Statement of the
American Foundation for the Blind

Submitted to the
Subcommittee on the Constitution, Civil Rights and Civil Liberties
House Judiciary Committee

In the matter of

Achieving the Promise of the Americans with Disabilities Act in the Digital Age –
Current Issues, Challenges, and Opportunities

Public Hearing
April 22, 2010

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Introduction

Good afternoon, Chairman Nadler and Subcommittee members, and thank you for the opportunity to share with you our enthusiasm for the work that the U.S. Department of Justice is undertaking to make it clear that the Americans with Disabilities Act (ADA) will continue to be the emancipation proclamation for all people with disabilities in the digital age. Indeed, the title of today's hearing, *Achieving the Promise of the ADA*, could easily be reworded to *Keeping the Promise of the ADA*. People with disabilities have always been confident in our understanding that the reach and relevance of the ADA can, does, and must endure in a world that is increasingly reliant on technology and the Internet in literally every area of daily life.

My name is Mark Richert, and I serve as the Public Policy Director for the American Foundation for the Blind (AFB), the national organization to which Helen Keller devoted more than four decades of her extraordinary life. I am proud to speak this afternoon on behalf of the more than 25 million Americans living with significant vision loss. In addition I serve as a co-chair of the Civil Rights Task Force of the 100-organization-member Consortium for Citizens with Disabilities and a co-founder of the Coalition of Organizations for Accessible Technology, the nation's largest cross-disability coalition advocating for the right of all people with disabilities to full access to telecommunications and video technologies. I am keenly aware of the power of technology and the Internet to transform the lives of tens of millions of Americans living with a variety of disabilities. I also know from personal experience that, in many instances, unusable Internet sites and inaccessible communications and high-speed data equipment serve as the very barriers to employment, civic participation and quality of life that such powerful tools can and should be particularly useful in breaking down. Following the charge of today's hearing to explore the major issues, challenges and opportunities about which we must be aware to fully realize the promise of the ADA in the digital age, let me first turn to a very brief analysis of the public policy context in which we are having this discussion.

Issues

Although no one could have fully grasped in 1990 when the ADA was enacted exactly how technology would so fundamentally transfigure our lives, all who gloried in the ADA becoming the law of the land rallied behind one overarching moral call, as the first President Bush proclaimed it, to "Let the *shameful wall* of exclusion finally come tumbling down." Internet inaccessibility is itself a shameful and unnecessary obstacle but with the added complication of being somewhat less visible than the physical steps that even today may bar people with disabilities from entering a place of employment, a store or courthouse. When access to employment, education and information is locked behind an inaccessible website, access to justice and full participation in society is denied for people with disabilities. This is why the disability community has long understood that the ADA is as essential in the digital age as it has always been.

The question is not whether the ADA applies to the Internet. Rather, the ADA applies, as it has always applied, to a range of entities who are not and should not be free to shut out

people with disabilities virtually just as they may not do so physically. An array of divergent court decisions have scrambled the common sense understanding that the ADA's nondiscrimination mandate applies to public accommodations regardless of the modality they use to conduct business, in person, by phone or online. As a result, the disability community has consistently called for the U.S. Department of Justice (DOJ) to bring some order out of this needless chaos and restate, with specificity, the ADA's role in ensuring accessible e-commerce.

As the Presidentially-appointed National Council on Disability (NCD) declared in its 2009 ADA Progress Report (www.ncd.gov/newsroom/publications/2009/publications.htm):

> Use of the Internet is an inherent part of life today. For people with disabilities, however, access is not guaranteed. Because the ADA was passed before the Internet became pervasive, and the Department of Justice (DOJ) regulations do not address Internet access specifically, many Web sites still are not designed to be accessible by people with certain disabilities. ... Implementation of the Section 508 Web Accessibility standards in the Federal sector, as well as the global impact of the World Wide Web Consortium's Web accessibility standards, demonstrate that the means for making Web sites accessible are well-established, and a Federal requirement for full accessibility of public Web sites is long overdue.

