UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IT'S MY PARTY, INC.,	)	
	)	
Plaintiff,	)	
	)	
	)	**Civil Action No. L-01-3270**
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

The plaintiff, It's My Party, Inc. ("IMP"), has filed this action seeking a declaratory judgment that the Department of Justice's "policy" regarding the Americans with Disabilities Act ("ADA") and the regulations promulgated pursuant to it regarding effective communication for deaf and hard of hearing individuals, is incorrect. IMP bases its challenge on a settlement agreement signed by the Disability Rights Section of the Department of Justice with Sledge, Inc., a sister company to IMP. IMP claims that the Department of Justice "declared" its "policy" through its response to a complaint from a hearing-impaired individual, which led to the settlement agreement with Sledge, Inc.

This action must be dismissed for lack of subject matter jurisdiction. First, IMP alleges no statutory basis which confers a waiver of the United States' sovereign immunity. Second, the action IMP challenges is not a final agency action under the Administrative Procedure Act, as required to

permit judicial review. Third, this action is not ripe for review under the principles of the Declaratory Judgment Act.

II. FACTUAL AND STATUTORY BACKGROUND

IMP is a Maryland corporation that, upon information and belief, promotes and produces concerts throughout the Metropolitan Washington D.C. area. (Compl. at ¶ 1). It is a sister company to Sledge, Inc., a District of Columbia Corporation, which owns the 9:30 Club, a concert venue in Washington D.C. (Compl. at ¶ 11). The Disability Rights Section of the Department of Justice ("DOJ") was authorized by Congress to enforce the ADA, and to promulgate regulations implementing Title II (applying to programs of state and local governments) and Title III (applying to private entities that provide public accommodations) of the ADA. 42 USC §§12134, 12186.

In November 1999, the Disability Rights Section of the Department of Justice reached a settlement agreement with Sledge, Inc. regarding the provision of sign language interpreters to hearing impaired individuals who attend their concerts and request an interpreter. Generally, the settlement agreement provided that Sledge, Inc. would provide a sign language interpreter for an individual who had purchased a ticket to one of its concerts and requested an interpreter at least ten days before the concert. The settlement agreement also required Sledge, Inc. to provide monthly reports for one year to the Disability Rights Section. Over a 13 month period following the signing of the settlement agreement, Sledge reported that it received and filled three requests for interpreters.

IMP alleges, without any specific details, that it has received requests from patrons for qualified sign language interpreters for events being promoted by IMP. (Compl. at ¶ 5.) IMP alleges that it has

responded to these requests by providing or offering to provide written materials, such as a set list of the songs to be performed and the printed lyrics of the songs, and to place these patrons where sight lines to the stage were most direct. (*Id.*) IMP alleges that "on some of these occasions," the patrons considered these "auxiliary aids and services" not sufficient or reasonable under the ADA, and threatened to complain to the Department of Justice. (Compl. at ¶ 6-7.)

Title III of the ADA applies to private entities that are public accommodations, such as a concert hall or place of entertainment. 42 USC § 12181(7). The ADA, among other things, requires public accommodations:

> to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

42 USC § 12182(b)(2)(A)(iii).

The regulations clarify that "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 CFR § 36.303(c). The regulations explain further that the term "auxiliary aids and services" includes:

> Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

28 CFR § 36.303(b).

ARGUMENT

III. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THERE IS NO APPLICABLE WAIVER OF THE UNITED STATES' SOVEREIGN IMMUNITY

A court lacks jurisdiction over claims against the United States absent an express waiver of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see also Randall v. United States*, 95 F.3d 339, 345 (4th Cir. 1996) (the United States' consent to be sued is a prerequisite for jurisdiction); *Florida Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498, 501 (4th Cir. 1996) (same). Further, a statute must unequivocally express a waiver of sovereign immunity; the waiver cannot be implied. *Randall*, 95 F.3d at 345.

IMP's Complaint alleges that this Court has jurisdiction over its cause of action pursuant to "28 U.S.C., Sections 1331 and 1346(a)(2), and 42 U.S.C. 12188(a)(1) and (a)(2)" because the "cause of action raises a federal question arising under the Constitution and laws of the United States, with the United States as Defendant." (Compl. at ¶ 3.) In addition, IMP alleges that this Court has concurrent jurisdiction over its claim pursuant to 28 U.S.C. § 2201 because "Plaintiff seeks ... a declaration of its rights and legal obligations under" title III of the ADA, 28 U.S.C. § 12101 *et seq.* (*Id.*) Nowhere in its Complaint does IMP allege any statutory provision constituting a waiver of the Federal Government's sovereign immunity that is applicable to its claim. Therefore, this action should be dismissed because of lack of subject matter jurisdiction as a result of the Federal Government's sovereign immunity.

