

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 14-cv-03111-REB-KLM

JULIE REISKIN, *et al.*

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT, a/k/a RTD, a political subdivision of the
State of Colorado

Defendant.

**RTD'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
REGARDING LIABILITY [ECF NO. 82]**

Defendant Regional Transportation District ("RTD") hereby responds to Plaintiffs' Motion for Summary Judgment Regarding Liability [ECF No. 82] ("Pls.' Mot.").

INTRODUCTION

RTD's 172 light rail vehicles comply with the Department of Transportation's ("DOT") Americans with Disabilities Act ("ADA") regulations. Each RTD light rail vehicle ("LRV") offers at least two spaces for wheelchairs or mobility aids, each with a clear space of 48 inches by 30 inches, and a 32 inch-wide clear path to each space.

Plaintiffs argue that those spaces are inadequate because passengers cannot get past a wheelchair without the wheelchair having to move, an inconvenience that, Plaintiffs believe, ambulatory passengers do not experience. Plaintiffs make what amounts to a political case to amend the existing regulations, which, when adopted in 1991, did not

anticipate the size and number of wheelchairs riding transit today. Plaintiffs identify no theory, however, demonstrating that RTD is obligated by federal law to increase the size of wheelchair spaces on its existing LRV fleet. RTD's LRVs, some of which are now over twenty years old, satisfy the current regulations. Plaintiffs have ridden RTD's light rail system for many years, some since service began in 1994. They cannot now reasonably ask the Court to impose a new standard, the consequence of which is that RTD would likely have to retrofit or replace its entire fleet. If and when the DOT adopts new design regulations, RTD will ensure that LRVs ordered at that time comply, and even without such changes, RTD may take such considerations into account in ordering new LRVs.

UNDISPUTED MATERIAL FACTS

I. RTD's Light Rail Service and Light Rail Vehicle Fleet

RTD provides public transit services in the Denver metropolitan area and began light rail service in 1994. Third Amended Class Action Complaint ("Compl."), ECF No. 65, at ¶¶ 9, 55, 60. RTD operates a fleet of 172 Siemens LRVs put into service from 1994 through 2012. See Affidavit of Phillip Eberl ("Eberl Aff."), attached as Exhibit 1-1, at ¶¶ 2, 3.¹ RTD used DOT funds to purchase some of the LRVs. *Id.* In each contract, RTD required Siemens to comply with 49 C.F.R. Part 38, and when delivered, the LRVs appeared to accommodate at least two wheelchairs. *Id.* RTD can connect up to four LRVs to form a single train. *Id.* at ¶ 2. The fleet includes two models – 49 model SD100s and 123 model SD160s – that serve six light rail lines. *Id.* at ¶ 4. These same Siemens LRV models are also in service in other U.S. cities. *Id.* The differences between the two models

¹ All RTD Affidavits submitted with this brief are attached under Exhibit 1 and all RTD documents are attached under Exhibit 2.

are not visible to passengers; both models share the same door and aisle widths, seat size, and layout. *Id.* RTD obtains efficiencies in operations and maintenance from having interchangeable LRVs throughout its light rail system. *Id.*

Disabled passengers using mobility aids use a “mini-high” platform that aligns with the front door. *Id.* at ¶ 6. Operators let down a ramp between the platform and the LRV. *Id.* In the first row of seats, a flip seat can be raised to accommodate wheelchairs and mobility aids, facing inwards or outwards, in a clear space of 48 inches by 30 inches with a clear route of at least 32 inches wide. *Id.* at ¶¶ 7, 11. This space is designated with signs telling passengers to make room for a wheelchair. *Id.* at ¶ 8. There is an additional location for wheelchairs and mobility aids in the LRV entry area, also with a clear space of at least 48 inches by 30 inches and a 32 inch-wide route to that space. *Id.* at ¶ 9.

Additional priority seating for disabled passengers not using wheelchairs is located in the next row. *Id.* at ¶ 12. Signs direct non-disabled passengers to move. *Id.* After this lawsuit was filed, RTD updated its signage, moved the priority seating behind the spaces designated for wheelchairs and mobility aids, expanded its policy to give clear guidance to operators on exactly how to ask passengers to move, and retrained staff. See Policy & Training, attached as Exhibit 2-1.

