UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Case No. 96-2028**
	)	
	)	
DAYS INNS OF AMERICA, INC., *et al.*	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFF UNITED STATES' REPLY MEMORANDUM
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

(ORAL ARGUMENT REQUESTED)

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Dated: December 2, 1997

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INTRODUCTION

DIA[1] does not dispute that it participated in, and exercised extensive control over, the design and construction of the Champaign Days Inn. DIA also does not dispute that the Champaign Days Inn is inaccessible to persons with disabilities. Instead, DIA argues that, even though it participated in and controlled the design and construction of the Champaign Days Inn, it should nonetheless escape liability because franchisors cannot be held liable for violating §303 of the ADA or because § 303 of the ADA is void for vagueness.

DIA's arguments are fatally flawed. DIA cannot point to any statutory language or legislative history that in any way suggests Congress intended to exempt franchisors from liability under § 303 while placing liability solely on the small businesses that own individual franchises. Likewise, contrary to DIA's arguments, § 303 is not void for vagueness, since it gives DIA and other parties that participate in the design and construction of inaccessible buildings ample notice that the design and construct public accommodations and commercial facilities that are not accessible to persons with disabilities violates the law.

Unable to point to any evidence that Congress intended to protect franchisors from ADA liability, DIA urges the Court to adopt a strained interpretation of the ADA that has already been rejected by two courts. The Court should reject DIA's invitation to insulate it from liability because, as two courts have already recognized, DIA's construction of the ADA is inconsistent with the ADA's language, structure, purpose, and legislative history. Second, the Department of

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[1]Since DIA has no employees and since all of DIA's functions are actually performed by HFS' employees, DIA and HFS will be referred to collectively as DIA. For these same reasons, HFS' contention that it should escape liability is meritless. Since all of DIA's acts from which liability arises were actually performed by HFS' employees, the acts are plainly binding on HFS as well as DIA.

Justice's interpretation of § 303 is entitled to substantial deference. Finally, the facts show beyond dispute that DIA participated in, and exercised extensive control over, the design and construction of the Champaign Days Inn and other inaccessible Days Inns or, alternatively, that DIA operates the Champaign Days Inn.

ARGUMENT

A. The Ruling in the South Dakota Action Has No Relevance to this Case.

DIA's Opposition relies heavily on a ruling issued in the United States' action against DIA in the U.S. District Court for the District of South Dakota, Western Division. In that October 29, 1997 ruling, the district judge granted DIA's motion for summary judgment, holding on the narrowest possible grounds, that the facts in that specific case did not show that DIA designed, constructed, or operated the Days Inn in Wall, South Dakota ("Wall Days Inn"). That ruling, explicitly limited to the facts related to the design and construction of the Wall Days Inn, is not determinative in this case, involving the design, construction, and operation of the Champaign Days Inn, for two fundamental reasons.

First and foremost, the Court's decision in the South Dakota case was undeniably limited to the facts of that case -- it did not interpret § 303 of the ADA and did not foreclose franchisor liability for ADA violations. In addition, the facts in this case differ greatly from the facts in the South Dakota case, with DIA having significantly more involvement in the design, construction, and operation of the Champaign Days Inn than it had in the Wall Days Inn. For example, unlike the South Dakota case, the evidence here shows that DIA reviewed the final blueprints for the Champaign Days Inn, DIA made changes to those blueprints including a change relating to an accessibility feature, and the architect incorporated some of those changes into the final design

and construction of the Champaign Days Inn.

Second, the South Dakota decision is fatally flawed because it purports to apply § 303 of the ADA to the facts at issue in that case without providing any conclusions or guidance as to the conduct that § 303 prohibits or the proper interpretation of § 303.