In 2003, NCD released "Application of the ADA to the Internet and the Worldwide Web" (www.ncd.gov/newsroom/publications/2003/publications.htm) in which the issues and case law surrounding Internet access were examined. Concluding that public accommodations are not relieved of their nondiscrimination obligations under the ADA merely by moving online, the NCD called on DOJ to clarify the rights of people with disabilities to have access to the Internet. Since that time, people with disabilities have had to continue to fight for access to commercial web sites, including having to resort to litigation.

Most recently, the Federal Communications Commission (FCC) released its much-anticipated *National Broadband Plan*, a comprehensive set of policy objectives intended to make broadband affordable and accessible to all Americans. Among its many significant recommendations of particular impact on the lives of people with disabilities, the FCC is calling for the following:

> Accessibility laws, regulations and subsidy programs should be updated to cover Internet Protocol (IP)-based communications and video-programming technologies. To do so: The FCC should ensure services and equipment are accessible to people with disabilities. The FCC should extend its Section 255 rules to require providers of advanced services and manufacturers of end-user equipment, network equipment and software used for advanced services to make their products accessible to people with disabilities. ...The federal government should ensure the accessibility

of digital content. The DOJ should amend its regulations to clarify the obligations of commercial establishments under Title III of the Americans with Disabilities Act with respect to commercial websites. The FCC should open a proceeding on the accessibility of video programming distributed over the Internet, the devices used to display such programming and related user interfaces, video programming guides and menus.

In addition to the FCC's recommendation that DOJ's ADA regulations be clarified to resolve any lingering doubts about the relevance of the ADA to commercial websites, the FCC is recognizing in its recommendations the inextricable connection today between use of the Internet itself and the accessibility of the devices and services needed to access the Internet. This is why, though the anticipated improvements to the ADA rules announced by DOJ are critical, such a move is only one vital piece of the policy puzzle. As people with disabilities, the sites we visit online that are run by employers, governments and public accommodations that the ADA covers must be accessible to us, but the mobile and other technologies we use to get there must themselves be accessible.

Challenges

Research reveals that Internet use by people with disabilities is much lower than that of the general population. Specifically, fewer than 30% of people with disabilities over the age of 15 were shown to have access to the Internet, compared to more than 60% of people without disabilities. Also, people with disabilities in both metropolitan and non-metropolitan areas have lower rates of Internet use than their geographic counterparts with no disability, with non-metropolitan people with disabilities having the lowest rate of Internet use (26.7%) of all groups. (See Enders, Alexandra. "Ruralfacts: Disability and the Digital Divide: Comparing Surveys with Disability Data." Research and Training Center on Disability in Rural Communities, The University of Montana Rural Institute, Missoula, MT. June 2006, at http://rtc.ruralinstitute.umt.edu/TelCom/Divide.htm; *See also* Dobransky, Kerry and Hargittai, Eszter. "The Disability Divide in Internet Access and Use." *Information, Communication and Society.* 9(3):313-334. June 2006 at http://eszter.com/research/a18-disabilitydivide.html.)

Moreover, this past February, the FCC released the results of a consumer survey (conducted in October 2009), *Broadband Adoption & Use in America*, that found affordability and lack of digital skills are the main reasons why 93 million people -- or one third of the country -- are not connected to high speed Internet at home. Perhaps most astoundingly the survey found that 39 percent of all Americans without broadband have some type of disability**.** (See FCC's "Broadband Adoption & Use in America," at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf.)

These numbers demonstrate, among other things, that people with disabilities are being left behind as America migrates to broadband. There are of course many factors contributing to this inequity, particularly the inability of many people with disabilities to afford high-speed connection to the Internet. These challenges, however, are further

exacerbated by the routine every-day experience of people with disabilities who, once they get online, run into very real barriers.

To understand the impact, both positive and negative, that technology and the Internet has on the daily lives of people with disabilities, one must first have a general sense of how people with disabilities use and interact with such technologies. For individuals who are blind or visually impaired, the most commonly used means for connecting to the Internet and browsing the web are software applications that either magnify or enhance the text and images on the screen of the computer or hand-held device, read the text and images aloud through synthetic speech, or combine both of these approaches. To be effective, these applications need to operate in a predictable environment, meaning that the online destination to which a user goes must incorporate common design features with which these special applications can interact. When that environment is not so designed, the consequences can be devastating.

