JAMES W. BRANNIGAN, JR.
United States Attorney
JOHN R. NEECE
Assistant U.S. Attorney
Chief, Civil Division
940 Front Street
Room 5-N-19
San Diego, California 92189-0150
Telephone: (619) 557-5662

JAMES P. TURNER
Acting Assistant Attorney General
JOAN A. MAGAGNA
BEBE NOVICH
JOSEPH C. RUSSO
Attorneys
Public Access Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
Telephone: (202) 307-0663

Attorneys for the United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THEODORE A. PINNOCK, Plaintiff, v. INTERNATIONAL HOUSE OF PANCAKES FRANCHISEE, et al., Defendants. MAJID ZAHEDI doing business as INTERNATIONAL HOUSE OF PANCAKES, Counterclaimant, v. THEODORE A. PINNOCK, and ROES 1 THROUGH 50, Counterdefendants, and	CIVIL No. 92-1370-R (CM) **LEAVE GRANTED TO EXCEED PAGE LIMIT OF LOCAL RULE 7.1(h)** **UNITED STATES' MEMORANDUM IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** DATE: September 7, 1993 TIME: 10:30 a.m. CTRM: 5 The Honorable John S. Rhoades

THE UNITED STATES OF AMERICA,

Counterdefendant-Intervenor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTION:

STATUTES:

REGULATIONS:

LEGISLATIVE HISTORY:

RULES:

MISCELLANEOUS:

I. INTRODUCTION

Plaintiff Theodore Pinnock filed this action under title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-89 (Supp. II 1990), against the owners and operators of the International House of Pancakes restaurant ("IHOP") located at 5370 Kearny Mesa Road in San Diego. Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation, including restaurants. In his complaint, Pinnock alleged that IHOP failed to comply with certain title III provisions applicable to existing places of public accommodation.

IHOP has counterclaimed, asserting that title III is unconstitutional on various grounds. Because the constitutionality of a Federal statute was called in question, this Court duly notified the Attorney General and, upon uncontested motion, the United States was granted leave to intervene, pursuant to 28 U.S.C. § 2403 (1988) to defend the constitutionality of title III.

The case is now before the Court on cross-motions for summary judgment filed by IHOP and the United States regarding the constitutional issues raised in IHOP's counterclaim. Summary judgment is proper under Federal Rule of Civil Procedure 56(c) where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). We demonstrate below that there are no disputes of fact and there is no merit to any of the constitutional challenges asserted by IHOP.[1] Accordingly, this Court should grant the United States' cross-motion for summary judgment, deny IHOP's motion, and dismiss IHOP's counterclaim.

II. THE AMERICANS WITH DISABILITIES ACT

The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (Supp. II 1990).[2] Congress invoked the full sweep of its authority under the Commerce Clause and the Fourteenth Amendment to accomplish this mandate. Id. § 12101(b)(4) (Supp. II 1990). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision

[1] We take no position on the underlying merits of Pinnock's substantive ADA claim or IHOP's nonconstitutional defenses.

[2] For the Court's convenience, the full text of the title III regulation and preamble, as published in the Federal Register, is attached as Exhibit A. 56 Fed. Reg. 35,544 (1991).

of goods and services offered to the public by private businesses.

This case involves the application of title III of the ADA, which applies to privately owned and operated public accommodations and commercial facilities. As defined in the Act and in the regulation promulgated under title III, "public accommodation" means a private entity that owns, operates, or leases a place of public accommodation. Id. §§ 12181(7) & 12182 (Supp. II 1990); 28 C.F.R. §§ 36.104, at 460, 36.201, at 461 (1991).[3] Places of public accommodation are defined in title III as any of twelve categories of facilities whose operations affect commerce, one category of which is "restaurant[s], bar[s], or other establishment[s] serving food or drink," 42 U.S.C. § 12181(7) (Supp. II 1990).

For existing facilities, such as IHOP, title III imposes certain obligations to prevent discrimination on the basis of disability. Such facilities may not deny persons with disabilities the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations. Id. § 12182(a). This general rule encompasses prohibitions against:

---

[3] Throughout this memorandum, we cite the regulation implementing title III. This regulation was promulgated pursuant to statutory mandate, 42 U.S.C. § 12186(b) (Supp. II 1990), and, therefore, should be accorded "controlling weight," unless found to be "arbitrary, capricious, or plainly contrary to the statute." United States v. Morton, 467 U.S. 822, 834 (1984); see also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

(1) denying the opportunity to participate or benefit in the goods, services, etc., id. § 12182(b)(1)(A)(i);

(2) affording unequal participation in or an unequal benefit from the goods and services, id. § 12182(b)(1)(A)(ii);

(3) unnecessarily affording separate or different goods and services, id. § 12182(b)(1)(A)(iii);

(4) providing goods or services in a segregated setting, id. § 12182(b)(1)(B);

(5) imposing unnecessary discriminatory eligibility criteria to receive goods and services, id. § 12182(b)(2)(A)(i);

(6) failing to make reasonable modifications in policies, practices, and procedures when necessary to afford goods and services, unless doing so would fundamentally alter the nature of the goods and services provided, id. § 12182(b)(2)(A)(ii);

(7) failing to provide auxiliary aids and services for communication, unless doing so would cause an undue burden or would fundamentally alter the nature of the goods and services provided, id. § 12182(b)(2)(A)(iii);

(8) failing to remove architectural barriers and communication barriers that are structural in nature where removal is readily achievable, id. § 12182(b)(2)(A)(iv); and

(9) failing to take alternative measures to provide goods and services if such measures are readily achievable in those instances where barrier removal is not readily achievable, id. § 12182(b)(2)(A)(v).[4]

III. SUMMARY OF ARGUMENT

1. The enactment of title III of the ADA was well within Congress' broad power to legislate under the Commerce Clause,

[4] Only the title III obligations imposed on existing, unaltered facilities are at issue in this action. Title III has additional requirements for alterations of existing facilities and for the construction of new facilities. See 42 U.S.C. § 12183 (Supp. II 1990).

and title III properly reaches the conduct of privately owned and operated restaurants, including IHOP, regardless of whether their individual operations would, standing alone, substantially affect interstate commerce.[5]

2. Congress' enactment of title III does not intrude on State sovereignty in violation of the Tenth Amendment.

3. Congress has not improperly delegated legislative authority to the executive and judicial branches either by directing the Attorney General to develop regulations implementing title III or by authorizing the federal courts to hear title III claims.

4. The statutory language of title III, as further amplified by the Department of Justice's title III regulation, is sufficiently precise to notify covered entities of their obligations and, thus, is not unconstitutionally vague.

5. Title III does not destroy or adversely affect the economic viability of IHOP's operations and, accordingly, does not effect a taking requiring compensation under the Fifth Amendment.

---

[5] We agree with IHOP that constitutional authority for title III's application to private business must be found in the Commerce Clause. (See IHOP Mem. at 16). When it enacted the ADA, Congress invoked its powers under both the Fourteenth Amendment and the Commerce Clause because the Act imposes obligations upon both state actors (titles I and II) and private entities (titles I, III and IV). See 136 CONG. REC. E1913 (1990) (statement by Rep. Hoyer). The Commerce Clause provides the authority for reaching the conduct of private entities under title III. Id.

6. Title III's application to existing facilities is not a retroactive application that would violate the Due Process Clause.

IV. ARGUMENT

A. IN TITLE III OF THE ADA, CONGRESS PROPERLY EXERCISED ITS BROAD POWER UNDER THE COMMERCE CLAUSE TO REACH THE ACTIVITIES OF RESTAURANTS LIKE IHOP.

Article I, Section 8 of the Constitution grants Congress the power to "regulate Commerce . . . among the several States" and to enact all laws necessary and proper to this end. U.S. CONST., art. I, § 8, cls. 3, 18; Katzenbach v. McClung, 379 U.S. 294, 301-02 (1964). The Supreme Court has repeatedly emphasized the expansiveness of the Commerce Clause power.

> [T]he Commerce Clause is a grant of plenary authority to Congress. . . . This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); accord United States v. Darby, 312 U.S. 100, 114 (1941).