Third, the South Dakota decision is internally inconsistent. It declines to revisit the interpretation of § 303 reached in United States v. Ellerbe Becket, 1997 WL 610275 (D. Minn. Oct. 2, 1997) and Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fl. 1997), which adopt the Department of Justice's construction of the statute, implicitly recognizing that these rulings are correct, while concluding as a matter of law that DIA did not design and construct the Wall Days Inn. Yet, the Department's position in Ellerbe and Johanson was the same as that advanced in the South Dakota case and in this Court -- i.e., that involvement in the design and construction of inaccessible facilities is sufficient to trigger potential liability under § 303. But, without stating any legal rationale for its decision, the South Dakota court declined to accept the Department's interpretation of the terms "design" and "construct" -- even though the Department is the agency entrusted by Congress with the interpretation of these terms.

Finally, the South Dakota court plainly misunderstood the government's position on the interpretation of § 303. The opinion notes that both parties agree that § 303 incorporates the language from § 302 which limits liability to owners, operators, lessors, and lessees. Slip op. at 7 n.7. But, as the briefs in this case and the South Dakota case plainly show, the United States has consistently taken the opposite position -- that the limiting language of § 302 is not incorporated into § 303.

Thus, the opinion of the South Dakota court is simply not persuasive on the issues before

this Court. The United States, therefore, submits that the ruling of the South Dakota court should not control or direct the Court here.[2]

B. DIA's Construction of § 303 Is Inconsistent with the Statute and Legislative History.

DIA urges the Court to limit liability under § 303, which expressly applies to public accommodations and commercial facilities, to the parties named in § 302, which is limited to persons who own, lease (lease to), or operate public accommodations. DIA's interpretation of § 303 of the ADA effectively eliminates § 303's application to commercial facilities, although Congress expressly included commercial facilities within the scope of § 303. DIA Opp. Mem. at 13-16. DIA insists that the government's reading of § 303 makes no sense, and that the plain language of the statute and the legislative history support its arguments. Id. at 10-18. But DIA chooses to ignore the fact that Congress used identical "failure to design and construct" language in the Fair Housing Act, and its legislative history amply demonstrates that Congress did not intend to limit liability under its new construction provisions. See U.S. Opp. Mem. at 6-8. Moreover, in a recent federal court ruling that considered strikingly similar arguments about proper liable parties under § 3604 of the Fair Housing Act, Baltimore Neighborhoods, Inc. v. Continental Landmark, Inc., Civ. No. AMD 96-916 (D. Md. Oct. 29, 1997) (attached as Exhibit A), the court determined that Congress indeed intended a broad reach for "failure to design and construct." Id. at 7-10. The Court opined,

Case law and the pertinent regulations suggest that the FHA is directed to a broad group

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[2]DIA has filed a motion asking the Court to give collateral estoppel effect to the South Dakota ruling in this case. But, as will be shown more fully in the United States' opposition to that motion, collateral estoppel cannot apply, since, among other reasons, the ruling does not address identical issues and since the ruling is not a final, nonappealable order.

> of persons who have the potential of frustrating Congress' intent to expand housing opportunities for disabled persons and creating equal housing opportunities and diverse communities. Accordingly, I am constrained to conclude that [a party] is a proper defendant [if] it was in a position to affect in a significant way the implementation of the accessibility requirements set forth in the FHA and the regulations promulgated thereunder.

Id. at 9 (emphasis added).

Furthermore, DIA baldly asserts that other federal courts that have considered the very question of law at issue in this case -- whether § 303 incorporates the limiting language of § 302 -- provide this Court with little guidance. DIA Opp. Mem. at 3-5. But DIA offers no rationale for the Court to ignore these well-reasoned opinions. In the Ellerbe Becket case, the court rejected the argument that the "plain language" of title III requires liability under § 303 to be limited to the parties who are named in § 302(a). The court adopted the Department of Justice's construction of § 303:

> Congress clearly intended that commercial facilities be subject to the accessibility standards for new construction. See H.R. Rep. 485, Part 2, 101st Cong., 2d Sess. 116 (1990) ("the use of the term commercial facilities' is designed to cover those structures that are not included within the specific definition of public accommodation.'"). Statutory language should be construed in a manner that gives effect to all terms so as to avoid rendering terms useless. See Moskal v. United States, 498 U.S. 103, 109-110 (1990). [Defendant] has not explained adequately how its interpretation would not result in an inexplicable gap in coverage of a class of buildings Congress clearly intended to be covered by the accessibility standards for new construction. [Defendant] responds by arguing that the list of entities liable should be imported into § 303(a) from § 302(a), but the phrase "of public accommodations" should be expanded to include "or commercial facilities." This argument undercuts [Defendant's] "plain language" logic.