Take, for example, the case of Pam from Chicago who wrote to me in response to my invitation to share with this Subcommittee personal stories about the every-day online experiences of people with disabilities. As a mom who happens to be blind, Pam wants desperately to play as much of a role in the education of her son as would any loving parent. However, because the website used by her son's school system to allow parents the ability to track their children's progress, review teacher comments, and even peek at assignments that are in fact completed and grades received, does not incorporate basic web site accessibility design, Pam feels frustrated and ineffective as a parent. She of course is not an ineffective and uninvolved parent. She is, however, being shut out, through deliberate indifference by the school system that is aware of the website limitations, from her right as a parent to be fully involved with the education of her son. No half measures or alternative approaches that the school system might offer her can possibly afford Pam with the same degree of instant access, privacy, convenience and control over her ability to be a supportive and full partner in her son's education as is afforded parents who do not happen to have a disability. We can do better, and the promise of the ADA means that we must.

Try to imagine, if you can, how frustrating it is for people with vision loss to make the investment in frequently expensive specialized software and hardware for the express purpose of taking advantage of the world of possibilities open to anyone who can connect to the Internet only to find that much of what is available is just out of reach. Sophisticated software programs commonly used by people who are blind to read aloud the text on the computer screen can only work well when the websites visited allow them to do their job. My fellow panelists are certainly more well-versed than I about the technical requirements needed to ensure website accessibility, but I do know that the solutions to the most common website barriers are known and have been known for some time. The key is to incorporate accessible design at the earliest possible stage and not, as seems to be the case in Pam's situation, to leave accessibility as an afterthought.

Pat from California described her frustration with her bank which provides a website for customers to use to review statements and otherwise manage their accounts but which has

failed to take accessibility into account. As she put it:

> When I told my bank that I'm blind and can't use the website with my screen reader, they told me that they had heard that complaint before and that they knew it wasn't all that useful but that I could simply go over the information I was interested in by phone with them. I tried explaining to them that having them read through all the figures in my checking account over the phone would take forever and not let me see the information for myself, but they said that was the only option I had.

What Pat regularly experiences with her bank is an all-too-common problem. If Pat went into the bank and asked for help, and the bank refused outright to be of assistance to her, of course the ADA would give her a remedy. But in this instance, the bank is essentially saying that the first-class, up-to-date, information available to all customers will not be made available to Pat because they are providing inferior alternatives. That, of course, is the point. Increasingly, the web is providing more timely and accurate ways to manage our financial, health, and other data records—for all of us, that is, except too many people with disabilities. The ADA can, does, and must stand for the proposition that communication should be as effective for customers with disabilities as it is for those who do not have disabilities. In Pat's case, no alternative can afford the same degree of privacy, convenience, accuracy of information, and timeliness that the online statement and account management provides. Therefore, the promise of the ADA is only fulfilled when banks such as Pat's make their websites accessible.

John from Washington State emphasizes the online barriers to employment. He writes:

> An increasing number of individuals with disabilities seeking gainful employment into the nation's workforce continue to be significantly disadvantaged, and thereby left under or unemployed and reliant of the public safety net, because of the growing trend of online employment application processes, that are inaccessible to them. As an Employer Relations Manager ... in the State of Washington, it is brought to my attention constantly that employers have shifted their pre-employment process to the internet, that this shift has become very frustrating for job applicants with conditions such as blindness, deafness, reading disabilities, learning disabilities and many others. The lack of accessible application processes have an adverse impact on the desire of many qualified applicants to enter the labor force. We must do everything possible to increase the employment of people with disabilities, which includes removing the first barriers experienced in the hiring process.

John is right about a lot of things. He is right that making the Internet more accessible will have a direct impact on the ability of people with disabilities to obtain work and remain in the workforce. But he is also right in pointing out that web accessibility is not just a priority for people with vision loss. For example, people with motor difficulties or who may have cognitive disabilities frequently struggle to fill out online forms with built-in time-out features. Because the individual might not be able to complete the online

form as quickly as might someone without those disabilities, the form "times out" and information entered is lost. Even many users without disabilities find this frustrating, but an accessibility solution that can be implemented allowing the user to opt out of the time-out function or to regularly save what information has been entered before the time runs out would be a tremendous help. The recognized web accessibility guidelines take such issues into account and, if implemented, would increase the usability of websites for many people with and without disabilities.