II. Plaintiffs’ Use of Light Rail Service

Plaintiffs have ridden light rail since it began in 1994, and in all cases long before this lawsuit. See Excerpts from Plaintiffs’ Deposition Transcripts (“Pl. Dep.”) and attached

as Exhibit 4.² Plaintiffs have not noticed any change with the design of the LRVs. See Pl. Dep.³ Plaintiffs experienced the same issues identified in this case several years earlier but never notified RTD. See Pl. Dep.⁴ Plaintiffs were aware of how to make a complaint and had made complaints about bus service, but most did not make complaints about light rail service, some acknowledging it was not a priority. See Pl. Dep.⁵ RTD has record of only one Plaintiff making a complaint about light rail service to RTD in the two years prior to the filing of this lawsuit. Affidavit of Linda Ober (“Ober Aff.”), attached as Exhibit 1-2, at ¶ 5.

ARGUMENT

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Macon v. United Parcel Serv., Inc.*, 743 F.3d 708, 712-13 (10th Cir. 2014); Fed. R. Civ. P. 56(c).

I. **RTD’s light rail vehicles comply with the applicable design requirements.**

A light rail vehicle must provide space for two wheelchair or mobility aid users to reach areas, each with a minimum clear floor space of 48 inches by 30 inches:

(c) . . . [A]t **each entrance accessible by lift, ramp, bridge plate or other suitable means**, handrails, stanchions, passenger seats, vehicle driver seat platforms, and fare boxes, if applicable, shall be located so as to allow **a route at least 32 inches wide** so that at

² Deposition transcript cites are universally referenced as “Pl. Dep.” Specific page cites are provided in the footnotes. The following are available for this citation: Babcock, at 18:9-20; Beaver, at 25:23-25; Culpepper, at 29:20-23; Howey, at 32:24-33:10; Kilbourn, at 42:6-10; Lewis, at 35:15-17; McDonald, at 24:13-19; McNair, at 24:19-22; Milne, at 20:4-9; Quinlan, at 35: 22-23; Reiskin, at 64: 5-8; Torres-Vega, at 17:20-23.

³ Kilbourn, at 86:3-6; Beaver, at 112:9-12.

⁴ Lewis, at 35:21 – 38:24; 48:6-23; 64:18-65:10.

⁵ Babcock, at 13:4-19; 41:20-42:2; Beaver, at 36:8-14; 111:11-17; Culpepper, at 18:24-19:9; Lewis, at 41:22-42:2; McDonald, at 44:16-45:1; Milne, at 47:13-20; Reiskin, at 145:6-146: 13.

least **two wheelchair or mobility aid users** can enter the vehicle and position the wheelchairs or mobility aids in **areas, each having a minimum clear space of 48 inches by 30 inches, which do not unduly restrict movement of other passengers.** Space to accommodate wheelchairs and mobility aids **may be provided within the normal area used by standees and designation of specific spaces is not required. Particular attention shall be given to ensuring maximum maneuverability immediately inside doors.**

49 C.F.R. § 38.77(c) (emphasis added); see also 49 C.F.R. § 38.83(a)(1) (requiring “sufficient clearances” for two wheelchairs with same dimensions). RTD’s LRVs satisfy these requirements. Each LRV can accommodate a wheelchair or mobility aid in at least two locations, each with a clear space measuring at least 48 inches by 30 inches: at the entrance doors on either side of the entry area and at the designated area in the first row of seats, by raising the flip seat, on either side of the vehicle. See Expert Report by Geoff Ames (“Ames Rpt.”), attached as Exhibit 3, at 1; Eberl Aff., at ¶¶ 7-11. Passengers may also ride at the intersection of the aisle and the entry area. See Ames Rpt., at 1, 4. The route connecting the entrance to each wheelchair location is at least 32 inches wide. Ames Rpt., at 1, 4; Eberl Aff., at ¶11. Plaintiffs agree that an LRV can carry three or more wheelchairs at one time. See Pl. Dep.⁶

A. Whether or not they are outdated, the existing regulations still apply.

At least one vehicle per train must be accessible. See 42 U.S.C. §§ 12148(b), 12162 (a)(1) and (b)(1). The Architectural and Transportation Barriers Compliance Board (“Access Board”) establishes accessibility standards for transportation vehicles and published those standards in 1991. See 42 U.S.C. § 12204; ADA Accessibility Guidelines

⁶ Babcock, at 51:8-12; Beaver, at 109: 8-12; Culpepper, at 61:17 – 62:20; Jackson, at 86:5-18; Kilbourn, at 61:22-62:6; McDonald, at 50:15-21; 74:2-7; McNair, at 22:8-24; Nozlic, at 87:2-4; Torres-Vega, at 88:12-15.

for Transportation Vehicles, 56 Fed. Reg. 45530-01 (Sept. 6, 1991); 36 C.F.R. § 1192.83. The DOT enforces the transportation provisions of the ADA and incorporated the Access Board's design guidelines into its regulations. See 42 U.S.C. §§ 12149, 12163, 12186; 49 C.F.R. § 27.19; Transportation for Individuals with Disabilities, 56 Fed. Reg. 45584-01 (Sept. 6, 1991) (stated purpose is to enable people with all disabilities to safely and effectively use public transportation vehicles).