A statute's grant of subject matter jurisdiction to a federal court does not constitute a waiver of the Federal Government's sovereign immunity. As a result, IMP's reliance upon 28 U.S.C. § 1331[1] and 42 U.S.C. 12188(a)[2] fails to establish this Court's subject matter jurisdiction. It is well settled that 28 U.S.C. § 1331 "is not a general waiver of sovereign immunity. It merely establishes a subject matter that is within the competence of federal courts to entertain." *Randall*, 95 F.3d at 345; *see also Carrington Gardens Assocs. v. United States*, 258 B.R. 622, 628 (E.D. Va. 2001), *citing Randall*, 95 F.3d at 345 ("Congress does not waive sovereign immunity by establishing a subject matter that is within the competence of federal courts to entertain"); *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491, 503 (E.D. Va. 1999) (same), *aff'd* 232 F.3d 887 (4th Cir. 2000). In addition, although 42 U.S.C. § 12188(a) provides that federal courts have subject matter jurisdiction to grant injunctive relief to persons

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[1] 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[2] 42 U.S.C. § 12188 (a) provides in pertinent part:

> (1) The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.
>
> (2) In the case of violations of sections 12182(b)(2)(A)(iv) and section 12183(a) of this title, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this subchapter.

discriminated against in violation of title III of the ADA, nowhere in the ADA did Congress unequivocally express its intent to waive the Federal Government's sovereign immunity.[3] Therefore, neither 28 U.S.C. § 1331 nor the ADA provides a waiver of the United States' sovereign immunity.

As an additional basis for subject matter jurisdiction, IMP relies upon the Little Tucker Act, 28 U.S.C. § 1346(a)(2). The Tucker Act is not a proper jurisdictional basis for this action, however, because, with limited exceptions, equitable relief is not available under the Tucker Act. Only if injunctive relief is necessary to provide an entire remedy and when it is "an incident of and collateral to" an award of monetary relief may a court award such equitable relief under the Tucker Act. 28 U.S.C. § 1491(a)(2); *see also Randall*, 95 F. 3d at 347 ("The injunctive relief requested by plaintiff would not be available under the Tucker Act because it would not be incident of, or collateral to, a monetary award."); *Roetenberg v. Secretary of the Air Force*, 73 F. Supp. 2d 631, 636 (E.D. Va. 1999) (Plaintiff seeking to be released from an obligation to pay money to the United States did not raise a claim under the Tucker Act).

In light of the fact that the only type of relief requested by IMP is injunctive relief, the Little Tucker Act is not a valid basis for this court's jurisdiction. Specifically, IMP's prayer for relief demands a declaratory judgment that title III of the ADA and its implementing regulations do not require IMP to provide sign language interpreters for hearing impaired patrons at musical and public performances it promotes. (Compl. at ¶ 2.) In addition, IMP demands that this Court permanently enjoin the United

[3] Furthermore, the ADA is not a proper jurisdictional basis for this action since IMP is not a "person who is being subjected to discrimination on the basis of disability." 42 USC § 12188(a).

States from requiring that IMP provide sign language interpreters for musical performances it promotes when other auxiliary aids are made available. (Compl. at ¶ 3.) Even if IMP were to seek monetary damages because of an alleged financial hardship suffered as a result of providing sign language interpreters to its patrons in the past, obtaining monetary damages would not be the primary purpose of the lawsuit and, thus, would not sufficiently state a cause of action under the Tucker Act.

IMP also alleges that this Court has jurisdiction over its claim under the Declaratory Judgment Act, 28 U.S.C. § 2201. The Declaratory Judgment Act does not itself confer jurisdiction on a federal court where none otherwise exists. *Schilling v. Rodgers*, 80 S. Ct. 1288, 1296 (1960); *Wyoming v. United States*, 279 F. 3d 1214, 1225 (10th Cir. 2002). That statute was adopted by Congress as a procedural mechanism enlarging the range of remedies available in federal court, but did not extend the federal courts' jurisdiction. *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 671-72, 70 S. Ct. 876, 878-79 (1950). Thus, the Declaratory Judgment Act is not a waiver of the Federal Government's sovereign immunity. *Robishaw Engineering, Inc. v. United States*, 891 F. Supp. 1134, 1142 (E.D. Va. 1995); *Ocean Breeze Festival Park, Inc. v. Reich*, 853 F. Supp. 906, 917 (E.D. Va. 1994), *aff'd* 96 F.3d 1440 (4th Cir. 1996).

