery tickets because Respondents do not "provide funds to the retailers that will allow them to comply with the ADA." JA at 334, lines 18-20. The Court's ruling was incorrect because whether or not Respondents "provide funds" is irrelevant.

The trial Court's ruling was incorrect because under Virginia and federal law, Respondents must ensure that Petitioners can access Lottery tickets <u>today</u>, not "provide funds to the retailers" so they can become accessible at some later date. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b); VA. CODE ANN. §§ 51.5-1, 51.5-40; *Paxton,* 192 W.Va. at 219, 451 S.E.2d at

785. Respondents must comply with these obligations whether or not they "provide funds to the retailers." *See, e.g., Beverly Healthcare of Fredericksburg,* 41 Va. App. at 484, 585 S.E.2d at 866.

Moreover, if Respondents met their legal obligations, all of their Lottery retailers would be accessible today - without the need for "funds" from the Respondents - because inaccessible businesses would not receive or retain licenses to sell Lottery tickets. Therefore, the question before this Court is not whether Respondents do or should "provide funds" but whether they have obligations under the ADA and VDA and failed to meet them.

D. The trial Court erred in holding that "the Lottery Commission is not charged by law with the operation, maintenance and operation [*sic*] of the [Lottery] system" and, as a result, misapplied *Bacon v. City of Richmond.*

The trial Court erred in holding that Respondents are "not charged by law with the operation [and] maintenance . . . of the [Lottery] system," JA at 334-335. As a result, the trial Court misapplied *Bacon v. City of Richmond* and erroneously granted Respondents' Motion for Partial Summary Judgment. While this is an issue of first impression, Virginia and federal law, as well as *Bacon* itself, establish that the trial Court's final Order should be reversed and Petitioners' Motion for Partial Summary Judgment

should be granted.

1. Virginia law charges Respondents with the operation, supervision and maintenance of the Lottery system.

Contrary to the trial Court's ruling, Virginia law unequivocally charges Respondents to operate, supervise and maintain the Lottery system, including the sale of Lottery tickets through their Lottery retailers. *See, e.g.,* VA. CODE ANN. § 58.1-4001 ("This chapter establishes a lottery **to be operated by the Commonwealth**....") (emphasis added); VA. CODE ANN. § 58.1-4003 ("[T]here is hereby established . . . a State Lottery Department . . . **for the purpose of operating a state lottery.**")(emphasis added); VA. CODE ANN. § 58.1-4006(A) (The Executive Director of the Lottery "**shall supervise and administer the operation of the lottery** . . . . ")(emphasis added); VA. CODE ANN. § 58.1-4009; 11 VA. ADMIN. CODE 5-31-40; 11 VA. ADMIN. CODE 5-31-130(A); 11 VA. ADMIN. CODE 5-31-70(A); 11 VA. ADMIN. CODE 5-31-160.

Because Respondents are so "charged by law," the trial Court erred in holding that *Bacon v. City of Richmond,* 475 F.3d 633 (4th Cir. 2007), compelled it to rule against the Petitioners. JA at 334-335. In fact, *Bacon* supports Petitioners' case because that Court held that an agency charged to operate a system "can be punished or enjoined" if it operates in a way that violates the ADA. 475 F.3d at 642.

In *Bacon,* the plaintiffs sued the City of Richmond and the Richmond City School Board because Richmond schools were inaccessible to people with disabilities. *Id.* at 637. The School Board entered into a settlement, agreeing to bring their schools into compliance with the ADA "contingent on the School Board's receiving funding from the City of Richmond." *Id.*

The plaintiffs and the City then cross-moved for summary judgment. Even though the District Court found that the City was not at fault for the ADA violations, it entered final Judgment for the plaintiffs. *Id.* at 639.

The Court of Appeals for the Fourth Circuit reversed, holding "Injunctive relief may not issue where, as here, the City played no part in depriving any plaintiff of the rights guaranteed by the ADA." *Id.* The Court held that the City was not at fault because "Virginia law vests the School Board with exclusive authority over Richmond's public schools." *Id.* at 640. The Court further held that that the City, in "stark contrast" to the School Board, "is not charged by law with the establishment, maintenance and operation of the public school system." *Id.* at 640-641.

In the case at bar, the trial Court incorrectly analogized Respondents to the City in *Bacon.* JA at 334-335. The Court's analogy fails because Respondents, in "stark contrast" to the City in *Bacon*, are "charged by law with the establishment, maintenance and operation" of the Lottery.