The DOT has made clear that "a vehicle **shall be considered** to be readily accessible to and usable by individuals with disabilities if it meets the requirements" of 49 C.F.R. Part 38. See 49 C.F.R. § 37.7(a) (emphasis added). To avoid uncertainty and the need for transit agencies to constantly change their fleets to stay in compliance with federal law, the DOT created this bright-line minimum federal requirement, and RTD has more than met that requirement. RTD purchased its LRV fleet under these design standards. Eberl Aff., at ¶ 3. RTD believed in good faith that the Siemens design complied with the applicable design standards. See Ames Rpt., at 3; Eberl Aff., at ¶3. Because the LRVs have been able to carry three or more wheelchairs and the same LRV models have been in operation in other cities for many years, RTD has reasonably believed its LRVs to be in compliance. See Eberl Aff., at ¶4.

Since the DOT vehicle regulations came into effect in 1992, circumstances have changed. Advances in wheeled technology and demographic changes mean wheelchairs are bigger and as a result, experts have suggested that the current standards may be outdated. See Steinfeld et al., *Standards and Anthropometry for Wheeled Mobility* 3-4, 15-16 (July 2005), available at <http://idea.ap.buffalo.edu//Anthro/FinalAccessReport.pdf>.

In addition, because of increased ridership and passengers bringing more and larger items onto transit, such as bicycles and strollers, there is increased demand for limited space. See Transit Cooperative Research Program, *TCRP Synthesis 88: Strollers, Carts, and Other Large Items on Buses and Trains* (March 30, 2014), available at http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp_syn_88.pdf. To address these concerns, the Access Board appointed an advisory committee to review the design guidelines for rail vehicles. See *Rail Vehicles Access Advisory Committee*, 78 Fed. Reg. 30828-01 (May 23, 2013). That committee recently published a report calling for a larger space for wheelchairs and mobility aids. See US Access Board Rail Vehicles Access Advisory Committee, *Final Report* (July 29, 2015), available at <http://www.access-board.gov/guidelines-and-standards/transportation/vehicles/rail-vehicles-access-advisory-committee/final-report>. In that report, the committee recommends increasing the minimum clear floor space to up to 32 inches by 59 inches “to accommodate larger and differently configured mobility aids and ensure that space for maneuvering is provided.” *Id.* at Chap. 4, § IV.A. The committee suggested adding a 60-inch maneuvering circle that could overlap the aisle and other seating locations. *Id.*

These recommendations, while commendable, do not carry the force of law. For that to happen, the Access Board must adopt design guidelines incorporating the recommendations and the DOT must incorporate the Access Board’s revised guidelines into its regulations, each following the rulemaking process. Until the larger minimum clear floor space or maneuvering room is incorporated into the applicable regulations, RTD has no legal obligation to provide it. See Ames Rpt., at 2-3.

Not only do they fail to carry the force of law, but the recent recommendations also demonstrate that the current DOT regulations were never intended to provide the space that Plaintiffs have interpreted the regulations to require. The Access Board has now demonstrated its intent to make a clear break from the prior design standards to provide additional space, including maneuvering room. See *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) (no indication agency's current view is change). The DOT never intended the space for wheelchairs to grow with the size of wheelchairs; rather, a vehicle is considered accessible – regardless of what future trends may indicate – if it complies with the design specifications. See *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1220 (10th Cir. 2014) (“design—and its secondary exclusive effect—must be evaluated solely under the Design Standards”). To make compliance dependent on the use of the LRV would make compliance with the regulations meaningless because any fully compliant LRVs would always be subject to claims. *Id.*

For example, some Plaintiffs have wheelchairs that recline, and they ride light rail in a reclined position and others carry multiple shopping bags on the back of the wheelchair. See PI. Dep.⁷ RTD has no control over whether Plaintiffs recline their wheelchairs on light rail or whether, when reclined, those wheelchairs fit, and similarly for what bags are attached to the chair. The regulations specify a prescribed space, with prescribed measurements, for LRVs to be deemed accessible. RTD is not required by federal law to adapt its LRVs to meet the changing uses of wheelchair space. See *Colorado Cross Disability Coal.*, 765 F.3d at 1220. The current regulations create no

⁷ Beaver, at 25:5-17; Howey, at 54:23-55:11; Jackson, at 71:23-25; Kilbourn, at 37:12-22; Chris Quinlan, at 23:23-24:22; Torres-Vega, at 39:16-23; 48:7-21.

federal legal obligation upon transit providers like RTD to offer anything more than the two wheelchair spaces, each 48 inches by 30 inches.