IMP did not allege the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, as a jurisdictional basis. Even if it had, however, IMP's action would still require dismissal. The APA provides that a person who claims to have suffered a legal wrong because of agency action may file a complaint in federal court so as to obtain judicial review of the challenged agency action. *Randall*, 95 F.3d at 346. The APA provides a limited waiver of the Federal Government's sovereign immunity for

suits seeking relief "other than money damages." 5 U.S.C. § 702. *See also Bowen v. Massachusetts*, 487 U.S. 879, 891-92, 108 S. Ct. 2722, 2730-31 (1988) ("[I]t is undisputed that the 1976 amendment to [5 U.S.C.] § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment...."). However, the waiver of sovereign immunity afforded by the APA exists "only if the APA is implicated in the first instance: that is, only if there has been an agency action which is subject to review." *Circuit City Stores, Inc.*, 75 F. Supp. 2d at 505; *see also Randall*, 95 F.3d at 346 (waiver of sovereign immunity in the APA exists only to the extent that review under the APA is available, which requires final agency action). For the reasons set forth in Part IV.A. *infra*, the agency action IMP challenges is not subject to review because it is not a final action, and therefore, even if IMP had alleged the APA, it would not confer a waiver of sovereign immunity.

IV. THIS ACTION LACKS SUBJECT MATTER JURISDICTION BECAUSE THERE IS NO JUSTICIABLE CASE OR CONTROVERSY

The United States Constitution permits the federal courts to hear only those actions that are actual "cases" or "controversies." U.S. Constitution, Article III, Section 2. Both the Declaratory Judgment Act, cited by the plaintiff as a jurisdictional basis for this action, and the Administrative Procedure Act ("APA") incorporate this requirement. In an action like the instant one, where a plaintiff sues for declaratory judgment on the basis of agency action, the doctrines of ripeness under the Declaratory Judgment Act and "final agency action" under the Administrative Procedure Act must be applied to determine whether this court may exercise jurisdiction over the subject matter of this action. While the plaintiff did not cite the APA as a jurisdictional ground, the requirements under the APA may

nonetheless be considered to determine the existence of this court's subject matter jurisdiction.

A. No Subject Matter Jurisdiction Exists Because The "Action" Challenged by IMP Is Not a Final Agency Action.

The Administrative Procedure Act ("APA") permits judicial review of agency action. 5 USC § 702. However, only a "final agency action for which there is no other adequate remedy in a court" or an action made reviewable by statute is subject to judicial review.[4] 5 USC § 704; *Randall v. United States*, 95 F.3d 339 (4th Cir. 1996); *Circuit City Stores, Inc. v. EEOC*, 75 F. Supp. 2d 491, 505 (E.D. Va. 1999), *aff'd* 232 F.3d 887 (4th Cir. 2000). A complaint challenging an action that is not a "final agency action" is not judicially reviewable and must be dismissed. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 246-247 (1980); *Georator Corporation v. EEOC*, 592 F.2d 765, 769 (4th Cir. 1979).

An "'agency action' includes the whole or part of an agency rule, order, license, section, relief, or the equivalent or denial thereof, or failure to act." 5 USC § 551(13). For an agency action to be final, it must be "definitive," rather than "informal, or only the ruling of a subordinate official, or tentative." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (internal citations omitted). It must "mark the 'consummation' of the agency's decision-making process." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). A final agency action is a "considered and formalized determination," such as a regulation. *Toilet Goods Assn. v. Gardner*, 387 U.S. 158, 162 (1967). A final agency action must also have "determinate consequences for the party to the proceeding." *Georator v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979) (citing *ITT v. Electrical Workers*, 419 U.S. 428 (1975)). No finality exists with respect to a

[4] IMP does not challenge any action made reviewable by statute, and makes no argument to this effect.

determination that "can fix no obligation or impose any liability on the plaintiff." *Georator*, 592 F.2d at 768; *see also Bennett*, 520 U.S. at 178 (final action must be one that determines obligations and "from which legal consequences will flow").