Because this authority is so broad, the Commerce Clause has been interpreted consistently to empower Congress to regulate not only interstate activities, but also intrastate activities that substantially affect interstate commerce. See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc.,

444 U.S. 232, 241 (1980); Perez v. United States, 402 U.S. 146, 151 (1971) (citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)); Wickard v. Filburn, 317 U.S. 111, 122-25 (1942); Darby, 312 U.S. at 118; McCulloch v. Maryland, - 17 U.S. (4 Wheat.) 316, 421 (1819).

IHOP does not take issue with these general principles (see IHOP Mem. at 43-46). Rather, IHOP argues that its conduct is not covered by title III because its operations are entirely intrastate (IHOP Mem. at 47). However, we demonstrate below, based on undisputed facts, that IHOP operates in interstate commerce and, in any event, as part of the restaurant industry, IHOP is properly subject to Commerce Clause regulation regardless of its individual impact on interstate commerce.

1. IHOP Operates in Interstate Commerce.

To buttress its assertion that its activities are solely intrastate, IHOP offers as evidence only the statement that "all products (i.e., eggs, meat, bread, milk, etc.) that are served at IHOP were purchased within the state of California."[6] However, the determination of whether a business operates in interstate commerce encompasses far more than merely information about where the final products it uses are purchased. See Katzenbach, 379 U.S. at 296-97 (under title II of the Civil Rights Act of 1964, restaurant found to operate in interstate commerce where 46% of food served

[6] Declaration of Majid Zahedi, ¶ 9.

originated out-of-state, though defendant purchased the food from a local supplier); EEOC v. Ratliff, 906 F.2d 1314, 1316 (9th Cir. 1990) (under title VII of the Civil Rights Act of 1964, employer found to operate in interstate commerce where it used items that "have moved through interstate commerce at some point").

IHOP is a franchise of a large, international, publicly traded corporation ("IHOP Corp."), organized under Delaware law.[7] IHOP Corp. had total retail sales of $479 million in 1992, operates 547 franchises in 35 states, Canada, and Japan, and employs 16,000 persons.[8] We submit that the franchise relationship with IHOP Corp., without more, is sufficient to establish IHOP as fully in the mainstream of interstate commerce. However, there are many additional facts to support the conclusion that IHOP is an interstate business.

IHOP is located directly across the street from State Highway 163, and within 2 miles of two interstate highways.[9] Across Kearny Mesa Road from IHOP, within walking distance of the restaurant, are three hotels.[10] Three motels are located

---

[7] See IHOP Corp. July 12, 1991 Prospectus ("Prospectus"), attached as Exhibit B, at 6;

[8] See IHOP Corp. 1992 Annual Report, attached as Exhibit C, at inside cover, 2-3, 8.

[9] See Declaration of Sean M. Flynn ("Flynn Declaration"), attached as Exhibit D, ¶¶ 9-12.

[10] Id. ¶ 13.

within 1 1/2 miles from IHOP.[11] The courts have found these facts to be indicia of a business operating in interstate commerce. See Katzenbach, 379 U.S. at 127 (restaurant on state highway, 11 blocks from interstate highway, affected commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (motel 2 blocks from downtown road and "readily accessible" to two intrastate and two interstate highways affected commerce); Miller v. Amusement Enters., Inc., 394 F.2d 342, 345 (5th Cir. 1968) (amusement park 150 yards from intrastate highway affected commerce).

IHOP has advertised at one of the hotels.[12] It contributes to a national advertising account through which IHOP Corp. advertises nationally.[13] It contributes to a co-op, serving a number of IHOP franchises. This co-op advertises in newspapers and television.[14] The courts have

---

[11] Id. ¶ 14.

[12] Deposition of Majid Zahedi ("Zahedi Dep.") at 54-57, 61. Mr. Zahedi noted that he advertised at the hotel in order to attract its guests to IHOP. Id. at 56. Copies of the referenced pages from the Zahedi Dep. are attached as Exhibit E. These pages and the complete copy of the transcript filed with the Court today were reproduced from an unsigned copy of the transcript provided by the court reporter. We have not yet received the signed deposition transcript from IHOP. IHOP's counsel promised to inform us of any changes to the transcript by July 9, 1993. Zahedi Dep. at 299-300. At this time, IHOP's counsel has failed to notify us of any such changes and has not provided us with the signed copy.

[13] See Prospectus at 23; Zahedi Dep. at 41-42. IHOP Corp. spent $9.4 million in advertising dollars in 1990. See Prospectus at 22.

[14] Zahedi Dep. at 43.

deemed such conduct to be characteristic of a business operating in interstate commerce. See Daniel v. Paul, 395 U.S. 298, 304 (1969) (targeting advertising to out-of-state visitors at area hotels and motels); Miller, 394 F.2d at 349 (advertising on radio and television without geographic restrictions).

IHOP serves customers from out of state and accepts payment by out-of-state credit cards.[15] It also carries insurance written by an interstate company.[16] These are further attributes of a business in interstate commerce. Ratliff, 906 F.2d at 1316, 1317 n.4 (serving out-of-state patrons and carrying insurance from out-of-state company); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977) (serving out-of-state clients).

Most of the food and non-food items used by IHOP have moved in interstate commerce.[17] These facts establish that

---

[15] Zahedi Dep. at 57, 194-95; Flynn Declaration, ¶ 15.

[16] IHOP's insurer, Farmer's Insurance, operates in 28 states. See Zahedi Dep. at 202-07; Declaration of Timothy P. Leach, attached as Exhibit F, ¶¶ 4-5.

[17] Most of the food IHOP serves, including some ingredients in its pancakes, its largest selling items, were procured by IHOP's distributors from outside California. The food items procured from out-of-state include all or the majority of: its meat products, including bacon, ham, hamburger, and chicken, see Zahedi Dep. at 89-92; Declaration of John Renna, attached as Exhibit G, ¶¶ 5-6; its pancake syrups, see Zahedi Dep. at 83-86; Declaration of John Kocinski, attached as Exhibit I, ¶¶ 5, 6d; its boxed pancake mixes, see Declaration of Grace Guillory, attached as Exhibit H, ¶¶ 3-4; its coffee and tea, see Zahedi Dep. at 83-85, 117-18; Kocinski Declaration (Exhibit I), ¶¶ 5, 6c, and Declaration of Sam

IHOP operates in interstate commerce. See Daniel, 395 U.S. at 305 (Supreme Court took judicial notice that the principal ingredients of the food most often sold by defendant, hamburgers, hot dogs, soft drinks, and milk, probably originated out-of-state); Katzenbach, 379 U.S. at 296-97 (restaurant that served food, 46% of which originated out-of-state, operated in interstate commerce); United States v. Vizena, 342 F. Supp. 553, 554-55 (W.D. La. 1972) (defendant's bar found to operate in interstate commerce because juke box, pool table, pool equipment, and records played on the juke box originated out-of-state).

2. Title III Reaches the Full Extent of the Commerce Clause and Would Reach IHOP Even as Part of the Restaurant Industry Without Regard to IHOP's Individual Impact on Interstate Commerce.

Even if IHOP could possibly establish that it is strictly an intrastate operation, it would be covered by title III because title III reaches intrastate conduct having a substantial effect on interstate commerce and IHOP, as part of the restaurant industry, fits that description.

a. It is apparent from the language of the statute itself and from the legislative history that Congress intended

---

Heron, attached as Exhibit J, ¶¶ 5-9; its potatoes and potato products, see Zahedi Dep. at 96-99; Declaration of Dennis Moore, attached as Exhibit K, ¶¶ 4-6, 6a, 6d; and Declaration of Drew Russo, attached as Exhibit L, ¶¶ 4, 5, 5a, 5b, 5e; and its condiments, including Tabasco Sauce, ketchup, mustard, etc., see Zahedi Dep. at 131-45 and Renna Declaration (Exhibit G), ¶¶ 4-6, 6l-6n. In addition, the majority of IHOP's silverware and equipment bears labels indicating out-of-state manufacture. See Flynn Declaration at 16-19.

title III to reach activities of places of public accommodation to the fullest extent permissible under the Commerce Clause. To have this scope, a statute need not, as IHOP argues (IHOP Mem. at 46-47), state explicitly that it covers intrastate activities having a substantial effect on interstate commerce.