Compare, VA. CODE ANN. § 58.1-4000, *et seq.* and 11 VA. ADMIN. CODE 5-31-10, *et seq.*. (establishing Respondents' obligations to operate and supervise the Lottery system) *with* Va. Const. art. VIII, § 7 (School Boards operate and supervise schools) and VA. CODE ANN § 22.1-79(2) (School boards must operate schools "according to law.").

Therefore, the trial Court's ruling missed the mark entirely: Respondents position in this case is analogous to the School Board in *Bacon,* not the City. Like the School Board, Respondents alone are "charged by law" to operate the system at issue. Virginia and federal law charge the Respondents to:

- Operate the Lottery. VA. CODE ANN. §§ 58.1-4001, 58.1-4003;
- "[S]upervise and administer the operation of the Lottery." VA. CODE ANN. § 58.1-4006(A);
- Determine whether a prospective Lottery retailer receives a license to sell Lottery tickets. VA. CODE ANN. § 58.1-4009;
- Examine whether prospective Lottery retailers are accessible to people with disabilities prior to granting them a license to sell Lottery tickets. VA. CODE ANN. § 58.1-4009(A); 11 VA. ADMIN. CODE 5-31-40(A);
- Mandate that Lottery retailers comply with all applicable state and

federal laws as a condition of being or remaining eligible to sell Lottery tickets. 11 VA. ADMIN. CODE 5-31-130(A);

- Periodically examine whether their Lottery retailers are in compliance with all applicable laws. 11 VA. ADMIN. CODE 5-31-70(A);
- Deny or revoke the license to sell Lottery tickets of any Lottery retailers that do not comply with all applicable laws or Lottery requirements. 11 VA. ADMIN. CODE 5-31-160; and
- Ensure that people with disabilities are not "excluded from participation in" or "denied the benefits of" Lottery tickets and prizes. VA. CODE ANN. § 51.5-40; 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(1).

Accordingly, when Petitioners cannot access Lottery tickets because Respondents' retailers are inaccessible, it is because Respondents failed in their legal obligations to (1) ensure that those retailers were accessible prior to granting them a license; (2) require those retailers to be accessible as a condition of maintaining their licenses; and (3) periodically examine whether those retailers are accessible. As a result, Respondents, unlike the City in *Bacon* but <u>just like</u> the School Board, "can be punished or enjoined." *Bacon,* 475 F.3d at 642.

The trial Court's analogy to *Bacon* might have some merit if Respondents were obligated to grant licenses to anyone who applied for them. However, Respondents have authority over licensure and can deny licenses to inaccessible businesses. *See,* VA. CODE ANN. § 58.1-4009(A); 11 VA. ADMIN. CODE 5-31-40(A); 11 VA. ADMIN. CODE 5-31-160. Indeed, in order to meet their ADA and VDA obligations, they must do so. VA. CODE ANN. §§ 51.5-1, 51.5-40; 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b); *Paxton,* 192 W.Va. at 219, 451 S.E.2d at 785; *Tyler,* 14 F.Supp.2d at 1228.

2. *Bacon* and the uncontroverted evidence in this case establish that Respondents violated their ADA and VDA obligations and should be "punished or enjoined."

Furthermore, *Bacon* and the uncontroverted evidence in this case establish that the trial Court erred in denying Petitioners' Motion for Partial Summary Judgment. Because Respondents are "charged by law" to operate the Lottery system and failed to meet their ADA and VDA obligations, *Bacon* holds that they can be "punished or enjoined." 475 F.3d at 640-642.

Respondents' "primary position," by its express terms, proves that they refuse to comply with their legal obligations. Therefore, pursuant to *Bacon,* the trial Court should have held that Respondents had violated their ADA and VDA obligations and are subject to an injunction.

Furthermore, Respondents' admissions provide additional evidence of their refusal to comply with the ADA and VDA. Respondents admitted that they have never denied or revoked the license of any Lottery retailer because it was inaccessible, JA at 81, ¶ 48-92, ¶ 184, and, with the exception of one "accessibility survey," have never reviewed any of their retailers to determine if they are accessible. JA at 269-274.

Additionally, Respondents' own admissions prove that they failed to meet their obligations so egregiously and often that the overwhelming majority of their Lottery retailers are inaccessible to Petitioners. Respondents admitted that, in their one "accessibility survey," they found over 94% of their Lottery retailers to be inaccessible to people with disabilities. JA at 230-267.