The agency action complained of by IMP in this case does not meet the definition of a final agency action, as set out by the APA and interpreted by case law. IMP asserts that DOJ's response to a complaint filed by a deaf individual against Sledge, Inc. ("Sledge"), which culminated in a settlement agreement between DOJ and Sledge, constitutes the "policy" of the Department of Justice. (Compl. at ¶¶ 10-11.) The policy declared in this settlement agreement, IMP asserts, requires IMP to provide sign language interpreters to hearing-impaired patrons who request them. IMP requests this Court to regard DOJ's position as set out in the settlement agreement with Sledge as an agency policy and to review this policy as an agency action. This "policy," however, is neither a policy nor a final agency action.

The settlement agreement between DOJ and Sledge is not the consummation of the agency's decision-making process setting forth a policy, like a regulation. Rather, it is a negotiated agreement reached by two parties to resolve a particular complaint. Further, a settlement agreement has no "determinate consequences," nor fixes any obligations or imposes any liability, as would an administrative adjudication or a court order. A settlement agreement is a voluntary contract that does not, by itself, impose liability. Moreover, since the settlement agreement was between DOJ and Sledge, it certainly has no determinate consequences for IMP, which is a distinct corporate entity from Sledge with separate business operations. Therefore, the settlement cannot be a final agency action.

Any liability for IMP arising from a DOJ investigation could only be imposed after multiple steps, including the following: a disabled individual is denied an auxiliary aid by IMP and files a complaint with DOJ or DOJ initiates a compliance review; DOJ investigates the complaint or IMP's services and determines that IMP is not in compliance with the ADA; DOJ and IMP do not reach a settlement; DOJ authorizes filing a lawsuit against IMP; and a federal court determines that IMP has violated the ADA. All of these steps build upon one another, and to our knowledge, no complaint against IMP has been filed with DOJ, and DOJ has not begun a compliance review of IMP's services for individuals with hearing impairments. Most importantly, none of these steps has any relation to the settlement agreement with Sledge.

Under Fourth Circuit and other case law, the settlement in this agreement cannot be final agency action because it carries no determinate consequences for IMP. In *Georator v. EEOC*, the Fourth Circuit addressed a somewhat similar agency action – an EEOC reasonable cause determination. The court held that the EEOC's determination of reasonable cause on a charge of discrimination filed against Georator by a complainant was not a final agency action because it imposed no obligations or liability on Georator. Only if and when the EEOC or the complainant filed suit in district court, then Georator would have the opportunity to challenge the determination, and liability would be determined. 592 F.2d at 768. *See also Circuit City Stores, Inc. v. EEOC*, 75 F.Supp.2d 491 (E.D. Va. 1999), *aff'd* 232 F.3d 887 (4th Cir. 2000) (holding that the EEOC's issuance of a reasonable cause finding (a Commissioner's Charge), its threat to institute enforcement proceedings, and steps taken in preparation of litigation were not final agency actions). Consequently, the court dismissed the complaint for lack of subject matter

jurisdiction.

Like an EEOC reasonable cause finding, a DOJ settlement agreement imposes no liability or obligations, other than the contractual obligations to which the parties to the settlement agree. In fact, IMP is much further removed from liability than was Georator. Georator was challenging a reasonable cause determination as to its own conduct. IMP is, in effect, challenging the position DOJ took in the settlement agreement as to Sledge's conduct. Thus, under *Georator*, this action must be dismissed because the challenged agency action has no legal effect on IMP.

Other courts have heard declaratory judgment actions against DOJ involving similar scenarios to the instant action, and have held that the challenged agency actions were not final because they did not impose liability. Three district courts held that a DOJ amicus brief filed in a fourth lawsuit, which involved the same issue – the ADA requirements for stadium-style seating – was not a final agency action because it imposed no legal obligations. *U.S. v. AMC Entertainment, Inc.*, CV 99-1034 (C.D. Cal. Sept. 8, 1999), slip op. at 10-11; *U.S. v. Cinemark U.S.A., Inc.*, 99 CV 0705 (N.D. Ohio Mar. 22, 2000), slip op. at 6; *Cinemark U.S.A., Inc. v. U.S Department of Justice*, No. 3:99CV 0183, 2000 WL 915091, *6-7 (N.D. Tex. July 6, 2000). In *AMC Entertainment*, the court reasoned that "Advocacy in the context of a judicial proceeding does not constitute final agency action ... because an agency's statement of position in litigation with a private party imposes no legal obligations, denies no existing rights and fixes no legal relationships." *U.S. v. AMC Entertainment*, slip op. at 10-11 (citing *Mount Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990); *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975); *Board of Trade of the City of Chicago v. SEC*, 883

F.2d 525, 529-30 (7th Cir. 1989); *Ukiah Valley Medical Center v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990)).

