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.

REPLY BRIEF OF APPELLANTS

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III. ARGUMENT

A. Even if Respondents' "role" is to fund education, their sale of Lottery tickets through their Lottery retailers is a "program, service or activity" for the purposes of the VDA and ADA.

Even if Respondents' "role" is to fund education, they generate those funds by selling Lottery tickets to the public through their Lottery retailers. Those sales are a "program, service or activity" for the purposes of the Virginians with Disabilities Act ("VDA") and the Americans with Disabilities Act ("ADA") and must be fully accessible to the Petitioners. *See*, VA. CODE ANN. §§ 51.5-1, 51.5-40; 42 U.S.C. § 12132; 28 C.F.R. § 35.130(b)(1).

Respondents' argument that they do not provide a program or activity for the purposes of the VDA, which is not supported by any citations to authority, is contrary to the plain language of the Act and the plain meaning of the words used by the General Assembly. Tellingly, Respondents do not attempt to distinguish *Herrell v. Commonwealth*, 28 Va. App. 579, 585, 507 S.E.2d 633, 636 (1998), which held that "Any is defined as . . . every." Hence, pursuant to *Herrell* and the plain meanings of "program" and "activity," this Court should hold that the phrase "any program or activity conducted by or on behalf of any state agency" in VA. CODE ANN. § 51.5-40 means that the VDA applies to <u>every</u> program or activity of <u>every</u> state agency - including Respondents' sale of tickets through their retailers.

If the General Assembly had wanted to exempt Respondents' actions from the VDA, it would have so stated in the Act. This is especially true because the General Assembly included exceptions in every other section of the VDA. *See,* VA. CODE ANN. §§ 51.5-41(2); 51.5-42(B); 51.5-43; 51.5-44(c); 51.5-45(C); 51.5-46(A). Because the General Assembly did not expressly exempt Respondents, this Court should hold that it intended for them to be subject to the VDA. *See, Comm. ex rel. Virginia Dept. of Corrections v. Brown*, 259 Va. 697, 704-705, 529 S.E.2d 96, 100 (2000) (applying principle of *expressio unius est exclusio alterius*).

Respondents fail to cite a single case in support of their argument that they do not provide a "program, service or activity" for the purposes of the ADA. Indeed, case law has consistently held that "the ADA's broad language brings within its scope anything a public entity does." *Yeskey v. Pa. Dep't of Corr.*, 118 F.3d 168, 171 (3d Cir. 1997), *affirmed* 524 U.S. 206 (1998). *See*, also, *Johnson v. City of Saline, et al.*, 151 F.3d 564, 570 (6th Cir. 1998) ("the word 'activities,' on its face, suggests great breadth and offers little basis to exclude any actions of a public entity.").

Nevertheless, Respondents cite publications of the United States Department of Justice in an attempt to support their argument. However, their effort fails because the Department flatly states that the ADA "applies

to anything a public entity does." 28 C.F.R. pt. 35, app. A at 456 (1996).

Even if the phrase "service, program or activity" is ambiguous, Respondents' argument would still fail because the legislative history of the ADA states that the Act applies to "all actions of state and local governments." H.R. REP. NO. 101-485(II), at 84, 151 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367, 434.

Furthermore, Congress intended that the ADA be interpreted consistently with the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.. Johnson,* 151 F.3d at 571; 1990 U.S.C.C.A.N. at 473 ("The Committee intends that Title II work in the same manner as" the Rehabilitation Act.). The Rehabilitation Act defines "program or activity" as including "all of the operations of" a government entity. 29 U.S.C. § 794(b)(1)(A). Thus, the term "services, programs and activities of a public entity" in the ADA must also encompass all actions of a state agency, including Respondents' sale of Lottery tickets through their Lottery retailers.

Consequently, Respondents argument that their only program or activity is the "production of revenues to support public education" must fail. But even if that is Respondents' only program, they have unlawfully excluded Petitioners from it. The revenues supporting public education come from Respondents' sale of Lottery tickets to the public. Because

Respondents' Lottery retailers are inaccessible, Petitioners cannot purchase tickets and, therefore, cannot equally support public education.

B. The "real remedy" sought by Petitioners is equal access to Lottery tickets sold through Respondents' Lottery retailers. Respondents' obligations under state and federal law give them the power and duty to ensure this access.

As is more fully stated in Petitioners' Motion to Strike Issues and Arguments Raised in Respondents' Brief of Appellees ("Motion to Strike"), the arguments contained in Section C of Respondents' Brief were not preserved for Appeal and, therefore, are not before this Court. Petitioners rely upon the arguments made in their Memorandum in Support of their Motion, filed on 12 December 2008.