1997 WL 610275 at *5. Noting that another federal court had come to the same conclusion, the Ellerbe court concluded that although the architect did not own, lease (lease to), or operate any of the facilities in question, it could nonetheless be held liable under § 303. Id. at *4-5, 7. See also Johanson v. Huizenga Holdings, Inc., 963 F. Supp. at 1178 (same). In sum, both the Ellerbe and

Johanson courts have concluded that the government's position is firmly grounded in the language, structure, purpose, and legislative history of §§ 302 and 303, squarely rejecting the same arguments that DIA makes to this Court. The United States respectfully requests this Court to do the same.[3]

C. **The United States' Construction of § 303 Is Entitled to Deference.**

DIA argues at length that the Department's construction of § 303 is entitled to no deference because DIA's interpretation of § 303 allegedly relies on the plain language of the statute, because the Court should not defer to the Department of Justice's technical expertise, and because the Department's interpretation of § 303 is allegedly unreasonable and nothing more than a litigating position. These arguments equally lack merit.

Contrary to DIA's assertions, DIA's interpretation of § 303 does not rely on the plain language of the ADA. DIA asks the Court not only to incorporate the limiting language from § 302(a) but also to amend it so that it applies to persons who own, lease (lease to), or operate commercial facilities in addition to the parties actually named in § 302(a). Clearly, DIA's construction of § 303, which incorporates language from § 302(a) that the Court must somehow amend to suit DIA's purposes, is not based upon plain language logic.

Recognizing that its own argument implicitly admits that § 303 is ambiguous, DIA argues that the Court should not defer to the Department's expertise in interpreting the statute it administers because the ADA's language is not technical in nature. But the Supreme Court has

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[3]Even the court in United States v. Days Inns of America, Inc., Civ. 96-5012 (D.S.D. Oct. 29, 1997) found that § 303 must be read to include parties who design and construct new buildings other than persons who own, lease (lease to), or operate public accommodations and commercial facilities. Slip. op. at 8-10.

not limited deference to agency interpretations involving technical matters. As the Supreme Court recently explained, courts must defer to agency interpretations of statutes they administer not because of an agency's expertise on technical matters but "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." Smiley v. Citibank (South Dakota), N.A., 116 S. Ct. 1730, 1733 (1996). Accord Auer v. Robins, 117 S.Ct. 905, 909 (1997) (holding that courts must defer to an agency's permissible construction of a statute it administers where Congress has not directly spoken on the question at issue). Since DIA implicitly admits by virtue of its convoluted statutory construction argument that § 303's reference to § 302(a) is ambiguous, deference to the Department's interpretation of § 303 is plainly warranted in this case.

DIA argues that the Department's construction of § 303 is not entitled to deference because it is unreasonable. But DIA's assertion of unreasonableness is plainly meritless, since two courts have already ruled that the Department's interpretation of § 303 is not only a reasonable one but, in fact, the correct one. Johanson, 963 F. Supp. at 1175; Ellerbe, 1997 WL 610275 at *7 n.4 (holding that although the government's interpretation of § 303 is plainly supported by traditional methods of statutory construction, Department's interpretation of statute is a reasonable one that would be entitled to deference). Even the court in South Dakota refused to accept DIA's strained statutory construction argument, holding instead that the franchisor did not do enough in that case, as a factual matter, to be responsible for ADA violations at the Wall Days Inn.