In 1999 and 2000, Respondents surveyed their retailers to determine if they were accessible. *See, e.g.,* JA at 9, ¶ 40; 269. Respondents then wrote letters reporting their findings to the retailers they surveyed. In their letters, Respondents either informed their retailers that they were accessible to people with disabilities or used one or more of 30 different "stock" paragraphs to describe inaccessible conditions they found at their Lottery retailers.

To make the stock paragraphs easier to identify in discovery, the

parties assigned a letter to each. JA at 232-236. The parties assigned letter "FF" to the paragraph Respondents used when they found a Lottery retailer to be inaccessible. JA at 236. Paragraph FF reads:

> Ideally, people with disabilities should be able to enter and exit a facility and obtain materials or services without assistance. **We have found that your facility is compliant with the ADA requirements and allows this access, except for the following area(s):**
> JA at 236 (emphasis added).

In letters containing paragraph "FF," Respondents would then include at least one of the other stock paragraphs to inform their retailer of the ways they found it to be inaccessible.

Respondents admitted that they sent letters to 3,660 Lottery retailers and that 3,420 of those letters - 93.4% - included paragraph FF. JA at 230; 238. Respondents also admitted that they drafted, but did not send, an additional 1,019 letters to their retailers and that 989 of those letters - 97.1% - included paragraph FF. JA at 258; 260.

More disturbingly, seven years after they found over 94% of their Lottery retailers to be inaccessible, Respondents could not identify <u>even one</u> Lottery retailer that is accessible to Petitioners. JA at 276-278; 136-137; 142, lines 8-11.

These admissions are all the more disheartening because "[t]here currently exists no procedure by which a person can purchase or access a

single, one time Virginia Lottery product or game other than [by] visiting a Lottery retailer." JA at 225, ¶ (5).

Respondents' "primary position" and their own admissions lead to an inescapable conclusion: that Respondents refuse to comply with their VDA and ADA obligations and, as a result, Petitioners have been denied equal access to Lottery tickets sold through Respondents' Lottery retailers. Therefore, pursuant to *Bacon,* "[i]njunctive relief may . . . issue." *Bacon,* 475 F.3d at 639.

E. The trial Court erred in holding that only Lottery retailers are legally responsible for ensuring that Petitioners can access Lottery tickets and, as a result, misapplied *Bacon v. City of Richmond.*

Finally, the trial Court incorrectly held that Lottery retailers, and not Respondents, are responsible for ensuring that Petitioners can access Lottery tickets because "the retailer . . . is responsible for selling tickets to buyers." JA at 335, lines 2-3. As a result, the Court again misapplied *Bacon* and erred when it granted Respondents' Motion for Partial Summary Judgment.

At the outset, the trial Court's ruling is contrary to the express language of the VDA and ADA. The Acts obligate Respondents to ensure that Petitioners can access all programs and activities conducted on their

behalf. VA. CODE ANN. § 51.5-40; 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b). Thus, Respondents cannot escape their ADA and VDA obligations simply because their retailers sell Lottery tickets to the public for them.

Nevertheless, Petitioners agree that Lottery retailers have a separate obligation to be accessible. *See,* 42 U.S.C. § 12182; VA. CODE ANN. § 51.5-44. Petitioners also agree that they could sue inaccessible Lottery retailers individually. *See, Paxton,* 192 W.Va. at 219, 451 S.E.2d at 785.

However, the mere fact that Petitioners can sue individual Lottery retailers for being inaccessible does not mean they cannot sue Respondents for failing to ensure that their Lottery retailers are accessible. Moreover, even if Petitioners sued thousands of inaccessible Lottery retailers and prevailed against each, their victories would not solve the problem identified by this action because Respondents would be free to continue granting licenses to other inaccessible retailers. As a result, there could well be more inaccessible Lottery retailers when those cases ended than when they were filed.

Instead, it is logical for Petitioners to seek relief from Respondents because Petitioners only want access to Lottery tickets; they do not seek "accessible restrooms or other amenities unrelated to the purchase of

Lottery tickets." JA at 96. Therefore, Petitioners should seek that access from Respondents, the entity charged by law to operate, maintain and supervise the Lottery system.

Case law supports holding Respondents accountable for the inaccessibility of their Lottery retailers. In *Paxton,* the Court noted that "individual licensees are not parties to this litigation" and that those retailers "have a separate responsibility under the . . . ADA." 192 W.Va. at 219, 451 S.E.2d at 785. Even so, the Court enjoined the state Lottery agency to ensure that its Lottery retailers are accessible, holding "the lottery is the service provided by the Lottery Commission. . . . When the Lottery Commission allows this service to be provided on premises which are inaccessible to individuals with disabilities, it violates its obligations" under the ADA. *Id. See also, Tyler,* 14 F. Supp. 2d at 1228.