By invoking the language of the Commerce Clause itself, Congress indicates that a statute is to reach as broadly as that clause permits. The Commerce Clause grants Congress the power to regulate commerce with "foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Title III of the ADA covers, inter alia, "public accommodations," which are defined by an illustrative list of types of facilities whose operations "affect commerce." 42 U.S.C. § 12181(7) (Supp. II 1990). Title III uses the language of the Commerce Clause, defining "commerce" as travel, trade, traffic, commerce, transportation, or communication:

> (A) among the several States;
>
> (B) between any foreign country or any territory or possession and any State; or
>
> (C) between points in the same State but through another State or foreign country.

Id. § 12181(1). In addition, the ADA's statement of purpose recites that it intends "to invoke the sweep of congressional

authority, including the power . . . to regulate commerce." Id. § 12101(b)(4).[18]

Statutes that use the same "affect commerce" language as title III have been interpreted to demonstrate congressional intent to encompass the full extent of the commerce power. See, e.g., Russell v. United States, 471 U.S. 858, 859 (1985); Ratliff, 906 F.2d at 1316. Courts have uniformly upheld the constitutionality of statutes that cover entities whose activities "affect commerce," including title II of the Civil Rights Act of 1964, which was the model for title III of the ADA. See Katzenbach, 379 U.S. at 298; Heart of Atlanta Motel, Inc., 379 U.S. at 258; see also McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980) (Sherman Act); Ratliff, 906 F.2d 1314 (title VII of Civil Rights Act of 1964).[19]

---

[18] See also 136 CONG. REC. E1913 (1990) (statement of Rep. Hoyer) ("Congress also, of course, has broad authority to pass antidiscrimination laws under the commerce clause . . . .").

[19] IHOP also argues that the Commerce Clause does not give Congress authority to regulate strictly intrastate activities that do not substantially affect interstate commerce. We quite agree. But we disagree with IHOP's suggestion that title III was intended to have such an overly broad scope. As stated above, title III uses the language of the Commerce Clause and states that it intends "to invoke the sweep of congressional authority." 42 U.S.C. § 12101(b)(4) (Supp. II 1990). Nothing in the ADA purports to go beyond such authority.

Courts should construe a statute within constitutional limits if consistent with congressional intent. See, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Thirty-Seven Photographs, 402 U.S. 363, 368 (1971).

b. In deciding whether a Federal statute operates within the constitutional authority granted under the Commerce Clause, a court may consider only: (1) whether regulation of the activity at issue is rationally related to a legitimate constitutional end, and (2) whether the means chosen by the statute are reasonable to reach that end. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11-12 (1990); Hodel, 452 U.S. at 276 (citing Heart of Atlanta Motel, 379 U.S. at 262).

Courts must defer to congressional findings that an activity affects commerce, so long as there is a rational basis for such a finding, but formal congressional findings are not necessary. Hodel, 452 U.S. at 276; Katzenbach, 379 U.S. at 303-04; Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030, 1034 (11th Cir. 1992) (citing Preseault, 494 U.S. at 18); Stevens v. United States, 440 F.2d 144, 151-52 (6th Cir. 1971). In fact, a court may take judicial notice of some publicly known facts in determining the rationality of a statute. See, e.g., Ratliff, 906 F.2d at 1318 (commenting on the ease with which the court may take judicial notice of the spa industry's affect on interstate commerce); Stevens, 440 F.2d at 151-52 (the fact that possession of firearms by convicted felons threatens interstate commerce "is a statement of facts of public knowledge of which this Court will take judicial notice").

The ADA's legislative history reflects that discrimination in restaurants against persons with disabilities has adverse affects on persons with disabilities.[20] Congress is well within its Commerce Clause power to redress such discrimination. As the Supreme Court has recognized in the context of racial discrimination, the restaurant industry unquestionably affects interstate commerce in a substantial way. In Katzenbach, the Court noted that

> discrimination in restaurants ha[s] a direct and highly restrictive effect upon interstate travel by Negroes. This resulted . . . because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, . . . discrimination deter[s] professional, as well as skilled, people from moving into areas where such practices occurred and thereby cause[s] industry to be reluctant to establish there.

---

[20] See the statements of the Honorable Tony Coelho of California, introducing the original bill to the House of Representatives:

> Our Society has been inadvertently structured in a way that unnecessarily denies innumerable opportunities, great and small, to people with disabilities, in ways that are never even noticed by most Americans. Simple daily tasks, like visiting a grocery store or the bank, going to a restaurant, or a movie . . . can become monumental tasks or impossible barriers to overcome - not due to the actual physical or mental conditions of disabled Americans, but due to prejudice, fears, and unnecessary obstacles which have been placed in their path.

134 CONG. REC. E1308 (1988) (statement of Rep. Coelho) (emphasis added); see also 138 CONG. REC. S614 (1992) (statement of Sen. Durenberger).

Katzenbach, 379 U.S. at 300.

The commerce power allows Congress to regulate any entity, regardless of its individual impact on interstate commerce, so long as the entity engages in a class of activities that affects interstate commerce. Russell, 471 U.S. at 862; Hodel, 452 U.S. at 277 (citing Fry v. United States, 421 U.S. 542, 547 (1975)), Perez v. United States, 402 U.S. 146, 151-54 (1971). As the Supreme Court stated in Darby, Congress has "recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." Darby, 312 U.S. at 123; Wickard, 317 U.S. at 128-29; Ratliff, 906 F.2d at 1318; Stevens, 440 F.2d at 151-52.

In Russell, for example, the Supreme Court sustained a federal arson statute's coverage of a landlord whose property had no direct connection to interstate commerce. Russell, 471 U.S. 858. The Court noted that "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties" and concluded that "[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class." Id. at 862; see also Ratliff, 906 F.2d at 1317-18 (upholding plaintiff's claim that "as a matter of law if a local business is within a class of activities which in the aggregate has an effect on commerce, there is no need for a particularized

factual showing that the [business] meets the 'affecting-commerce' test".) Thus, regardless of IHOP's individual circumstances, it is subject to Commerce Clause regulation as part of the restaurant industry.

B. TITLE III DOES NOT INTRUDE UPON STATE SOVEREIGNTY IN VIOLATION OF THE TENTH AMENDMENT.

The Tenth Amendment reserves to State governments "the powers not delegated to the United States by the Constitution nor prohibited by it." U.S. CONST. amend. X. Title III regulates private activity in a manner that does not usurp State authority or intrude upon State sovereignty. Therefore, contrary to IHOP's argument, title III does not contravene the Tenth Amendment.

Title III requires existing places of public accommodation, like IHOP, to remove architectural barriers to access where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv) (Supp. II 1990). The title III regulation provides that measures taken to comply with barrier removal must, if readily achievable, comply with the Standards for Accessible Design applicable to alterations. 28 C.F.R. §§ 36.304(d), at 467, 36.406(a), at 474 (1991).[21] IHOP argues that the design standards comprise, essentially, a national

---

[21] The title III regulation adopted as its Standards for Accessible Design ("Standards") the ADA Accessibility Guidelines ("ADAAG") issued by the Architectural and Transportation Barriers Compliance Board ("Access Board"). See 28 C.F.R. § 36.304(d), at 467 (1991); 42 U.S.C. §§ 12186(b)-(c), 12204 (Supp. II 1990).

building code that violates the Tenth Amendment because building codes are "essentially local in nature" and, therefore, exclusively within the regulatory authority of the States. (IHOP Mem. at 41).

The Supreme Court has rejected the argument IHOP makes, that a Federal law violates the Tenth Amendment simply because the law regulates in an area traditionally subject to State regulation. In its landmark decision, Garcia v. San Antonio Metropolitan Transit Authority, the Court found

> unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is "integral" or "traditional."

469 U.S. 528, 546-47 (1985). In rejecting the "integral or traditional governmental function" test, the Court observed that the "composition of the federal government was designed in large part to protect the states from overreaching by Congress." Id. at 551. Finding the Constitution's limitation on Congress' actions with respect to States to be one of "process rather than one of result," id. at 554, the Court ruled that the sovereignty of States is protected by "the built-in restraints that our system provides through state participation in federal governmental action." Id. at 556.

Similarly, in South Carolina v. Baker, the Court ruled that Congress' removal of Federal tax exemption for interest earned on State and local government bonds did not violate the Tenth Amendment. 485 U.S. 505, 512 (1988). Rejecting South

Carolina's substantive analysis, the Court said, "States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable activity." Id. at 512.