Desperate to convince the Court not to defer to the Department's reasonable construction of § 303, DIA argues that the Department's construction of the statute is nothing more than a litigating position adopted for the purposes of this lawsuit. DIA's argument fails for two reasons. First, the Department's interpretation of § 303 is not a mere litigating position adopted for this case. The Department first advanced its construction of § 303 in its Technical Assistance Manual which was published in November 1993 -- years before this lawsuit was filed. U.S. Department of Justice, Civil Rights Division, Public Access Section, The Americans with Disabilities Act Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities ("Technical Assistance Manual") § III-5.1000 at 45-46 (November 1993), Exh. 45. Moreover, the Department has consistently applied its construction of § 303 in other cases -- i.e., in amicus briefs filed in Johanson and Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1 (D.D.C. 1996) and in opposing a motion to dismiss in Ellerbe. But, even if the Department's construction of § 303 had been a mere litigating position, it would still be entitled to deference. Auer v. Robbins, 117 S. Ct. at 911 (holding that an agency interpretation first advanced in a legal brief is nonetheless entitled to deference so long as it "reflect[s] the agency's fair and considered judgment on the matter in question" and is not a post hoc rationalization "advanced by an agency seeking to defend past agency action against attack"). Since the Department first advanced its interpretation of § 303 long before it filed suit against DIA, there is no reason whatsoever to suspect that the Department's construction of § 303 does not reflect "its fair and considered judgment" or that it is in any way a "post hoc rationalization" of past actions. Thus, if the Court finds § 303 to be ambiguous, as DIA suggests, deference to the Department's construction of § 303 is plainly

warranted.

D. The Undisputed Facts Prove that DIA and HFS Have Violated § 303.

Although DIA makes numerous legal arguments about the facts on which the government relies for summary judgment purposes, DIA does not dispute the facts establishing its participation in, and extensive control over, the design and construction of the Champaign Days Inn. DIA does not dispute that an HFS Design & Construction Manager reviewed and approved specifications for the Champaign facility, and specifically requested building plans. DIA does not dispute that an HFS Design & Construction Manager reviewed and approved the blueprints used to construct the Champaign Days Inn, indicating changes for compliance with DIA's design standards that are contained in the Days Inn Planning and Design Standards Manual ("PDSM") (and indicating one change to improve the accessibility of the parking area), or that the changes were incorporated into the final design and construction of the Champaign Days Inn. Further, DIA does not dispute that it went so far as to send a camera to Mr. Panchal for photographs to monitor the construction at the Champaign Days Inn, and that an HFS employee toured and inspected the facility after it was constructed but before it was opened for business as a Days Inn, and that HFS Quality Assurance inspectors have routinely toured and inspected the facility at least three times each year since it opened for business.

DIA also does not dispute the basic facts that the government relies on to prove that DIA operates the Champaign Days Inn -- i.e., that DIA establishes extensive system standards for the operation of Days Inn hotels, that DIA's license agreement with Panchal & Patel, Inc. ("P & P") requires the Champaign Days Inn to be operated in accordance with those system standards, that the Champaign Days Inn is operated according to DIA's system standards, that HFS Quality

Assurance inspectors conduct unannounced inspections of the Champaign Days Inn at least three times a year to ensure that the facility is, in fact, operated according to DIA's system standards, and that P & P has changed the manner in which it operates the Champaign Days Inn in response to directives from DIA's Quality Assurance inspectors.

DIA also attempts to divert this Court's attention from the fact that the United States has proved that DIA has engaged in a pattern or practice of discrimination against individuals with disabilities by repeatedly suggesting that evidence of DIA's nationwide practices and procedures is not relevant here. See DIA's Response at ¶¶ 25-31, 36-38, 43, 88, 91. But the evidence of DIA's nationwide practices and procedures regarding design and construction and hotel operations is relevant. It shows that DIA has committed a pattern or practice of discrimination--"more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts ... [that] discrimination [is] the company's standard operating procedure[,] the regular rather than the unusual practice." International Bhd. Teamsters v. United States, 431 U.S. 324, 336 (1977). Thus, by showing that DIA engaged in nationwide practices and procedures, the United States has shown that DIA engaged in a pattern or practice of discrimination nationwide. Id. at 360.[4] *See also* Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 469-70 (8th Cir. 1984) (in addition to evidence relating to specific instances of discrimination, pattern or practice case will typically