Even if Respondents' arguments are before this Court, they are meritless. First, Respondents incorrectly argue that the "real remedy" sought by Petitioners is "retrofitting, renovation or alteration of the Lottery retailers" and that this "real remedy" is barred by VA. CODE ANN. § 51.5-44.

Respondents' position is simply wrong. Petitioners pray that the Court enjoin Respondents to provide full and equal access to their Lottery tickets by ensuring that their Lottery retailers are accessible. *See,* JA at 1-3, 35-47. If the Court grants Petitioners the remedy they seek and Orders Respondents to only grant licenses to accessible retailers, Petitioners will receive equal access to tickets without a single retailer having to "retrofit"

its premises. This remedy is legally cognizable and was described by the Court in *Paxton v. Department of Tax and Revenue*[1], 192 W.Va. 213, 451 S.E.2d 779 (1994) and *Tyler v. The Kansas Lottery,* 14 F. Supp. 2d 1220 (D. Kan. 1998).

This remedy is not only required by the ADA and VDA, but by Respondents' own statute and regulations, which state that they must:

- determine whether retailers are accessible 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 retailers comply with all applicable state and federal laws as a condition of being eligible to sell tickets. 11 VA. ADMIN. CODE 5-31-130(A); and
- periodically examine whether their retailers are complying with all applicable laws. 11 VA. ADMIN. CODE 5-31-70(A).

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[1] Respondents incorrectly claim that *Paxton* was superseded by *Bacon v. City of Richmond,* 475 F.3d 633 (4th Cir. 2007). The two cases are in harmony. *Bacon* 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. *Paxton* enjoined the state Lottery agency, which was charged to operate the Lottery, to ensure that its Lottery retailers were accessible as required by the ADA. Thus, the result in *Paxton* is consistent with *Bacon.* Both are applicable to the present case. Because Respondents are the agency charged to operate the Lottery, VA. CODE ANN. § 58.1-4001, they can, pursuant to *Paxton* and *Bacon,* be "punished or enjoined" when they fail to ensure that their retailers are equally accessible to Petitioners.

Unfortunately, as Respondents' "primary position" shows, they have ignored these duties and admitted that they found over 94% of their retailers to be inaccessible. JA at 230-267. Consequently, Petitioners have been excluded from participating in Lottery tickets and benefiting from Lottery prizes, in violation of their ADA and VDA rights, because the only way a person can buy a ticket is to visit a retailer. JA at 225, ¶ (5).

If the Court grants Petitioners their remedy and enjoins Respondents to only grant licenses to accessible retailers, Respondents' violations will be cured and Petitioners will receive equal access as required by the VDA and ADA. Respondents seem to acknowledge this, but wrongly claim that "seeking to impose a no-license sanction for an alleged accessibility shortcoming achieves no appropriate or judicially cognizable goal in and of itself." To the contrary, Petitioners' requested remedy will achieve the intent of Congress and the Virginia General Assembly: equal access for people with disabilities. *See*, VA. CODE ANN. § 51.5-1; 42 U.S.C. § 12101. Petitioners' remedy will also serve the public's interest in "the full participation of the disabled in the economic, social and recreational life of the community." *Martin v. Metropolitan Atlanta Rapid Transit Authority,* 225 F. Supp. 2d 1362, 1383 (N.D. Ga 2002).

Put another way, if the Court enjoins Respondents to revoke the

licenses of inaccessible Lottery retailers, people without disabilities will have the same access to tickets at those retailers that Petitioners do now. Respondents seem to acknowledge that this remedy will put Petitioners on equal footing with people without disabilities, but claim that equal access is unfair because it will result in "reduced availability of those products to everyone in the Commonwealth."

Even if this is true, the result will be equal access as intended and required by the ADA and VDA. At any rate, Respondents' argument is groundless because an agency of the Commonwealth "will not be heard to complain of fairness when it, through the General Assembly . . . created the system." *Horner v. Department of Mental Health,* 268 Va. 187, 192-193, 597 S.E.2d 202, 205 (2004). This is especially true because "[w]hether an enactment is wise, and matters of policy, are questions for the legislative branch of government and not the judicial branch." *Id.*

Additionally, Respondents' argument is contrary to years of case decisions holding that Petitioners are the "masters of their complaint" and choose the defendants to sue and the causes of action to pursue. *See, e.g., Caterpillar, Inc. v. Williams,* 382 U.S. 386, 392 (1987). Because of this, Courts are "bound to accept [Petitioners'] characterization of [their] own claims." *Dolan v. Roth,* 325 F. Supp. 2d 122, 130 (N.D. NY 2004)

affirmed 170 Fed.Appx. 743 (2d Cir. 2006) (citing *Caterpillar*).