These courts further held that settlement negotiations between DOJ and the respondents were not final agency actions because they imposed no legal rights or obligations. *U.S. v. AMC Entertainment*, slip op. at 12-14; *U.S. v. Cinemark U.S.A.*, slip op. at 6. Other courts also have held that settlement negotiations are not final agency actions. *See Assn. of Public Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) ("Negotiations, which are not final actions, therefore are not reviewable, and we decline to consider them"); *New Jersey Hosp. Assn. v. United States*, 23 F. Supp. 2d 497, 500 (D. N.J. 1998) (holding that DOJ's settlement letters do not constitute final agency action).

In addition, DOJ's initiation of litigation is not a final agency action. *U.S. v. Cinemark U.S.A.*, slip op. at 6-8. As the court noted in *U.S. v. Cinemark U.S.A.*, "If the Court were to adopt Defendant's position, the United States and the Attorney General would be subject to suit any time the Attorney General initiated an investigation or filed a complaint based on the belief that some party was unlawfully discriminating against persons with disabilities. This is an untenable position which this Court declines to adopt." *U.S. v. Cinemark U.S.A.*, slip op. at 8. *See also FTC v. Standard Oil Co. of California*, 449 U.S. 232, 241, 242 (1980) (holding that the FTC's issuance of a complaint asserting that the defendant was violating the Federal Trade Commission Act was not a final agency action because it was not a definitive statement of position and had no legal force comparable to that of the regulation at issue in *Abbott Laboratories*). Judicial review "should not be a means of turning prosecutor into defendant" and thus review of the position an agency takes in its complaint is not permitted. *Standard Oil Co. of*

California at 243.

As the court explained in *U.S. v. Cinemark U.S.A.*, since DOJ has no inherent power under the ADA to adjudicate, issue fines, or order a violator to take some action, unlike other agencies, none of the challenged agency actions could create liability, a necessary criteria of a final agency action. Rather, a legal obligation could only be ordered by a District Court. Slip op. at 8. Similarly, the settlement agreement between DOJ and Sledge creates no liability for IMP and cannot be a final agency action.

In addition to establishing no liability, the settlement agreement between DOJ and Sledge does not set forth a policy that represents a consummation of DOJ's decision-making process, and does so to an even lesser degree than would an amicus brief, which at least reflects the position of the agency alone, rather than possibly a compromise position agreed on to reach a settlement. Likewise, as compared to a decision to file litigation, a settlement agreement equally falls short as a consummation of DOJ's decision-making process. A decision to file litigation may be seen as a commitment of resources and to a legal position that would more likely reflect a consummation of the agency's decision-making process than would reaching a settlement with a private party to resolve a complaint.

Under Supreme Court law, Fourth Circuit law, and the well-thought out reasoning of other district courts who have considered similar issues, as discussed above, the action challenged in the instant case is not a final agency action. Because the agency action IMP challenges is not a final agency action, no judicial review is permitted. Therefore, this action must be dismissed for lack of subject matter jurisdiction.

B. The Claim Is Not Ripe for Judicial Resolution under the Declaratory Judgment Act.

In addition to lacking subject matter jurisdiction under the APA, this action also lacks ripeness under the Declaratory Judgment Act and thus should be dismissed. A declaratory action is only ripe for judicial resolution, when the "facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *Helco Products Company v. McNutt*, 137 F.2d 681, 682 (D.C. Cir. 1943). While the Declaratory Judgment Act authorizes federal courts to review claims for declaratory relief, the court's determination to hear a declaratory judgment action is discretionary. *Abbott Laboratories*, 387 U.S. at 148; *Wilton v. Seven Falls Company*, 515 U.S. 277, 286-88 (1995). "Courts traditionally have been reluctant to apply [injunctive and declaratory judgment remedies] to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution." *Abbott Laboratories*, 387 U.S. at 148. *Abbott Laboratories* set out the two factors to consider to determine whether an administrative determination is ripe for review: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding the court's consideration. 387 U.S. at 149.

1. Fitness of the Issues for Judicial Decision

The "fitness for judicial decision" factor analyzes whether the issue tendered is purely a legal one for which no further factual development is necessary. *Abbott Laboratories*, 387 U.S. at 149. In *Abbott Laboratories*, the Supreme Court decided that a challenge to a regulation was purely legal and thus fit for judicial decision. In *Toilet Goods Assn. v. Gardner*, however, the Supreme Court concluded that the

action was not ripe for judicial review because the circumstances under which the challenged regulation would be enforced were not clear.