[4]Because various civil rights statutes all employ the same "pattern or practice" language, the courts have held that the same standard of proof applies under each of the statutes. *See, e.g.*, United States v. DiMucci, 879 F.2d 1488, 1497 n. 11 (7th Cir. 1989)(in Fair Housing Act case court noted that phrase "pattern or practice" appears in several federal civil rights statutes, and is interpreted consistently from statute to statute, citing Teamsters, 431 U.S. at 336 n. 16); United States v. Balistrieri, 981 F.2d 916, 929 n.2 (7th Cir. 1992) (same).

involve more general evidence relating to defendant's standard policies or practices).[5]

The undisputed facts establish that DIA's standard policy or practice is to enter into license agreements that give it extensive control over the design and construction of all new Days Inn hotels, and to involve itself in various ways in the design and construction of individual facilities (e.g., visiting sites; recommending architects and contractors; assisting with construction financing; providing design services like conceptual site plans, architectural renderings, or prototype drawings; reviewing plans for compliance with DIA's design standards (as expressed in the PDSM) and requiring changes to those plans; monitoring the progress of construction; and inspecting completed facilities). *See* U.S. Mem. at 4-6. DIA's control over and participation in the design and construction of the Champaign Days Inn is entirely consistent with this pattern. *See* U.S. Mem. at 4-6. And the undisputed facts show that numerous other new Days Inn hotels fail to comply with the Standards, and that the violations at these hotels are largely typical of violations found at the Champaign Days Inn hotel. *See* U.S. Mem. at 4. Indeed, DIA has come forward with no evidence to suggest that any new Days Inn hotel complies with the Standards. In sum, the United States has clearly established that DIA has engaged in a pattern or practice of illegal discrimination.[6]

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[5]See also Johnson v. Hale, 13 F.3d 1351, 1354 (9th Cir. 1994) (holding that a single example can be shown to be typical of the defendant's conduct, it suffices to establish the pattern or practice of discrimination); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) (holding that the number of individual acts of discrimination is not determinative, and that no mathematical formula is workable; rather, "[e]ach case must turn on its own facts"); United States v. Real Estate Devel. Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972) ("No minimum number of incidents is required . . . .")

[6]Similarly, assuming for the sake of argument that DIA's reading of the statute were correct -- that only those who own, lease, or operate the facility are responsible for its design and

E. The United States' Reading of § 303 Does Not Make the Statute Void for Vagueness.

DIA contends that the Department's interpretation of § 303 renders the statute so vague as to be unconstitutional. This argument is baseless.

DIA argues that the Department's interpretation of § 303 is impermissibly vague because the United States' Fed. R. Civ. P. 30(b)(6) designee testified that she could not answer certain hypothetical questions posed by DIA's counsel about liability under § 303 without knowing more facts. But a witness' inability to apply a statute to a complex hypothetical fact situation posed by counsel during a deposition is not evidence that a statutory interpretation is impermissibly vague.[7] As the Supreme Court has explained, "we can never expect mathematical certainty from our language": rather, "it will always be true that the fertile legal imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question." Grayned v. City of Rockford, 408 U.S. 104, 110, 110 n.15 (1972) (parentheses in original; internal quotation marks and citation omitted). *See also* United States v. Powell, 423 U.S. 87, 93 (1975) (holding that a statute is not unconstitutionally vague because doubts may be conceived "as to the

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construction -- the undisputed facts also show that DIA's control over the operations of the Champaign Days Inn is typical of its control over the operations of all of the hotels in its system. *See* U.S. Mem. at 20-23.