Title III does not "commandee[r] the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program." New York v. United States, 112 S. Ct. 2408, 2420 (1992) (citing Hodel, 452 U.S. at 288). In New York, the Supreme Court ruled that certain provisions of the Federal Low-Level Radioactive Waste Policy Act were unconstitutional because they required states to choose between either "accepting ownership of [radioactive] waste or regulating according to the instructions of Congress." New York, 112 S. Ct. at 2428. This the Court found to be "no choice at all." Id.

Title III's statutory scheme is quite different. It does not displace local building codes or usurp local powers. It is not a building code but a Federal civil rights act that sets forth accessibility standards that places of public accommodation and commercial facilities must follow.[22] State and local building codes remain in effect to be enforced by State officials. State and local codes can provide for accessibility that goes beyond ADA requirements. State

[22] Departures from the ADA Standards are expressly permitted where "alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. pt. 36, app. A, § 2.2, at 482 (1991).

officials are required neither to adopt nor to enforce the ADA Standards for Accessible Design.[23]

C. TITLE III DOES NOT IMPROPERLY DELEGATE AUTHORITY TO EITHER THE EXECUTIVE OR JUDICIAL BRANCH.

Article I of the Constitution vests legislative authority in the Congress. The early cases cited by IHOP stand for the proposition that Congress may not abdicate its legislative responsibilities altogether by authorizing the executive branch to make law. This general principle, however, "does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches." Touby v. United States, 111 S. Ct. 1752, 1756 (1991) (citing Mistretta v. United States, 488 U.S. 361, 372 (1989)). So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." Touby, 111 S. Ct. at 1756 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928); see also Skinner v. Mid-America Pipeline Co., 490 U.S.

---

[23] Title III permits, but does not require, State and local governments to submit their building codes or ordinances to the Attorney General for a determination of whether they meet or exceed the minimum ADA requirements. 42 U.S.C. § 12188(b)(1)(A)(ii) (Supp. II 1990). If a favorable determination is reached after hearing and comment, the Attorney General will so certify. Id. In subsequent enforcement proceedings, such certification "shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this Act." Id.

212, 218-21 (1989). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

Title III meets this standard. Congress directed the Attorney General to promulgate regulations to implement title III. See 42 U.S.C. § 12186(b), (c) (Supp. II 1990). Moreover, the statute guides the Attorney General's discretion by, among other things: (1) defining who is to be considered an individual with a disability under the Act, 42 U.S.C. § 12102(2) (Supp. II 1990); (2) listing the categories of entities subject to title III as well as those that are exempt, 42 U.S.C. §§ 12181(2), (7) & 12187 (Supp. II 1990); (3) specifying in detail the conduct that will violate the statute, 42 U.S.C. § 12182 (Supp. II 1990); and (4) setting forth the means for enforcement including the types of relief to be afforded, 42 U.S.C. § 12188 (Supp. II 1990). Thus, Congress gave the Attorney General a very complete framework within which to articulate the more detailed regulatory provisions.

The courts have upheld far more open-ended delegations of authority to the executive branch. For example, in Yakus v. United States, the Supreme Court upheld the Emergency Price Control Act's delegation of authority to [the Administrator to] "promulgate regulations fixing prices of commodities which

'in his judgment will be generally fair and equitable and will effectuate the purposes of th[e] Act'." Yakus v. United States, 321 U.S. 414, 420 (1944). In Railway Labor Executives' Ass'n v. Skinner, the Court of Appeals ruled that the Secretary of Transportation's promulgation of drug testing regulations did not result from an unconstitutional delegation of power when that rulemaking authority was derived only from a statutory directive to promulgate "appropriate rules, regulations, orders, and standards for all areas of railroad safety." 934 F.2d 1096, 1100 (9th Cir. 1991) (quoting 45 U.S.C. § 431(a) (1988).

Contrary to IHOP's suggestion, the delegation of rulemaking authority to the executive branch is not improper because it calls for policy judgments to be made. In Yakus, the Supreme Court specifically rejected just such an argument, stating that in determining regulations implementing fixed prices, "It is no objection [that such determinations] . . . call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." Yakus, 321 U.S. at 425. The Supreme Court reiterated this position when it upheld Congress' delegation of authority to establish sentencing guidelines in Mistretta, 488 U.S. at 361.

Indeed, the complex task of gathering and analyzing the necessary facts to develop more specific rules is particularly suited to the administrative rule-making process. Prior to

issuing the regulations implementing title III, the Department of Justice held four public hearings across the nation at which 329 persons testified. 56 Fed. Reg. 35,544 (1991). In addition, the Department solicited comments through its rulemaking process and received hundreds of comments containing over 10,000 pages of information. Id. The Department reviewed all of these comments and took them into account in formulating the final regulation. Id. at 35,545. The Supreme Court has observed that it is just these sorts of "intricate, labor-intensive task[s]" and the related discretionary authority to draw from these efforts that are particularly appropriate for delegation. Mistretta, 488 U.S. at 379.[24]

D. TITLE III PROVIDES A SUFFICIENTLY PRECISE STANDARD OF CONDUCT AND, THEREFORE, IS NOT UNCONSTITUTIONALLY VAGUE.

Title III of the ADA, a civil statute regulating commercial conduct, can successfully be challenged as unconstitutionally vague in violation of the Due Process Clause only if it specifies "no standard of conduct . . . at

---

[24] IHOP also argues (IHOP Mem. at 37) that Congress has improperly delegated authority to the judicial branch, because the courts interpreting title III will have to decide whether barrier removal is "readily achievable" or whether the provision of auxiliary aids and services is an "undue burden" in any given case. This is a frivolous argument. Interpreting statutes is precisely what courts are supposed to do. U.S. CONST. art. III, § 2. United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940); Hepburn v. Griswold, 75 U.S. 603, 611 (1869).

all." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 & n.7 (1982); see Boutilier v. INS, 387 U.S. 118, 121 (1967) (to violate due process, a statute must be "so vague and indefinite as really to be no rule or standard at all") (quoting A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 239 (1925)). IHOP mistakenly bases its vagueness argument on the higher standard that is applicable only to statutes that, unlike title III, prescribe criminal penalties or reach constitutionally protected speech.[25] As the Supreme Court ruled in Hoffman Estates:

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. . . . Indeed the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

---

[25] For example, IHOP relies on Keyishian v. Board of Regents, which involved a challenge to a regulation allowing "treasonable or seditious" utterances to be grounds for dismissal of university faculty members. 385 U.S. 589, 593 (1967). The Court emphasized the higher degree of specificity required in the regulations that reach protected speech. Id. at 603-04 (citing NAACP v. Button, 371 U.S. 415, 432-33, 438 (1963)). Similarly, Baggett v. Bullitt, cited by IHOP, involved a statute requiring state employees to swear that they were not "subversive," did not "advocate[], abet[], advise[] or teach[]" subversive activities, and were not a member of a "subversive organization." 377 U.S. 360, 362 (1964). The Baggett Court also noted the increased sensitivity a court must show to specificity in statutes infringing on speech. Id. at 372-73 n.10.

455 U.S. at 498; see also Grayned v. City of Rockford, 408 U.S. 108, 109 (1972); Chalmers v. City of Los Angeles, 762 F.2d 753, 757 (9th Cir. 1985).

Title III of the ADA covers millions of different kinds and sizes of businesses in large and small communities all across the country. Congress opted for flexible language in the statute to allow for sensible and fair application to this myriad group of covered entities. In addressing vagueness challenges, courts have recognized the difficulties legislatures face in drafting statutes -- to make them precise enough to afford fair notice of the prohibited conduct, yet broad enough to reach a variety of situations, many of which cannot be anticipated at the time of drafting. As the Supreme Court stated:

> [M]ost statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions . . . .

Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952); see Colten v. Kentucky, 407 U.S. 104, 110 (1972); Fowler v. Board of Educ., 819 F.2d 657, 664 (6th Cir. 1987), cert. denied, 484 U.S. 986 (1987).