Plaintiffs are asking for more than federal regulations require, and a federal lawsuit is not the proper venue for such requests. For example, in their depositions, Plaintiffs indicated that they are asking the Court to order RTD to provide a number of accommodations that the regulation does not require: level boarding, to ride parallel to the direction of the train or forward facing, and priority boarding. See Pl. Dep.⁸ While understandable and appealing, none of these accommodations are required. Further, in order to redesign the LRV with two designated wheelchair spaces completely out of the aisle, the space would need to be much larger than 48 inches by 30 inches, plus additional maneuvering room. This case is instead about what the applicable DOT regulations require for LRVs to be considered readily accessible and RTD's LRVs meet those requirements. If Plaintiffs want additional space, they should encourage the rulemaking process. Asking this Court to find that the regulations required this extra space all along is asking this Court to make an untenable interpretation.

B. Plaintiffs' interpretation of the regulation is unsupported.

Plaintiffs urge an extreme interpretation of the regulation. See *Colorado Cross Disability Coal.*, 765 F.3d at 1221 (CCDC "take[s] the use of 'space' in the Design Standards to extremes"). For this Court to require RTD to commit millions of dollars to replace or retrofit its entire LRV fleet, Plaintiffs must present far more authority than dictionary definitions of the terms *clear space*, *maximum maneuverability* and *undue*

⁸ Culpepper, at 52:3-53:4; Lewis, at 63:9-11; McDonald, at 26:5-19; 52:9-53:6; 55:8-14. Plaintiff Nozlic, who uses a walker, asked for assurance so that she can always sit down. Nozlic, at 37:20-38:24.

restriction on movement. See Pls'. Mot., at 17,18. Plaintiffs do not cite a single case to support their interpretations. *Id.* Plaintiffs' expansive reading of these general terms, in contrast to DOT's specific standards, is untenable. See *Colorado Cross Disability Coal.*, 765 F.3d at 1223 (statutory construction states that the specific governs the general).

The DOT has never interpreted its own regulation to find that any of these terms require more than the specific requirement for at least two spaces for wheelchairs, each measuring 48 inches by 30 inches, with a 32-inch wide path to those spaces. This straightforward approach that LRVs "shall be considered" accessible if they meet the specific dimensional requirements avoids ever-shifting standards based on societal norms. See 49 C.F.R. § 37.7(a). The regulation does not define the terms *clear space*, *unduly restrict* and *maximum maneuverability*, and the Appendix gives no explanation. See 49 C.F.R. §§ 37.3, 38.3 & Appendix. Nothing in the new DOT guidance reasonably suggests the standards are subject to new interpretation. See Final Notice *Federal Transit Administration Issues Guidance to Public Transportation Agencies on Implementing Americans with Disabilities Act*, U.S. Department of Transportation 182 FR 60224 (Oct. 5, 2015); U.S. Department of Transportation, Federal Transit Administration, *FTA Circular 4710.1 Americans with Disabilities Act (ADA): Guidance* (Nov. 4, 2015), available at http://www.fta.dot.gov/documents/Final_FTA_ADA_Circular_C_4710.1.pdf.

Because RTD used DOT funds to purchase some of the LRVs, it is significant that the DOT has not identified any deficiency involving the RTD fleet. See Eberl Aff., at ¶13. In its most recent audit report, the DOT found no ADA violations. See Federal Transit Administration ("FTA"), *FY2014 Triennial Review Workshop Workbook*, available at

http://www.fta.dot.gov/documents/FY_2014_Triennial_Review_Workshop

[Workbook_Rev_2.pdf](#); Selections from Final Audit Report 2014, attached as Ex. 2-3.

These same LRV models are in operation in two other U.S. cities, and the DOT has not found a compliance problem with those vehicles either. See Eberl Aff., at ¶ 4. When Expert Ames asked for federal comments, the agencies remained silent. Ames Rpt., at 2.