Because Petitioners can hold Respondents accountable, the trial Court again misapplied *Bacon.* In addition, the trial Court erroneously ignored the *Bacon* Court's ruling that public entities cannot "immunize themselves from ADA or other claims by dividing operational control and funding authority . . . ." 475 F.3d at 641 (citations omitted).

Despite this ruling, the trial Court essentially held that Respondents escaped liability <u>because</u> they divided "operational and funding control."

Under the trial Court's reasoning, Respondents prevailed because they chose to make "the retailer . . . responsible for selling tickets" in exchange for Respondents paying them a commission. Thus, while purportedly relying upon *Bacon,* the trial Court gave its blessing to the very scheme forbidden by that Court.

The *Bacon* Court was correct to preclude such a system. State agencies are given statutory responsibilities for one reason: because the legislature determined they should meet them. Here, the General Assembly charged Respondents to operate and maintain the Lottery system. VA. CODE ANN. § 58.1-4000, *et seq.* The General Assembly and Congress charged Respondents to ensure that people with disabilities are not excluded from their programs and activities. VA. CODE ANN. § 51.5-40; 42 U.S.C. § 12132, 28 C.F.R. 35.130(b)(1). This Court should not allow Respondents to shirk their duties through a scheme decried by the case upon which they relied.

VI. CONCLUSION

Respondents "primary position" calls to mind the opinion of a Justice of the United States Court of Appeals for the Fourth Circuit who, after hearing a similar argument, stated:

> From the perspective of a disabled American, the absence of... accommodations in a building. . . or a state-run program is tantamount to a sign that says "No disabled allowed." A state's failure to consider these necessary and often minor accommodations . . . is invidious discrimination in a most pernicious form – willful blindness. The state effectively tells the disabled, "As far as we are concerned, you do not exist." Like so many in the rest of society, the state simply averts its eyes when confronted with a member of the disabled, and tries to ignore the person as the state goes about its business.
>
> But this deliberate indifference is unreasonable and irrational. The disabled are as much a part of society as are those fortunate enough not to be challenged. . . . A state's decision to . . . construct programs as if the disabled are not a part of society stems from attitudes formed during a lengthy and tragic history of segregation and discrimination.
> *Amos v. Maryland Department of Public Safety*, 178 F.3d 212, 224 (4th Cir. 1999) (Murnaghan, J. concurring), *vacated on other grounds and dismissed as settled by Amos v. Maryland Dept. of Public Safety & Correctional Services*, 205 F.3d 687 (4th Cir. 2000).

Judge Murnaghan's words are as true today as when he wrote them. The "deliberate indifference" inherent in Respondents' "primary position" is unreasonable, irrational and contrary to their obligations under the VDA and ADA.

Therefore, for the reasons set forth herein, Petitioners respectfully request that this Court hold that the trial Court erred when it denied Petitioners' Motion for Partial Summary Judgment, granted Respondents' Motion for Partial Summary Judgment and entered final Judgment on behalf of the Respondents. Petitioners further pray that this Court reverse the trial Court's final Order of 5 May 2008 and remand this case to the trial Court with instructions to grant Petitioners' Motion for Partial Summary Judgment.

VII. REQUEST TO PRESENT ORAL ARGUMENT

Petitioners respectfully request an opportunity to present oral argument to this Court, in support of their Appeal.

DATED: 14 November 2008

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VIII. CERTIFICATE

The Appellants in this case are: Roger Winborne, Greg Morrell, Charles Holliday and John DeHaven.

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There are no parties to this action unrepresented by counsel.

Petitioners certify that they complied with Rule 5:26(d).

Petitioners do request Oral Argument before this Court.

CERTIFICATE OF SERVICE

I, Jonathan G. Martinis, caused to be served 12 copies of the Brief and Appendix by hand in the Office of the Clerk of the Supreme Court of Virginia, three copies to opposing counsel

Frank Ferguson, Esquire and Amy K. Dilworth, Esquire, at 900 East Main Street Richmond, VA 23219

caused to be served by hand, and one caused to be electronically filed by CD as a PDF document delivered by hand, at the same time as the Brief and Appendix this 14 day of November, 2008.

We do request oral argument on this matter.

Jonathan G. Martinis

11-14-08

14 November 2008