Petitioners have consistently stated that they seek relief from Respondents pursuant to VA. CODE ANN. § 51.5-40 and 42 U.S.C. § 12132, not from individual Lottery retailers under VA. CODE ANN. § 51.5-44. *See, e.g.,* JA at 35-40, 45-47. That alone defeats Respondents' attempt to define their "real remedy." *Dolan,* 325 F. Supp. 2d at 130. Moreover, Respondents have acknowledged that Petitioners do not seek relief under VA. CODE ANN. § 51.5-44. JA at 60, ¶ 15.

Finally, Respondents completely misstate the requirements of the ADA when they argue that the Act does not require facilities built or altered before 1993 to be accessible. Contrary to their argument, the ADA requires such facilities to become accessible by removing "architectural barriers" to accessibility when doing so is "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). 28 C.F.R. § 36.304 gives examples of "readily achievable" barrier removal including the provision of accessible parking, ramps and paths of travel - the very features Petitioners need to access Lottery tickets and Respondents admit are lacking from the vast majority of their Lottery retailers. JA at 230-267.

C. The VDA provides Petitioners a "basis for relief" even though no regulations have been promulgated. The VDA does not import 28 C.F.R. § 35.150.

As with the arguments in Section C of Respondents' Brief, the arguments they make in Section D were not preserved for Appeal and, therefore, are not before this Court. Petitioners rely upon the arguments made in their Memorandum in Support of their Motion.

Even if Respondents' arguments are before this Court, they are groundless. First, Respondents' incorrectly argue that the VDA is unenforceable because no regulations have been issued. To the contrary, nothing in the VDA either conditions it on the issuance of regulations or requires VOPA to promulgate regulations. The Act simply states that VOPA will issue regulations "**as may be necessary** to implement this section." VA. CODE ANN. § 51.5-40 (emphasis added).

VOPA has not issued regulations because the VDA is clear on its face and does not require additional interpretation. *See, e.g., Supinger v. Stakes*, 255 Va. 198, 205, 495 S.E.2d 813, 827 (1998) ("that which is plain needs no interpretation.")(citation omitted). The VDA unequivocally gives people with disabilities the right to access all programs and activities of all state agencies, VA. CODE ANN. §§ 51.5-1, 51.5-40, and the ability to sue state agencies that violate that right, VA. CODE ANN. § 51.5-46. These plain

requirements and remedies do not require elaboration. *Id.*

Furthermore, Respondents' argument is disingenuous. As Respondents admit, they have been aware of the issues in this case since 1999. JA at 134, line 5. Had they truly misunderstood their VDA responsibilities or honestly felt that regulations were necessary, they could have pursued any number of remedies at any time since then, including:

- Filing an action for a Declaratory Judgment and asking the Court to make a "binding adjudication" of their responsibilities under the VDA. *See*, VA. CODE ANN. § 8.01-184;
- Filing a Petition for a Writ of Mandamus to compel VOPA to promulgate regulations. *See*, VA. CODE ANN. § 8.01-644; or
- Seeking an opinion from the Virginia Attorney General as to their or VOPA's VDA responsibilities. *See*, VA. CODE ANN. § 2.2-505.

Instead, Respondents chose to ignore their obligations until they were called before the Court. Only then did they claim that regulations are needed to interpret the unambiguous language of the VDA.

Next, Respondents incorrectly argue that the VDA "offers Petitioners no basis for relief." This argument, which is not supported by a single citation, is false. The VDA gives Petitioners rights, VA. CODE ANN. §§ 51.5-1, 51.5-40, and a remedy to secure them, VA. CODE ANN. § 51.5-46.

Nothing more is needed to offer a "basis for relief."

Respondents' argument that the VDA "imports" a defense from ADA regulation 28 C.F.R. § 35.150(a) is incorrect and contrary to statements they made to the trial Court. Respondents previously admitted, "we can't assume that the VDA adopts, even by reference or implication, all the. . . regulations that have come out . . . on the ADA." JA at 315, lines 18-25.

Respondents were correct to admit this. No reference or citation to 28 C.F.R. § 35.150(a) appears in the VDA. If the General Assembly had wanted to provide Respondents with such a defense, it would have been included in the language of § 51.5-40, like the exceptions that appear in every other section of the Act. *Brown*, 259 Va. at 704-705.

Moreover, it is common for ADA defenses to be inapplicable to state disability rights laws. Federal civil rights laws create a "floor" rather than a "ceiling." *Adams Fruit Co. Inc. v. Barrett,* 494 U.S. 638, 647-48 (1990). Thus, the ADA cannot "serve as a 'ceiling' limiting the . . . greater scope of rights and remedies available under" the VDA. *Wood v. County of Alameda*, 875 F. Supp. 659, 663 (N.D. Ca. 1995) (citing *Adams Fruit*).