The DOT's interpretation of its own regulations is entitled to deference. It is difficult to imagine how this Court should supersede the DOT's regulatory authority and find that after twenty years, based on dictionary definitions and in the face of clear regulatory standards as to what "shall be considered" accessible, RTD's LRV fleet fails to comply with the ADA. See *Decker*, 133 S. Ct. at 1337 (deferring to agency interpretation of its own regulation unless interpretation is plainly erroneous or inconsistent with the regulation); see e.g. *Melton v. Dallas Area Rapid Transit*, 391 F.3d 669, 675 (5th Cir. 2004) (deferring to the DOT as federal agency empowered to enforce Title II Part B of the ADA); *Midgett v. Tri-County Met. Trans. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir. 2001) (Ninth Circuit did not step in when a recent FTA review found transit agency was in compliance with the ADA).

1. Spaces designated for wheelchairs and mobility aids are compliant.

Plaintiffs make three arguments challenging the designated spaces for wheelchairs, but none renders the designated space noncompliant. Pls.' Mot., at 9-12.

First, Plaintiffs argue that because the LRV interior is 91 inches wide, the two spaces designated for wheelchairs and mobility aids on either side of the vehicle do not each provide 48 inches of clear space. See Pls.' Mot., at 10. Focusing exclusively on the

designated spaces is a red herring because the regulation specifically states that designated spaces are “not required.” 49 C.F.R. § 38.77(c); U.S. Access Board, *Light Rail Vehicles & Systems: Technical Assistance Manual 24* (Oct. 1992), available at <https://www.access-board.gov/attachments/article/693/Lightrail.pdf> (“Tech. Man.”). Even if the designated spaces do not each offer a 48-inch by 30-inch clear space on both sides of the vehicle at the same time, at least one designated space and other non-designated spaces are available. Moreover, contrary to Plaintiffs’ assertion that no wheelchair can adequately fit in the designated space, Plaintiffs have produced evidence that some wheelchairs do fit. See Image from Video (Beaver Dep. Ex. 3), attached as Exhibit 5; Pl. Dep.⁹

Second, Plaintiffs claim passengers do not have enough space to pass by a wheelchair in the designated space. Plaintiffs wrongly interpret the phrase “not unduly restrict passenger flow” as requiring a 32-inch wide path **past** the designated space. See Pls.’ Mot., at 18; Pl. Dep.¹⁰ Instead, each clear floor space must be connected to a 32-inch wide path to the door but not past it. See 49 C.F.R. §§ 38.77(c), 38.83(a)(1). The 32-inch wide path requirement “should not be interpreted as a requirement that the area where wheelchair or mobility aid users can position themselves be designated at a specific location.” Tech. Man., at 24. The only purpose of the 32-inch wide path is to ensure entry access for wheelchairs. See *id.*

⁹ Beaver, at 64:19-65:24; Culpepper, at 49:8-13; Jackson, at 86:5-18; McNair, at 22:8-23:7; Milne, at 32:9-14; Quinlan, at 48:10-15.

¹⁰ Howey, at 65:13-20.

It would make no sense to require an accessible path past the designated space when the space for wheelchairs can coexist in areas for standees. See 49 C.F.R. § 38.88(c); Tech. Man., at 24. The original proposed language was to “not prevent” the movement of passengers but was changed to unduly restricts: “[P]assengers may have to negotiate around an occupied space the same way in which they often must negotiate around standees.” ADA Accessibility Guidelines for Transportation Vehicles, 56 Fed. Reg. 45530-01, 45549 (Sept. 6, 1991). The phrase unduly restricts “more adequately reflect[s] its intent in specifying a location that need not be entirely out of the path of travel so long as passengers could still pass and embark or disembark.” *Id.* If either the Access Board or DOT had intended to clarify the design guidelines, they could have.¹¹

Here, passengers have enough room to pass outside of the 48-inch wide clear space to reach the interior of the train, as the Access Board intended. Even so, the only passengers that would pass through this area are those that need to board or exit the LRV at the front door (others can use another door). See Pl. Dep.¹² A walker does not need to get past a wheelchair because a walker, which fits within the definition of a wheelchair, is intended to use the space for wheelchairs. See 49 C.F.R. § 37.3. Further, Plaintiffs’ complaints seem less pointed towards passengers passing by rather than that the feet of passengers in wheelchairs riding in the designated space stick out into the aisle where they may be bumped by other passengers. See Pl. Dep.¹³ It is an acceptable

¹¹ The regulations have been amended several times, most recently in 1998 to adopt new standards for over the road buses. See Americans with Disabilities Act (ADA) Accessibility Guidelines for Transportation Vehicles: Over-the-Road Buses, 63 FR 51694-01 (Sept. 28, 1998).