Opportunities

In assessing trends in online shopping, comScore, Inc. (www.comscore.com) found that, in spite of a volatile economy, the 2009 November-December holiday season was a remarkable one for e-commerce with more than $29.1 billion in online retail spending reported. In fact, December 15, 2009, was an historic moment with the highest ever online spending in a single day, more than $913 million in sales. It is more than superfluous to say that e-commerce is booming and holds tremendous promise for business and customers alike. It is equally as clear that people with disabilities, either as employees, customers, or business owners can share in this potential but largely do not. As I have discussed and as my colleagues will further demonstrate, solutions currently exist that would, if more widely used, turn this unfortunate and unnecessary inequity around.

In fact, we know that this is already proving to be the case. Over the last few years, through measured advocacy, information sharing, and cooperative negotiation, several major companies, among them Marriott, CVS, RiteAid, and Radio Shack, have committed to making their websites much more accessible (See the impressive array of structured negotiation press releases at www.lflegal.com). What this important work shows is that companies committed to meeting the needs of all their customers can and do achieve what some nay-sayers allege cannot be done. Most recently, Major League Baseball has committed to making www.mlb.com fully accessible, making literally millions of fans of America's favorite pastime happy while demonstrating conclusively that significant progress toward an inclusive online world is within our reach.

More and more educational institutions are waking up to their responsibilities to ensure that students with and without disabilities can achieve academically by benefiting equally from the online learning tools and methods available. But even as we are pleased with the progress, we know there are many more opportunities to break down needless barriers to full participation by people with disabilities. As Claudia, a visually impaired veteran of the Persian Gulf War, explained it to me:

> I am currently enrolled in an online program with the University of Phoenix in the doctorate program for industrial and organizational psychology. I have noticed that the university goes through extensive efforts to make all forms of their online program accessible, however, this is not easily accomplished with copyrighted material for some scholarly articles provided through EBSCOHost, ProQuest, and Thomson Gayle databases. All of the databases are used by most libraries and

provide extensive articles for research in any school projects. I have to spend numerous hours trying to get the articles to be accessible for me, therefore, I have to spend more hours and do lots of extra unnecessary steps to get the article. I think that companies make profits from universities, but never have any accountability for providing accessible documents to the university. ... I hope that your efforts are heard loudly and bring some accountability to those companies that use the internet to consider making the services accessible to all parties that could potentially use their services.

A Strategy for Ensuring Digital Independence

What Claudia, John, Pat and Pam all know from their personal experiences and those of their family members, friends, coworkers, employees and clients, is that this question of the ADA's role in the digital age, as important as it is, cannot be considered in isolation. How do we, for example, ensure that a student who is blind can access her college's online portal from her mobile phone just like her classmates regularly do? How can we be sure, as online library websites are made accessible to more people with disabilities, that our copyright law rewards author and publisher creativity and investment while permitting all those with a right to read the materials to do so without artificial or unnecessary access barriers? How can we know for certain that a deaf couple will be able to rent and download movies from an online video store and have confidence that the captions provided with the original movie will be passed through to the couple's computer or Internet-equipped television? How we will ensure that people with vision loss have access to programs with description on televisions with controls they can independently use? And how will we know that the plentiful gadgets that hotels, universities, schools, conference centers, health facilities, and a host of other venues will increasingly offer, if not require us to use, will truly be usable by all of us?

The answer is that the DOJ's commitment to affirm and clarify the ADA's applicability to commercial websites is a critical component of a much larger policy agenda. The Congress can help to keep the ADA's promise of full inclusion by looking beyond the four corners of the ADA itself, beginning that commitment anew this year and promptly enacting H.R. 3101, the Twenty-first Century Communications and Video Accessibility Act. This landmark bipartisan legislation would ensure that mobile and other Internet-equipped devices and video technologies are accessible to and usable by people with disabilities. It makes no sense for us to praise ourselves for our commitment to the promise of the ADA if we fail to ensure that commonly available high tech tools are liberators and not liabilities for people with disabilities. There is no greater statement that the U.S. House could make this year to commemorate the twentieth anniversary of the ADA than the passage of H.R. 3101.