Respondents' contention that Petitioners have not "alleged that Lottery products are not readily and broadly available" is absurd. Petitioners have repeatedly made such allegations. *See, e.g.,* JA at 8-29,

36 at ¶ 189, 40 at ¶ 198. Moreover, Respondents' admissions prove the veracity of these allegations. Respondents admitted that they found over 94% of their Lottery retailers, in every corner of the Commonwealth, to be inaccessible, JA at 174-176; 230-267. Moreover, Respondents could not identify, in any part of the Commonwealth, a single accessible retailer. JA at 136-137; 142, lines 8-11, 276-278.

D. *Bacon* does not absolve Respondents of liability because they are charged by law to supervise, operate and maintain the Lottery system. Respondents must only control their own actions to ensure equal access to Lottery tickets.

Respondents' argument that *Bacon v. City of Richmond,* 475 F.3d 633 (4th Cir. 2007) absolves it from liability is wholly dependent upon their assertions that they do not "control . . . the physical operations of" their Lottery retailers and "[i]t is these retailers who are responsible for . . . managing and controlling their own property." Respondents' argument fails because whether they "control the physical operations" of their retailers is irrelevant. Because Respondents are charged by law to supervise, operate and maintain the Lottery system, they must ensure that Lottery tickets are accessible to Petitioners and "control" their own actions by ensuring that only accessible retailers have licenses to sell tickets.

Bacon supports Petitioners' case. The *Bacon* Court did not hold that individual schools were liable for their inaccessibility. Rather, it held that

the School District, the government agency "charged by law" to operate the school system, was responsible for ensuring equal access to schools. 475 F.3d at 640-641. This Court should follow *Bacon* and hold that Respondents, the government agency "charged by law" to operate the Lottery system, are responsible for ensuring equal access to tickets.

It is undeniable that Respondents are "charged by law" to supervise, operate and administer the Lottery system, including the sale of Lottery tickets. *See, e.g.,* VA. CODE ANN. § 58.1-4001 ("This chapter establishes a lottery to be operated by the Commonwealth."); VA. CODE ANN. § 58.1-4006(A) (The Executive Director of the Lottery "shall supervise and administer the operation of the lottery."). Respondents are also charged to license and supervise[2] their retailers, including the power and duty to:

- 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 prior to granting them a license to sell Lottery tickets. VA. CODE ANN. § 58.1-

[2] Respondents "offer more than a mere license" to their Lottery retailers. *Paxton,* 192 W.Va. at 784-785, 451 S.E.2d at 219-219. They "furnish the lottery devices and services that allow [retailers] to conduct lottery sales." *Id.* Respondents provide their retailers with training, equipment and tickets. *See,* 11 VA. ADMIN CODE. 5-31-10, *et seq;* 11 VA. ADMIN CODE. 5-41-10, *et seq.* They also require retailers to sell tickets at certain prices, pay prizes, undergo training and maintain specific bank accounts. *Id.*

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 comply with all applicable laws. 11 VA. ADMIN. CODE 5-31-70(A);
- Deny or revoke the license of retailers that violate applicable laws 11 VA. ADMIN. CODE 5-31-160

Accordingly, *Bacon,* the ADA, the VDA and Respondents' own statute and regulations give them the power to "control" whether retailers have a license to sell Lottery tickets and the duty to "control" licensure by ensuring that only accessible retailers have licenses. Hence, in order to comply with the ADA and VDA, Respondents need not "control the physical operations" of their retailers. Instead, they must only control <u>their own</u> actions; specifically, they must use their licensing authority to ensure that only accessible retailers receive and maintain licenses to sell tickets.

Because Respondents have refused to do so, as their "primary position" and admissions show, their Lottery retailers are overwhelmingly inaccessible to Petitioners. Consequently, Respondents have "violated [their] obligations under" the ADA and VDA because Petitioners have been

excluded from participating in Lottery tickets or benefiting from Lottery prizes. *Paxton,* 192 W.Va. at 219 213, 451 S.E.2d at 787. Therefore, Respondents "can be punished or enjoined" as Petitioners request. *Bacon,* 475 F.3d at 642.

IV. CONCLUSION

For the reason set forth herein and in their Opening Brief, Petitioners respectfully request that this Court 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.

Dated: 19 December 2008

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VIII. CERTIFICATE

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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 this Brief 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 mail and one caused to be electronically filed by email as a PDF document, at the same time as the Brief this 19th day of December, 2008.

We do request oral argument on this matter.

Jonathan G. Martinis

12-19-08

19 December 2008