Statutes similar to and less specific than the ADA have been upheld in the face of vagueness challenges. For instance, in Boyce Motor Lines, the Supreme Court upheld a criminal statute requiring truck drivers who carry explosives or flammable liquids to avoid driving into congested

thoroughfares "so far as practicable, and where feasible." 342 U.S. at 339. The Boyce Motor Lines Court found the words "so far as practicable, and where feasible" to be capable of common understanding, even under the more rigorous standard of specificity required of statutes with criminal penalties. Id. at 340-42. The ADA, which uses similarly flexible language, and which contains far more explanation and illustration than the criminal statute at issue in Boyce, certainly satisfies the more lenient standard applicable to civil statutes.

The statutory language of title III is itself readily understandable, and the meaning of the statute is further amplified by the regulation issued by the Attorney General pursuant to statutory mandate. 42 U.S.C. § 12186(b) (Supp. II 1990); 28 C.F.R. pt. 36, at 457 (1991). Administrative regulations and interpretations may provide sufficient clarification for statutes that might otherwise be deemed vague. United States v. Schneiderman, 968 F.2d 1564, 1568 (2d Cir. 1992), cert. denied, 113 S. Ct. 1283 (1993); see, e.g., Hoffman Estates, 455 U.S. at 502, 504; Fleming v. USDA, 713 F.2d 179, 184 (6th Cir. 1983); Rath Packing Co. v. M.H. Becker, 530 F.2d 1295, 1299 (9th Cir. 1975), aff'd sub nom. Jones v. Rath Packing Co., 430 U.S. 519, cert. denied, 430 U.S. 954, reh'g denied, 431 U.S. 925 (1977). In reviewing a statute for vagueness, a Federal court must consider limiting constructions proffered by an enforcing agency. Hoffman

Estates, 455 U.S. at 494 n.5; Ward v. Rock Against Racism, 491 U.S. 781, 795 (1989).

We demonstrate below that each of the terms challenged by IHOP is sufficiently clear to meet the constitutional standards based on the statutory language itself, its legislative history, and the implementing regulation. The preamble accompanying the regulation provides further explication and, frequently, examples of the type of conduct required. See 28 C.F.R. pt. 36, app. B, at 566 (1991).[26]

1. Readily Achievable Barrier Removal

Title III requires existing places of public accommodation to remove architectural barriers to access, where such removal is "readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv) (Supp. II 1990). Statutes with language similar to the "readily achievable" standard, with no further definition of the phrase, have been upheld in the face of vagueness challenges, even under the higher scrutiny required for criminal statutes. See, e.g., West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308, 314 (4th Cir. 1983) ("readily

[26] The Attorney General, also pursuant to statutory mandate, has published a title III Technical Assistance Manual, providing even more explanation and illustration of all of the provisions challenged by IHOP. 42 U.S.C. §§ 12206(c)(3) & (d) (Supp. II 1990); U.S. Department of Justice, The Americans with Disabilities Act -- Title III Technical Assistance Manual (1992 & Supp. 1993) ("Technical Assistance Manual"). A copy of the Technical Assistance Manual is attached as Exhibit M to this memorandum. IHOP failed to consult the regulation or the Technical Assistance Manual, though their existence is plain from a reading of the statute. See Zahedi Dep., at 214, 219.

visible"); United States v. Felsen, 648 F.2d 681, 683 (10th Cir. 1981) ("readily attachable"), cert. denied, 484 U.S. 861 (1981); United States v. Catanzaro, 368 F. Supp. 450 (D. Conn. 1973) ("readily restor[able]").

In contrast to the statutes upheld in those cases, title III and its regulation provide a definition, factors to consider, and many examples of the "readily achievable" standard. "Readily achievable" is defined in the statute as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9) (Supp. II 1990). The statute itself enumerates factors to consider when determining if an action is readily achievable:

> (A) the nature and cost of the action needed under this Act;
>
> (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
>
> (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

Id.[27]

[27] The legislative history contains useful guidance for construing the "readily achievable" standard. The Senate Report, for example, points out that it is a lower standard

In addition to the statutory explication and the legislative history, the Federal regulation further elucidates the term "readily achievable" by adding other factors to consider.[28] In addition, and perhaps most significantly, the regulation lists 21 examples of barrier removal likely to be "readily achievable" in many circumstances.[29] Finally, the preamble to the regulation, published with the regulation, provides even more analysis and explanation:

---

than the "undue burden" standard in title III and the "undue hardship" standard in title I, which derived from section 504 of the Rehabilitation Act of 1973. S. Rep. No. 116, 101st Cong., 1st Sess. 65 (1989) ("Senate Report"). The Report further distinguishes "readily achievable" from "readily accessible," a term used in another part of the statute. Id. The Report also lists examples of the types of changes Congress believes would be readily achievable, including specific examples for small stores and restaurants -- rearranging tables and chairs, installing small ramps, grab bars in restrooms, "and other such minor adjustments and additions." Id. at 66.

[28] The additional factors listed in the regulation are:

[1] legitimate safety requirements that are necessary for safe operation, including crime prevention measures;

[2] overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

[3] the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

28 C.F.R. § 36.104, at 460-61 (1991) (definition of "readily achievable").

[29] Among the examples are: installing ramps, repositioning shelves and telephones, installing accessible door hardware, installing grab bars in toilet stalls. See id. § 36.304(b), at 466, & app. B, at 576-77.

> The list of factors . . . reflects the congressional intention that a wide range of factors be considered in determining whether an action is readily achievable. It also takes into account that many local facilities are owned or operated by parent corporations or entities that conduct operations at many different sites. This section makes clear that, in some instances, resources beyond those of the local facility where the barrier must be removed may be relevant in determining whether an action is readily achievable. One must also evaluate the degree to which any parent entity has resources that may be allocated to the local facility.

28 C.F.R. § 36.104, app. B, at 576-77 (1991) (definition of "readily achievable").

The preamble to the title III regulation also explains that the ADA uses a general standard for barrier removal because a more specific financial standard would contravene the goals of the ADA:

> [T]he Department has declined to establish in the final rule any kind of numerical formula for determining whether an action is readily achievable. It would be difficult to devise a specific ceiling on compliance costs that would take into account the vast diversity of enterprises covered by the ADA's public accommodations requirements and the economic situation that any particular entity would find itself in at any moment.

Id. § 36.104, app. B, at 577.[30]

The "readily achievable" standard for barrier removal in existing facilities is thus intended to be flexible so as not to be unduly burdensome for businesses covered by title III. It is clear, however, that this standard, as defined in the

---

[30] See also Technical Assistance Manual at 29-32 (definition, factors, and examples of "readily achievable barrier removal").

statute and the regulation, is sufficiently precise to withstand constitutional scrutiny.

2. Alternatives to Barrier Removal

The ADA provides that where barrier removal is not readily achievable, a covered entity must make its goods or services available through "alternative methods if such methods are readily achievable." 42 U.S.C. § 12182(b)(2)(A)(v) (Supp. II 1990). IHOP asserts that the phrase "alternative methods" is vague because "readily achievable" is vague and the two are "inextricably attached," and because Congress did not define "alternative methods" in its debates or reports.

First, as we have demonstrated above, "readily achievable" is not unconstitutionally vague. In addition, the legislative history, the title III regulation, and the preamble all provide specific and easily understood examples of appropriate alternatives to barrier removal -- providing curb service or home delivery, coming to the door of the facility to handle transactions, serving beverages at a table for persons with disabilities where a bar is inaccessible, providing assistance to retrieve items from inaccessible shelves, relocating services and activities to accessible locations. Senate Report at 66; 28 C.F.R. § 36.305(b), at

467-68, app. B, at 599 (1991).[31] As these examples make clear, title III's "alternative methods" requirement allows creativity and flexibility in providing access to people with disabilities, but is not unconstitutionally vague.

3. Reasonable Modifications of Policies and Procedures

> Public accommodations are required to: make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services . . . to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations being offered.

42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. II 1990). IHOP argues that the phrases "reasonable modifications" and "fundamentally alter" are unconstitutionally vague.

Like the readily achievable standard for barrier removal, the reasonable modification requirement for policies and procedures was designed to be flexible so that it could apply in a sensible and fair way to many different kinds of situations. The term "reasonable" has been recognized by the courts as an easily understood phrase. See, e.g., Bandini Petroleum Co. v. Superior Court of Cal., 284 U.S. 8, 18 (1931) (statute prohibiting "unreasonable waste of gas" upheld, with acknowledgment of the need for flexibility in applying the statute); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 250 (1922) (Court found "unjust and unreasonable" rent to be

[31] See also the Technical Assistance Manual at 37-42 (describing "alternative methods").