Additionally, the DOJ must take action to clarify that accessibility obligations under the ADA also extend to high-tech equipment. The DOJ must ensure that the pending refresh of the ADA regulations incorporates meaningful guidance to ADA covered entities with respect to their obligation to offer accessible equipment to patrons and customers. The proposed Title II and Title III regulations fail to address the need for accessibility to

equipment provided by state and local government entities and public accommodations. Indeed, the regulations implementing the ADA have never adequately accounted for the need for access to equipment by people with disabilities, and the Department has acknowledged as much in the narrative accompanying the proposed regulations. For example, according to the Department,

> When the title III regulation was initially proposed in 1991, it contained a provision concerning accessible equipment, which required that newly purchased furniture or equipment that was made available for use at a place of public accommodation be accessible, unless complying with this requirement would fundamentally alter the goods, services, facilities, privileges, advantages, or accommodations offered, or would not be readily achievable. See 56 FR 7452, 7470-71 (Feb. 22, 1991). In the final title III regulation promulgated in 1991, the Department decided not to include this provision, explaining in the preamble to the regulation that 'its requirements are more properly addressed under other sections, and '... there are currently no appropriate accessibility standards addressing many types of furniture and equipment.' 56 FR 35544, 35572 (July 26, 1991). ' . . . The Department has decided to continue with this approach, and not to add any specific regulatory guidance addressing equipment at this time.

Unfortunately, the other regulatory provisions that the Department says should address free standing equipment accessibility are at best vaguely applicable. They do not specifically mention equipment accessibility or provide examples of some of the most commonly used items.

As a result, ADA coverage for most of the equipment to which people with disabilities, such as people with vision loss, for example, need access is at best in doubt. There is no specific regulatory hook clearly requiring accessibility of, for example, exercise equipment using electronic interfaces, computers at Internet cafes or hotel business centers, reservations kiosks used by hotels in lieu of an in-person check in procedure, and devices provided by medical facilities with which a patient must interact reliably.

Sometimes making such equipment accessible can be as simple as labeling a few basic controls in braille or large print, and sometimes equipment accessibility demands the modification or purchase of additional software or hardware. The combined effect of miniaturization, reduced power consumption, increased memory and functional capacity, and ever-lowering costs, means that making electronic and information technology (E&IT) and other equipment utilizing visual displays accessible is significantly more accomplishable today than was the case when the original ADA regulations were published.

In spite of the fact that the Department is proposing not to address equipment accessibility, the Department is certainly aware of the issues. Remarkably, instead of spelling out additional regulatory requirements per se, the Department merely acknowledges in the narrative accompanying the proposed rules that,

> If a person with a disability does not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration or would not be readily achievable.

We therefore urge the Department to specifically reference the accessibility of both fixed and free standing equipment in sections 36.302 and 36.304 entitled "Modifications in Policies, Practices, or Procedures" and "Removal of Barriers" respectively. The Department should reference specific examples of equipment (such as those outlined above) that best illustrate how such equipment's use is key to allowing people with disabilities to benefit from the goods and services offered by public accommodations such as private universities, hotels, medical facilities, gymnasia, business centers, retailers and others. Equipment accessibility is equally relevant in the context of Title II. Equipment such as automated teller machines, information kiosks and vending machines are frequently located in facilities operated by state and local government entities and hence, equipment accessibility should be addressed in the Title II regulations in a comparable manner to that which we propose for the Title III regulations.

Conclusion

In summary, we congratulate the DOJ for its leadership in ensuring the ADA's full relevance in the digital age. Hopefully the new rules will go a long way toward breaking down the often unseen but very real technology barriers that confront so many people with disabilities. We also know that much more needs to be done, and the American Foundation for the Blind is committed to working in partnership with you to expand possibilities for people with vision loss and all people with disabilities. Thank you.