> Whether the regulation is justified... will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets. We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164.

Similarly, the declaratory relief that IMP seeks – a determination as to what kind of auxiliary aid the ADA requires for hearing impaired patrons at concerts promoted by IMP – cannot be resolved in the framework of the generalized challenge made here. Because the ADA requires an individualized, case-by-case analysis to decide what is appropriate or necessary in a given set of circumstances, a judicial determination as to the appropriate auxiliary aid to achieve effective communication for a hearing impaired individual at a concert would stand on a much surer footing in the context of a specific application of the ADA and its regulations. *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) (holding that a challenge to the constitutionality of a California statute was not ripe for review because the statute requires case-by-case determinations and thus a judicial decision could be premature). Consequently, this court should decline to exercise jurisdiction over this declaratory action.

The need for sufficiently concrete facts is a principal also articulated in *Helco Products v. McNutt*, 137 F.2d 681 (D.C. Cir. 1943) (cited in *Abbott Laboratories*, 387 U.S. at 151). In *Helco Products*, the plaintiff wrote to the Food and Drug Administration seeking a response as to whether the

plaintiff's proposed shipment of dyed poppyseed would violate the Federal Food, Drug, and Cosmetic Act. Two officials of the Food and Drug Administration responded that such action would be a violation of law. The plaintiff sued for a declaration that its proposed action did not violate the statute. The court decided that the suit was not ripe for judicial review because the FDA officials were only responding to a hypothetical question, and therefore their opinion was only advisory and could change upon an actual state of facts. Further, the officials who responded did not have authority to initiate prosecution, and the Attorney General, who did, was not under a mandatory duty to prosecute. 137 F.2d at 683.

The instant action can be analyzed through the framework of *Helco Products*. IMP is treating DOJ's response to the complaint brought against Sledge as a response to a hypothetical question from IMP, asking if it would be a violation of law if IMP did not provide sign language interpreters to hearing impaired patrons. Such a question to DOJ, however, would only be hypothetical, since it would not be based on an actual factual scenario. Therefore, a response from DOJ to this hypothetical question would not constitute an agency action ripe for judicial review, according to *Helco Products*. This rationale reinforces the importance of the ripeness doctrine – that a court should not review an advisory opinion based on hypothetical facts when a judicial determination of the issue requires a solid factual grounding. Because the ADA and the issue challenged here require fact based, individualized determinations, the declaratory relief sought in the instant case is not ripe for review.

2. Hardship to the Parties

The second factor outlined in *Abbott Laboratories* to determine ripeness is the hardship to the parties of withholding judicial review. In *Abbott Laboratories*, the challenged regulation required all drug companies to change the labels on every drug product they produced and all advertisements and promotional materials. Failure to comply with this regulation could result in serious criminal and civil penalties. 387 U.S. at 152-153. Because the regulation required an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, the court decided that the action was appropriate for judicial review. 387 U.S. at 153.

In contrast, in *Toilet Goods*, the Supreme Court decided that the hardship to the plaintiff would not be felt immediately in its day-to-day affairs and was not sufficiently severe to justify judicial review. The regulation authorized the Commissioner to inspect manufacturers' factories, and allowed for penalties if the manufacturer refused to allow inspection, but required no advance action by the manufacturers. The consequence of noncompliance with the regulation could lead to a suspension of certification services, which could be challenged through an administrative procedure. The court determined that such review would provide an adequate forum for testing the regulation in a concrete situation. 387 U.S. at 165.

Similarly, the DOJ "policy" that IMP challenges causes no immediate consequence for IMP in its day-to-day affairs and no severe penalties. At worst, IMP's refusal to provide a sufficient auxiliary aid to a hearing impaired patron could result in a complaint filed with DOJ, which could result in DOJ opening an investigation, and ultimately could result in DOJ filing a lawsuit in federal court, in which

forum IMP could assert its challenge to any position DOJ asserts during litigation. Such consequences would not constitute "irremediable adverse consequences,"*Toilet Goods*, 387 U.S. at 164, nor rise to the level of hardship as presented in *Abbott Laboratories*.

V. CONCLUSION

For the reasons discussed above, this action must be dismissed for lack of subject matter jurisdiction.

Dated: April 5, 2002

Respectfully Submitted,

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