"as definite as the 'just compensation' standard adopted in the Fifth Amendment . . . and therefore . . . sufficiently definite to satisfy the Constitution"); Harris v. Lukhard, 733 F.2d 1075, 1080 (4th Cir. 1984) ("reasonable effort" and "unreasonable loss" found sufficiently precise).

The title III regulation and preamble provide several illustrations of "reasonable modifications." For example, stores in which all of the checkout aisles are not accessible would be required to ensure that an adequate number of accessible checkout aisles are left open at all times. See 28 C.F.R. § 36.302(d), at 465 (1991). Similarly, facilities that do not permit entry to animals would be required to modify such polices with regard to service animals used by people with disabilities. Id. § 36.302(c), at 465.

The concept of "fundamental alteration" is not confusing or complex. Nor is it new with the ADA. The term was first articulated in Southeastern Community College v. Davis, 442 U.S. 397 (1979), a decision construing section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability in federally assisted or operated programs or activities. In Davis, the Court concluded that programs did not discriminate if they failed to make accommodations that would "fundamentally alter" the nature of the program. Id. at 409. The preamble to the title III regulation also contains an explanation of fundamental alteration:

> The rule does not require modifications to the legitimate areas of specialization of service providers. Section 36.302(b) provides that a public accommodation may refer an individual with a disability to another public accommodation, if that individual is seeking, or requires, treatment or services outside of the referring public accommodation's area of specialization, and if, in the normal course of its operations, the referring public accommodation would make a similar referral for an individual without a disability who seeks or requires the same treatment or services.
>
> For example, it would not be discriminatory for a physician who specializes only in burn treatment to refer an individual who is deaf to another physician for treatment of an injury other than a burn injury. To require a physician to accept patients outside of his or her specialty would fundamentally alter the nature of the medical practice and, therefore, not be required by this section.

28 C.F.R. pt. 36, app. B, at 592 (1991); see also Senate Report at 62-63; Technical Assistance Manual at 22-24, 27, and Supp. 1993 at 4 (explanation of reasonable modifications and fundamental alteration). As the regulation and the corresponding explanations in the preamble make clear, then, the terms "reasonable modifications" and "fundamental alteration" are readily understandable and are not unconstitutionally vague.

4. Most Integrated Setting Appropriate

Title III requires covered entities to afford their goods and services to an individual with a disability "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(1)(B) (Supp. II 1990). IHOP asserts that this requirement is unconstitutional, although it fails to explain why it believes so.

The statute's language is easily understandable, and obviously indicates that a public accommodation must serve persons with disabilities integrated among other persons, as long as the integration serves the needs of the person with the disability. In addition, once again, the title III regulation provides illustration of this provision. The preamble to the title III regulation contains two pages of examples and explanation, including the following:

> The ADA recognizes that the provision of goods and services in an integrated manner is a fundamental tenet of nondiscrimination on the basis of disability. Providing segregated accommodations and services relegates persons with disabilities to the status of second-class citizens. For example, it would be a violation of this provision to require persons with mental disabilities to eat in the back room of a restaurant or to refuse to allow a person with a disability the full use of a health spa because of stereotypes about the person's ability to participate.

28 C.F.R. pt. 36, app. B, at 581 (1991) (discussing the "integrated settings" requirement of regulation § 36.203).[32] The legislative history further illustrates this provision, explaining, for example, that the "integrated settings" provision is intended to prevent segregation based on fears and stereotypes about persons with disabilities. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. II, at 102 (1990), reprinted in 1990 U.S.C.C.A.N. 327, 385 ("House Report, Pt.

[32] See also Technical Assistance Manual at 14-15 (illustrating integrated and separate programs designed to meet the needs of persons with disabilities).

II"); see also id. pt. III, at 56-57 (1990), reprinted in 1990 U.S.C.C.A.N. 327, 479-80 ("House Report, Pt. III").

5. Undue Burden

Title III requires public accommodations to provide auxiliary aids and services necessary to afford its services to persons with disabilities, unless to do so would pose an "undue burden" to the covered entity or would "fundamentally alter" the nature of its goods or services. 42 U.S.C. § 12181(b)(2)(A)(iii) (Supp. II 1990). IHOP claims that the term "undue burden" is unconstitutionally vague.[33]

The legislative history explains that "undue burden" is analogous to the phrase "undue hardship" used in the employment title of ADA and is derived from section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1973). Senate Report at 63; see also Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979). The legislative history also explains, as noted above, that this is a higher standard than "readily achievable."

"Undue burden" is defined in the regulation as a "significant difficulty or expense." 28 C.F.R. § 36.104, at 461 (1991) (definition of "undue burden"). The regulation lists factors for determining whether a particular action will create an undue burden; these are the same as those to be used

[33] IHOP also challenges the term "fundamental alteration," which is discussed earlier.

in assessing whether an action is "readily achievable." Id. The preamble clarifies that:

> "[R]eadily achievable" is a lower standard than "undue burden" in that it requires a lower level of effort on the part of the public accommodation.
>
> and
>
> [A] public accommodation is not required to provide any particular aid or service that would result in either a fundamental alteration in the nature of the goods, services, facilities, privileges, advantages, or accommodations offered or in an undue burden. Both of these statutory limitations are derived from caselaw under section 504 [of the Rehabilitation Act of 1973] and are to be applied on a case-by-case basis . . . .

Id., app. B, 576, 595 (discussing definition of "undue burden" in § 36.104).[34]

Language similar to "undue burden" has been upheld, even where the statute provided no definition of the term and no list of factors to consider in making the determination. See Jackson Court Condominiums, Inc. v. City of New Orleans, 665 F. Supp. 1235, 1242 (E.D. La. 1987), aff'd, 874 F.2d 1070 (5th Cir. 1989) (rejecting a vagueness challenge to a zoning ordinance that allowed for variances upon a showing of "undue hardship").

[34] The regulation is supplemented by discussion in the Technical Assistance Manual, which provides explanations of both "undue burden" and "fundamental alteration." See Technical Assistance Manual at 27-28.

6. Full and Equal Enjoyment and Opportunity to Participate

Title III's general prohibition against discrimination provides as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .

42 U.S.C. § 12182(a) (Supp. II 1990). IHOP claims that the phrase "full and equal enjoyment" is impermissibly vague.

The challenged phrase is a simple concept commonly used in civil rights statutes.[35] Affording "full and equal enjoyment" clearly comprehends that persons with disabilities are not to be provided only a portion of the goods and services provided to others or lesser goods and services. The legislative history explains that

> 'Full and equal enjoyment' does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.

Senate Report at 60. Moreover, the next subsection of the statute further defines the general rule. Entitled

---

[35] See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (1988) ("All persons shall be entitled to the full and equal enjoyment of the goods . . . of any place of public accommodation . . . ."); Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B) (1988) (discrimination includes failure to modify policies where "necessary to afford such person equal opportunity to use and enjoy a dwelling"); id. § 3631 (rendering punishable retaliation against anyone "participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate"); Roberts v. United States Jaycees, 468 U.S. 609, 610 (1984) (interpreting "full and equal enjoyment").

"Construction," it enumerates categories of actions that constitute discrimination "in the full and equal enjoyment" of goods and services.[36]

IHOP also challenges as vague one of the subsections of the general rule, which provides:

> (i) DENIAL OF PARTICIPATION.--It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, . . . to a denial of the opportunity of the individual . . . to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

42 U.S.C. §§ 12182(b)(1)(A)(i) (Supp. II 1990) (emphasis added to specific terms IHOP has claimed are impermissibly vague). Similar to the general rule cited above, this provision is simple language, capable of common understanding. The prohibition on denying individuals with disabilities an

---

[36] Those categories of discrimination are:

> (1) denying to a person with a disability the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations offered by a place of public accommodation;
>
> (2) affording a person with a disability an opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals;
>
> (3) providing an individual with a disability with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual with a good, service, facility, privilege, advantage or accommodation, or other opportunity that is as effective as that provided to others.