¹² Kilbourn, at 79:16-80:12; Reiskin, at 110:20-23.

¹³ Culpepper, at 48:19-49:7; Howey, at 55:12-22, 58:6-23; Lewis, at 69:9-21; Reiskin, at 89:20-90:16; 109:18-110:15.

characteristic of public transit that passengers may have to move within close proximity to each other and squeeze between other passengers. See Ames Rpt., at 2. The Access Board also acknowledged that crowding is expected on transit and suggested wheelchair users “have as many options as possible in positioning themselves” in the train. See Tech. Man., at 25. Simply because Plaintiffs feel crowded does not mean the design unduly restricts passenger flow.

Third, the signage designating the next row of seats as priority seating is not confusing. The regulation mentions priority seating only within the context of signage and does not specify where the priority seating must be located or what the path of travel must be to that location. See 49 C.F.R. § 38.75(a) (“Each vehicle shall contain sign(s) which indicate that certain seats are priority seats for persons with disabilities and that other passengers should make such seats available to those who wish to use them.”). Here, RTD has provided signs that designate both priority seating and space for wheelchairs and mobility aids and is in compliance. See Ames Rpt., at 28-29; Eberl Aff., at ¶12.

2. Non-designated spaces for wheelchairs and mobility aids are compliant.

RTD’s LRVs offer additional options for wheelchair users in non-designated spaces in the entry area. Plaintiffs argue that those spaces are noncompliant because wheelchairs must move to let passengers in and out of the front door. See Pls.’ Mot., at 13-18; Pl. Dep.¹⁴ Plaintiffs believe this amounts to discrimination because ambulatory passengers are not inconvenienced in the same way. See Pl. Mtn., at 16; Pl. Dep.¹⁵ “The

¹⁴ Lewis, at 52:18-53:12; Beaver, at 69:2-18.

¹⁵ Babcock, at 8:15-9:10; 18:24-20:22; 45:13-46:12; 61:7-22; 83:8-22; Beaver, at 107:11-108:12; Jackson, at 54:21-55:1; Lewis, at 68:15-69: 2; McNair, at 19:20-20:1; Reiskin, at 107:12-108:15. Plaintiffs argue that turning their wheelchairs on to move aggravates the inconvenience, but in their depositions, most Plaintiffs

30 by 48 inch dimension is based on the standard space allowance for a person in a wheelchair. . . . The clear floor space that is typically provided for standees is usually large enough to meet this requirement.” Tech. Man., at 24. In other contexts, the concept of clear floor space can overlap other required clearances, including other clear floor spaces, and does not include turning space unless specifically stated. See 36 C.F.R. Part 1191, Appx. D, Ch. 3 (describing accessible building blocks for facilities); U.S. Access Board, *Guide to the ADA Standards* Ch. 3, available at <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/guide-to-the-ada-standards/chapter-3-clear-floor-or-ground-space-and-turning-space>.

Here, Plaintiffs acknowledge that movement is not fully inhibited but that, while inconvenient, they can move out of the way to allow the operator to help others get on or off the train at the front entrance. Pl. Dep.¹⁶ In addition, it is considered acceptable in public transit for a passenger in any area available for standing to move to allow other passengers to enter or exit the train. See Ames Rpt., at 2 (no guarantee passengers can find and occupy a seat for the duration of the trip every time they ride public transit, particularly during peak demand hours). The entry area is space provided for standing passengers and is not considered any less safe.¹⁷ The regulations do not require handrails. See Tech. Man., at 24. Because of low acceleration and deceleration forces,

acknowledged the time to power on a wheelchair is only a few seconds. See Beaver, at 78: 17-20; Culpepper, at 51:18-52:2; Lewis, at 55:21-56:11.

¹⁶ Beaver, at 69:12-18; 104:12-23; Howey, at 97:18-98:6; McNair, at 79: 9-12; Quinlan, at 81:12-82:12.

¹⁷ While they did not raise the issue of safety in their motion, Plaintiffs mentioned they felt unsafe in the entry area. See Pl. Dep.: Babcock, at 31:9-32:11; Beaver, at 98:21-99:7; Culpepper, at 13:14-14:19; Nozlic, at 42:23-44:10. Plaintiff Lewis disagreed with these Plaintiffs, however. Lewis stated that power wheelchairs are essentially too heavy to move if a train stops suddenly. See Lewis Dep., at 55:17-20.