[7]DIA filed a motion to compel the United States' Fed. R. Civ. P. 30(b)(6) designee to answer these hypothetical questions with the U.S. District Court for the Eastern District of California. That court ruled that it was unfair for DIA's counsel to pose such hypothetical questions in a deposition and to expect the witness to provide an on-the-spot answer that was binding on the United States. See November 7, 1997 Order denying DIA's motion to compel, which is attached hereto as Exh. B. Plainly the answers to these improper questions are not evidence of vagueness but merely evidence that DIA was seeking to take unfair advantage of the United States' Fed. R. Civ. P. 30(b)(6) designee by posing hypothetical questions that a Fed. R. Civ. P. 30(b)(6) witness is not required to answer.

applicability of the language in marginal fact situations"). Thus, there is no merit to DIA's complaint that Ms. Savage frequently responded to the hypothetical questions posed by DIA's counsel by indicating that the answers would depend on the facts of the case. A statute is not void for vagueness because its application requires a factual inquiry into a party's specific conduct.

Indeed, case law makes clear that neither § 303 nor the United States' interpretation of it are impermissibly vague. Because title III of the ADA is a civil statute regulating commercial conduct, it is subject to scrutiny less strict than that applied to criminal statutes, or statutes restricting free speech.[8] Thus, § 303 (or the government's interpretation of it) can only be held void for vagueness if "no standard of conduct is specified at all." Hoffman Estates, 455 U.S. at 495 n.7 (1982). Further, in determining whether DIA has proved that no standard of conduct is specified, the Court must consider the words of the statute, and any limiting constructions proffered by the agency charged with enforcing it. Hoffman Estates, 455 U.S. at 495 n.5.

The language of § 303 itself provides ample notice of the conduct that it prohibits: the design and construction of inaccessible facilities. Moreover, the government has consistently interpreted § 303 to apply to all parties who engage in that conduct. The preamble to the Department of Justice's regulation implementing title III of the ADA indicated that the section could apply to "architects, contractors, developers, tenants, owners, and other entities," and that the Department intended to enforce § 303 in a manner consistent with its broad prohibition of

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[8]Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); Fogie v. Thorn Americas, Inc., 95 F.3d 645, 650 (8th Cir. 1996); Pinnock v. Int'l House of Pancakes Franchisee, 844 F. Supp. 574, 580 (S.D. Cal. 1993).

the design and construction of inaccessible facilities.[9] In addition, the Department specifically addressed the scope of § 303's coverage in its Technical Assistance Manual for title III. The Manual poses a hypothetical situation in which portions of a new facility are constructed inaccessibly, and warns that not just the owner, but also the architect and contractor who designed and constructed those portions of the facility may be held liable under § 303. Technical Assistance Manual § III-5.1000 at 45-46, Exh. 45.[10] In sum, there is simply no basis for DIA's claim that the statute and the Department of Justice's interpretation of it fail to provide adequate notice of either what conduct is prohibited, or who may be held liable.

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[9]In explaining its interpretation of § 303, the Department of Justice stated:

> The Department will interpret this section in a manner consistent with the intent of the statute and with the nature of the responsibilities of the various entities for design, for construction, or for both.

28 C.F.R. Part 36, Appendix B, § 36.401.

[10]The Technical Assistance Manual is issued by the Department pursuant to statutory mandate, *see* 42 U.S.C. § 12206(a), (c), and is thus, along with the issuance of the title III implementing regulation, one of the mechanisms by which the Attorney General is to "flesh out the statutory framework" of title III. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 585 (D.C. Cir. 1997). Indeed, the Pinnock court relied in part on the Department's Technical Assistance Manual for title III to hold that the statute was not void for vagueness. Pinnock, 844 F. Supp. at 581. In Pinnock, a defendant charged with violating section 302 of the ADA challenged title III of the statute as being unconstitutionally vague. The court rejected this challenge, concluding that "the terms of title III are marked by well-reasoned flexibility and breadth," and that "[w]hen considered in conjunction with the Department of Justice guidelines, these terms are not unconstitutionally vague." Id.

CONCLUSION

For the reasons stated above, and in the United States' other memoranda, the United States respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted,

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Dated: December 2, 1997