42 U.S.C. § 12182(b)(1)(A)(i) - (iii) (Supp. II 1990).

"opportunity to participate in or benefit from" the goods or services of a covered entity obviously means that persons with disabilities are not to be excluded from receiving the goods or services of a place of public accommodation.

The title III regulation contains further explanation and examples. The preamble explains that denial of participation means:

> A public accommodation may not exclude persons with disabilities on the basis of disability for reasons other than those specifically set forth in this part. For example, a public accommodation cannot refuse to serve a person with a disability because its insurance company conditions coverage or rates on the absence of persons with disabilities.

28 C.F.R. § 36.202, app. B, at 580 (1991) (setting forth general forms of discrimination prohibited by § 36.202).[37]

E. TITLE III OF THE ADA DOES NOT EFFECT AN UNCONSTITUTIONAL TAKING WITHOUT JUST COMPENSATION.

The Fifth Amendment to the Constitution prohibits the Federal government from taking private property "for public use, without just compensation." U.S. CONST. amend. V. The ADA requirements challenged by IHOP do not violate this constitutional command. An unconstitutional taking occurs only where a statute or ordinance "does not substantially advance legitimate State interests, or denies the owner

---

[37] See also Technical Assistance Manual at 13 ("Just as under the Civil Rights Act of 1964 a restaurant cannot refuse to admit an individual because of his or her race, under the ADA, it cannot refuse to admit an individual merely because he or she has a disability").

economically viable use of the land." Agins v. City of Tiburon, 447 U.S. 255, 260 (1979); See also Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 296-97 (1981); Furey v. City of Sacramento, 780 F.2d 1448, 1457 (9th Cir. 1986); Trustees for Alaska v. EPA, 749 F.2d 549, 559 (9th Cir. 1984). The Supreme Court has repeatedly stated that such an analysis must be made on an individual ad hoc factual basis. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962).

Title III of the ADA requires existing places of public accommodation, such as IHOP, to remove architectural barriers that impede or prevent access to such facilities by persons with disabilities, as well as communications barriers that are structural in nature, to the extent that such removal is "readily achievable," which means "able to be carried out without much difficulty or expense." 42 U.S.C. §§ 12182, 12181(9) (Supp. II 1990). As so defined, the "readily achievable" standard of performance can never so diminish or destroy the value of a covered entity's property, nor have such a grave economic impact on property, as to ever constitute an unconstitutional taking without just compensation within the meaning of the Fifth Amendment.

The ADA was designed to strike a balance that looks to the future -- all new construction of and alterations to places of public accommodation are required to comply strictly with the ADA Standards for Accessible Design. 42 U.S.C. §§

12183, 12186(b), 12186(c) (Supp. II 1990); 28 C.F.R. 36.406, at 474 (1991). This obligation is imposed without regard to cost factors because Congress found that incorporating accessibility features at the design stage for alterations and new construction added little to the overall cost. Senate Report at 89. However, Congress recognized that retrofitting existing facilities to improve accessibility could be expensive, sometimes extraordinarily so. Id. at 65. Accordingly, Congress imposed the "readily achievable" standard, which explicitly limits an entity's obligation to remove barriers based on the cost of retrofitting and the resources of the entity involved. 42 U.S.C. § 12181(9) (Supp. II 1990).

Businesses are thus required to remove barriers to access in existing facilities in accordance with their different resources, capabilities, and circumstances.[38] The "readily achievable" standard was designed to require "minimal investment with a potential return of profit from use by disabled patrons, often more than justifying the small expense." Senate Report at 66.

IHOP's argument regarding an unconstitutional taking reflects a total misunderstanding of the statute. IHOP's

---

[38] The title III regulation lists 21 examples of steps that are likely to be readily achievable in many circumstances. None of these actions is likely to have a significant adverse effect on the property or the income of most existing public accommodations. See 28 C.F.R. § 36.304(b), at 466 (1991).

analysis proceeds from a factual premise that compliance with the barrier removal requirement would absolutely require from $32,500 to $104,500 in renovations to restrooms that could also cause the loss of approximately twenty seating places for customers. (IHOP Mem. at 7-8). Although IHOP does not provide information about its resources, IHOP claims that such costs will have a "tremendous" economic impact and will "destroy" its reasonable business expectations (IHOP Mem. at 39-40). This Court must eventually determine, based on a full development of the record, whether IHOP's cost estimates and assessments of impact on its business are accurate. If barrier removal would in fact have a dramatic deleterious effect on IHOP's business, such modifications would not be required under the "readily achievable" standard.[39]

Because IHOP's argument is premised on a misunderstanding of title III's legal requirements, its contention that title III effects an unconstitutional taking without compensation is fundamentally flawed as well.

In a landmark case on takings, the Supreme Court set forth factors to be considered when determining whether an unconstitutional regulatory taking has occurred:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-

[39] We take no position on the accuracy of IHOP's cost estimates or assessments of the impact on its business. IHOP failed to respond to the United States' discovery requests seeking information about IHOP's financial circumstances. See Zahedi Dep. at 289-91, 295-99.

> backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). While courts do not always explicitly rely on the entire Penn Central test, the factors it sets forth are accepted as those appropriately considered in a regulatory takings analysis. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992). We examine title III of the ADA in light of each of these factors.

1. To constitute a taking, the economic impact of a challenged statute must be extreme, to the point of denying the claimant any economically viable use of the property. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985). A showing that there is merely some adverse economic impact is inadequate.[40] As Justice Brennan stated,

> Government regulation - by definition - involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.

Andrus v. Allard, 444 U.S. 51, 65 (1979); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

The barrier removal requirement in title III can never have so severe an impact as to deprive a covered entity of any

---

[40] IHOP bears the burden of proof on this issue. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987); Lake Nacimiento Ranch v. County of San Luis Obispo, 841 F.2d 872, 877 (9th Cir. 1987).

economically viable use of its property because, as we have explained, barrier removal is governed by the flexible "readily achievable" standard -- expressly tied to the costs involved in making changes and the resources of the business. The statute simply does not require a covered entity to take steps that are so costly or difficult as to cause a devastating economic impact. House Report, pt. III, at 61-62.

As discussed, IHOP misconstrues title III's requirements, but even in its best light, IHOP's argument is inadequate to demonstrate that a taking has occurred. In Pennsylvania Coal Co., the Supreme Court found that a statute forbidding the removal of anthracite coal, in instances where such removal would cause subsidence of the property above the coal mines, resulted in an unconstitutional taking because it would destroy the "previously existing rights" of a coal company that owned only the right to the coal. 260 U.S. at 413. Among the reasons for the Court's decision was its finding that the company owned only the right to mine coal and such mining had been made "commercially impracticable" by the statute.[41]

In this case, IHOP asserts only that accessibility modifications will be expensive and that they may result in

---

[41] Compare Pennsylvania Coal Co. with the more recent decision in Keystone Bituminous Coal, in which the Supreme Court upheld a similar coal mining restriction because it found that the restriction furthered a public interest ("the public interest in health, the environment, and the fiscal integrity of the area") and did not make use of the petitioners land economically inviable. 480 U.S. at 474.

some lost office and dining space. Nowhere does IHOP claim that the existing operations of the restaurant would no longer be financially viable. A taking does not occur just because a property holder is prohibited from using his or her property in the manner that would be most profitable. Lai v. City and County of Honolulu, 841 F.2d 301, 303 (9th Cir. 1988) (no taking found when creation of scenic easement prevented construction of a high-rise condominium); Rymer v. Douglas County, 764 F.2d 796, 801 (11th Cir. 1985) (no taking occurred when owners of plot of land approved and purchased for residential use were denied permission to install septic tanks, making residential use impossible); see also Goldblatt, 369 U.S. at 592.

As these cases make clear, requiring property owners to discontinue or substantially alter their intended use of the property affected does not amount to an unconstitutional taking. A taking occurs only when the government makes all uses of the property economically infeasible. Title III has no such impact. The barrier removal obligation in title III does not require any action that would force IHOP to abandon its operations or make such operations economically infeasible.

2. Title III's barrier removal requirement does not cause an adverse impact on reasonable investment-backed expectations sufficient to effect an unconstitutional taking. As the Supreme Court has stated,

> [L]oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim. . . . [P]erhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Andrus, 444 U.S. at 66; Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135, 139 (2d Cir. 1984) (quoting Andrus, 444 U.S. at 66), see also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976).