LRVs do not need to provide securement devices. *Id.* at 25. For these reasons, Plaintiffs have failed to show that the space in the entry area does not comply with the regulations.

II. RTD has made space available for wheelchairs and mobility aids.

Plaintiffs claim that RTD does not make space available for wheelchairs because RTD light rail operators allow bicycles onto the front of the train and fail to ask non-disabled passengers to move out of that space, each in contravention of RTD's policies. See Pls.' Mot., at 19. The Tenth Circuit has already held that "Design Standards specifically addressing an issue are a better benchmark than more general prohibitions found in the statute itself" that prohibit discrimination. *Colorado Cross Disability Coal.*, 765 F.3d at 1220. Plaintiffs concede that more space for wheelchairs on LRVs would resolve their concerns about operators making that space available. Pl. Dep.¹⁸ Plaintiffs' mention of light rail operators is another red herring to the true legal issue of whether the LRVs comply with the design standards, which they do.

There is no legal requirement that a light rail operator ask passengers to move from the wheelchair spaces: "This requirement applies to light rail, rapid rail, and commuter rail systems **only to the extent practicable.**" 49 C.F.R. § 37.169(j)(2) (emphasis added). Only in a bus, which must provide wheelchair securement systems, the passenger in a wheelchair needs to occupy a wheelchair securement location, whereas rail vehicles do not have securement systems. 49 C.F.R. §§ 37.169(j)(1), 38.23(d); Tech. Man., at 25. In contrast to smaller buses, on a train, even if the designated wheelchair area is full, a passenger can usually board by finding other space on the train

¹⁸ Babcock, at 84:11-85:12; Lewis, at 58:16-25; Reiskin, at 99:14-100:5.

– and Plaintiffs’ own deposition testimony supports this. See Affidavit of Eric Miller (“Miller Aff.”), attached as Exhibit 1-3, at ¶ 2; Pl. Dep.¹⁹ A light rail operator has only a few seconds to dwell at a station before another train arrives so the ability to resolve a conflict with a passenger is limited. Miller Aff., at ¶ 3. Maintaining timely movement of all trains is essential when one train can shut down the entire light rail system. *Id.* at ¶ 4. As a result, RTD cannot be held responsible for violating federal law if operators fail to ask passengers to move because the regulation does not require it.

Plaintiffs’ argument that RTD violates its own policy, and that this amounts to discrimination, fails because Plaintiffs do not point to any distinct RTD policy or practice that can be called a discriminatory “use” of the LRV. See *Colorado Cross Disability Coal.*, 765 F.3d at 1219 (finding no discriminatory use or policy of allegedly inaccessible space). Simply because some operators failed to follow RTD policy, if true, does not mean that RTD has adopted a discriminatory policy or a practice. See *Tandy v. City of Wichita*, 380 F.3d 1277, 1288 (10th Cir. 2004) (plaintiff must demonstrate drivers are authorized to decline to offer disabled passengers designated seats or that *all* drivers *always* fail to offer disabled passengers designated seats). RTD’s policies attempt to enable disabled passengers to board and require light rail operators to ask passengers to move to make room for disabled passengers. See Policy & Training Materials, Ex. 2-1. RTD’s bicycle policies reflect an effort to avoid conflicts by prohibiting bicycles at the front of the train. See RTD Bicycle Policy, attached as Exhibit 2-2. Therefore, RTD does train its operators

¹⁹ Beaver, at 53:15-19; 58:8-20; 68:12-17; Culpepper, at 17:10-18:9; Jackson, at 22:4-10; Quinlan, at 65:6-67:13; 92:4-14.

to proficiency and to ensure they make use of accessibility-related equipment. See 49 C.F.R. §§ 37.173, 37.167(e).

Moreover, Plaintiffs' own experiences do not support their claims. Even where the operator allegedly failed to ask a passenger to move, the Plaintiff can usually still board the train in the entry area. See *e.g.* Pl. Dep.²⁰ Since RTD adopted the new policy, operators do ask passengers to move, and Plaintiffs admit having had fewer conflicts boarding trains. Pl. Dep.²¹ Some Plaintiffs admit they have never seen a bicycle in the entry area. Pl. Dep.²² Plaintiffs also should not hold RTD responsible for identifying and correcting allegedly errant behavior of light rail operators when Plaintiffs have neglected to notify RTD of any such failures to follow policy. See Pl. Dep.²³ Although they were aware of how to file a complaint with RTD, virtually none of the Plaintiffs did. Ober Aff., at ¶5.