IHOP argues that the ADA adversely affects its reasonable investment-backed expectations because the statute applies to it as an existing business operation that complied fully with all applicable laws and regulations at the time of construction. This "existing facility" argument finds no support in the case law. Takings do not occur simply because legislation applies to existing operations that have previously been operating in a legal manner. Everard's Breweries v. Day, 265 U.S. 545 (1924); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1920).[42] This is true even if the new law frustrates all of the owner's previous and intended uses

[42] This does not mean, of course, that in instances where government completely frustrates reasonable investment-backed expectations a taking will not be found to occur. This is especially true where government guarantees have created expectations which are then crushed by subsequent legislative changes. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 985 (1984) (amendments to Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1988), which required disclosure of health, safety, and environmental data to others in industry, amounts to an unconstitutional taking of trade secrets); Pennsylvania Coal Co., 260 U.S. 393.

for the property, as long as the property remains economically viable for some purpose.[43]

Here, of course, the ADA effects no change at all in the use of any facility covered by title III. Restaurants, like IHOP, can continue to operate as restaurants. Indeed, it is anticipated that covered businesses will not only continue to operate as they have, but will become more profitable as they reach new customers by making their facilities accessible to the forty-three million persons with disabilities. Senate Report at 66.

3. The ADA also withstands scrutiny under the third Penn Central factor -- "the character of the government action." A takings violation does not occur if the statutory requirement at issue advances the underlying purpose of the statute.[44]

The barrier removal requirement in title III advances the stated purposes of the ADA --

---

[43] For example, in Andrus, the Supreme Court rejected claims that the Eagle Protection Act and the Migratory Bird Treaty Act effected a taking even though they prohibited all of the uses originally intended for the products made from the protected birds. 444 U.S. 51. Instead, the Court was satisfied that the claimants had not proven that they were unable to make any profitable use of the items. Id. at 66.

[44] See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), in which the Supreme Court held that a taking without compensation had occurred where owners of beach front property who wished to build homes were required to grant a public easement across the property. The Court found no evidence that the easement would further the stated rationale for the requirement -- to alleviate the effect the homes would have on the view of the beach from the public thoroughfare. See also Commercial Builders v. Sacramento 941 F.2d 872 (9th Cir. 1991).

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and]
>
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.

42 U.S.C. § 12101 (b)(1) & (2) (Supp. II 1990).

Congressional concern over the deleterious effects of discrimination against people with disabilities is clearly set forth in the legislative history.

> The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue. . . . The extent of non-participation of individuals with disabilities in social and recreational activities in [sic] alarming.

Senate Report at 11 (citing the findings of a recent Lou Harris poll summarized by the National Council on Disability).

Congressional hearings revealed that the "lack of physical access to facilities" was a major cause of the exclusion of individuals with disabilities. Senate Report at 11. With respect to existing facilities, Congress realized that it would be "appropriate to require modest changes" to make such facilities accessible to people with disabilities. Id. The barrier removal requirements at issue here were the result. Plainly, they serve the purposes of the statute.[45]

---

[45] There is no merit to IHOP's argument that the ADA constitutes a taking because it requires existing facilities to make modifications for the benefit of a specific group (people with disabilities) (IHOP Mem. at 40). The Supreme Court has rejected this type of takings argument in Heart of

F. TITLE III IS NOT RETROACTIVE LEGISLATION.

Title III mandates changes in the way existing places of public accommodation do business, but it imposes no liability for pre-Act conduct and, accordingly, is not retroactive and does not violate the Due Process Clause. "The determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." McAndrews v. Fleet Bank, 989 F.2d 13, 16 (1st Cir. 1993); see also FDIC v. Faulkner, 991 F.2d 262 (5th Cir. 1993), reh'g denied, Jun. 30, 1993 WL.

The title III provisions applicable to existing places of public accommodation impose no liability or penalty for conduct occurring prior to the effective date of the

---

Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), involving a challenge to title II of the Civil Rights Act of 1964, which is the model for title III. As Justice White stated in Connolly v. Pension Benefit Guarantee Corp., when considering such a challenge to a new pension benefit regulation,

> In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. . . . Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

475 U.S. 211, 222-23 (1986); see Elkhorn, 428 U.S. at 14-20; see also Miller v. Schoene, 276 U.S. 272, 279 (1928).

statute.[46] An existing restaurant facility, for example, cannot be held liable under title III for having had doorways too narrow for persons who use wheelchairs to enter or for having refused to serve persons with mental retardation, prior to January 26, 1992. Liability can attach under title III only if such a facility has failed, after that date, to widen the doorway where it would be readily achievable to do so, or to continue to refuse service to persons with mental retardation. Title III does not alter the legal consequences of conduct occurring before the statute's effective date and it is, therefore, not retroactive legislation.[47]

Title III is not retroactive, nor does it contravene the Due Process Clause, as IHOP seems to suggest, simply because it imposes new obligations on existing businesses. To accept

---

[46] The ADA was signed into law on July 26, 1990. The title III provisions applicable to existing facilities took effect 18 months later, on January 26, 1992. See 42 U.S.C. § 12181 note (Supp. II 1990). Small businesses could not be sued for title III violations until even later. Id. The period between enactment and effective date was designed to give covered businesses sufficient time to become aware of their new obligations under the ADA and to undertake barrier removal and operational changes necessary to come into compliance.

[47] Indeed, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect," Bennett v. New Jersey, 470 U.S. 632, 639 (1985), while procedural and remedial changes in the law are generally given retroactive effect, Bradley v. School Board of Richmond, 416 U.S. 696 (1974). Substantive provisions of titles I (employment) and II (State and local government programs and services) of the ADA have been found not to be retroactive. Barraclough v. ADP Automotive Claims Servs., Inc., 818 F. Supp. 1310, 1312 (N.D. Cal. 1993); Dean v. Thompson, No. 92 C 20388, 1993 WL 169734 at *4 (N.D. Ill. May 6, 1993).

IHOP's due process theory would absolutely paralyze Congress in any effort to regulate in the commercial arena; it could only act with respect to new businesses coming into existence. The Due Process Clause does not so drastically circumscribe congressional power. IHOP, and other existing businesses, have no due process right to continue to do business unencumbered by new obligations that may be imposed by Congress.

This point is well illustrated by Federal Housing Administration v. Darlington, Inc., 358 U.S. 84 (1958), reh'g denied, 358 U.S. 937 (1959). In that case the Court struck down a due process challenge to a statute which directed the Federal Housing Administration ("FHA") to insure mortgages only for strictly residential (not transient) housing. The Court held that the requirement could be constitutionally applied to an existing apartment facility with some transient units that was already mortgaged under the FHA program. The Court noted that the amended statute was only prospective in effect as it did not penalize the owner for past conduct. Furthermore, as the Court stated:

> [F]ederal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

358 U.S. at 91 (quoting Fleming v. Rhodes, 331 U.S. 100, 107 (1947)); see also United States v. Manufacturers Nat'l Bank,

363 U.S. 194, 200 (1960); Cox v. Hart, 260 U.S. 427, 435 (1922).

V. CONCLUSION

For the foregoing reasons, the Court should enter an order denying IHOP's motion for summary judgment, granting the United States' cross-motion for summary judgment on IHOP's counterclaim, and declaring that title III of the ADA:

A. is a constitutional exercise of Congress' power under the Commerce Clause that properly reaches restaurants, including IHOP;

B. does not intrude on State sovereignty in violation of the Tenth Amendment;

C. is not an unconstitutional delegation of legislative authority to the executive or judicial branch;

D. is not unconstitutionally vague in violation of the Fifth Amendment;

E. does not constitute an unconstitutional taking of property without compensation in violation of the Due Process Clause; and

F. does not apply retroactively in violation of the Due Process Clause.

Respectfully submitted,

JAMES P. TURNER
Acting Assistant Attorney General

By: _____

JAMES W. BRANNIGAN, JR.
Unites States Attorney
JOHN R. NEECE
Assistant U.S. Attorney
Chief, Civil Division
United States Courthouse
940 Front Street
Room 5-N-19
San Diego, Ca. 92189
(619) 557-5662

JOAN A. MAGAGNA
BEBE NOVICH
JOSEPH C. RUSSO
Attorneys
Public Access Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 307-0663