Plaintiffs want the wheelchair areas **reserved** or **held open** for passengers in wheelchairs. See Pls.' Mot., at 19 ("Bicycles should not be permitted in the Wheelchair Seating Areas. Neither should strollers."). Many Plaintiffs testified that what they really wanted was to reserve a designated, exclusive space so that they did not have to have any interactions with other passengers. See Pl. Dep.²⁴ Plaintiffs even disagree amongst

²⁰ Quinlan, at 70:9-71:14; Babcock, at 27:18-30:24.

²¹ Babcock, at 107:21-109:16; Culpepper, at 12:6-13; 16:4-8; Jackson, at 56:23-57:5; Reiskin, at 98:1-99:13; 105:15-106:10.

²² Kilbourn, at 82:14-83:2; Lewis, at 62:17-20; McNair, at 33:10-13.

²³ Babcock, at 13:4-19; 41:20-42:2; Beaver, at 36:8-14; 111:11-17; Culpepper, at 18:24-19:9; Lewis, at 41:22-42:2; McDonald, at 44:160-45:1; Reiskin, at 145:6-146: 13.

²⁴ Beaver, at 87:20-88:17; Culpepper, at 41:11-25; Kilbourn, at 84:21-85:19; Reiskin, at 93:19-94:7.

themselves as to exactly how to accomplish this.²⁵ Plaintiffs not only seek to hold RTD liable to provide accommodations that the regulations simply do not require, but also disagree amongst themselves about what accommodations will resolve their concerns. Such disputes are resolved through policy debates, not a summary judgment motion.

CONCLUSION

RTD is committed to providing accessible service. For twenty years, RTD has operated light rail in full compliance with federal regulations. Regrettably, in this case, rather than using the rulemaking or political process, Plaintiffs misuse the court system by asking this Court to adopt an untenable interpretation of the regulations. If the design standards need to be updated to accommodate bigger wheelchairs and more riders, then the rulemaking process is the appropriate means. A court is ill-equipped to modify design standards based on the inconveniences to litigants whose experiences in this case vary widely. For these reasons, Plaintiffs have failed to establish that they are entitled to judgment as a matter of law and because there are issues of material fact yet to be resolved among the Plaintiffs themselves, Plaintiffs' motion should be denied.²⁶

²⁵ Plaintiff Kilbourn testified that he wanted RTD to force passengers to collapse their strollers; in contrast, other Plaintiffs thought strollers did not need to be collapsed. Kilbourn, at 83:6-19; *compare* Reiskin, at 105:6-14.

²⁶ Plaintiffs are not entitled to judgment as a matter of law for other reasons, namely that their claims are outside the statute of limitations and that the court lacks jurisdiction to order injunctive relief. See Answer to Third Amended Complaint [ECF No. 69]. RTD intends to file its motion for summary judgment shortly after the discovery cutoff. RTD respectfully requests that the Court decide all issues concerning the merits of the claims at one time. In addition, the claims raised by Plaintiffs CCDC, Reiskin, Howey and Lewis' are barred because these Plaintiffs released those claims in a settlement agreement. This issue has already been briefed and is currently pending before the Court. See RTD's Mot. for Summ. J. to Dismiss Pls., ECF No. 67; Pls.' Resp. to RTD's Mot. for Summ. J. to Dismiss Pls., ECF No. 72; RTD's Reply to Mot. for Summ. J. to Dismiss Pls., ECF No. 75.

Respectfully submitted this 9th day of November, 2015.

REGIONAL TRANSPORTATION DISTRICT

By: /s/ Jenifer M. Ross-Amato

Jenifer Ross-Amato, No. 34665

Mindy Marie Swaney, No. 47828

1600 Blake St.

Denver, CO 80202

Tel: (303)-299-2479

Email: jenifer.ross@rtd-denver.com

Email: mindy.swaney@rtd-denver.com

The document is signed and filed electronically; the original signature is on file with the undersigned's office.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RTD's Response to Plaintiffs' Motion for Summary Judgment Regarding Liability was served on November 9, 2015 via ECF addressed to:

Kevin W. Williams kwilliams@ccdconline.org

Andrew C. Montoya amontoya@ccdconline.org

Colorado Cross-Disability Coalition

/s/ Jenifer Ross-Amato

Jenifer Ross-Amato

This document was filed electronically. The original document and signature are on file in the undersigned attorney's office.