UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOANNE COHEN, Plaintiff, v. THE TRUSTEES OF BOSTON UNIVERSITY, Defendants.	CIVIL ACTION NUMBER 93-10667WD

MEMORANDUM OF THE UNITED STATES AS *AMICUS CURIAE*
IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Joanne Cohen has Tourette Syndrome, and is an individual with a disability. She has filed this action against the Trustees of Boston University, alleging that when the Boston University School of Social Work denied her application for readmission to the school in November 1992, it violated both title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 *et seq.*, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[1] The University now seeks summary judgment against all of Cohen's claims, on the basis of certain affidavits from University faculty and administrators. Cohen opposes the motion, and has filed affidavits and exhibits controverting the University's claims.

[1]Cohen also alleges that the University's denial of her application for readmission violated two provisions of Massachusetts law, M.G.L. c. 272 § 98, and M.G.L. c. 93 § 101. The United States does not address any issue regarding these claims.

The United States, as *amicus curiae*, respectfully urges this Court to deny the defendants' motion for summary judgment. The plaintiff has stated valid causes of action under both the Americans with Disabilities Act of 1990 and section 504 of the Rehabilitation Act of 1973, and facts material to those claims are genuinely in dispute. The defendants are not entitled to judgment as a matter of law. *See* Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990) (trial court must view entire record in light most favorable to party opposing summary judgment, indulging all reasonable inferences in that party's favor, and grant motion for summary judgment only if there are no genuine disputes as to material facts).

Argument

I. COHEN HAS STATED A VALID CLAIM UNDER TITLE III OF THE ADA, AND FACTS MATERIAL TO THAT CLAIM ARE GENUINELY IN DISPUTE.

In Count I of her complaint, Cohen alleges that in denying her readmission to the School of Social Work, the University violated title III of the ADA. Cohen has already adduced substantial evidence in support of her claim, and the University's affidavits do not establish that there are no material facts in dispute.

A. *The Applicable Provisions of Title III*

Title III of the ADA prohibits discrimination on the basis of disability by private entities which own, operate, or lease

places of public accommodation. 42 U.S.C. § 12182(a). *See also* 28 C.F.R. § 36.201(a). In particular, title III provides that

> [i]t shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class 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). The Department of Justice's implementing regulation further provides that

> [n]o individual with a disability 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 by any private entity who owns, leases (or leases to), or operates a place of public accommodation.

28 C.F.R. § 36.201(a). Thus, if a plaintiff establishes that she is 1) an individual with a disability, 2) who was denied an opportunity to participate in or benefit from goods, services, facilities, privileges, advantages, or accommodations, 3) on the basis of her disability, 4) by a place of public accommodation, she has made out a claim under title III's general non-discrimination provision.

Here, concededly there is no dispute that Cohen is an individual with a disability, that she was denied an opportunity to participate in and benefit from the services, facilities, and accommodations offered by the Boston University School of Social Work, or that the Boston University School of Social Work is a

place of public accommodation within the meaning of the ADA.[2] However, the crucial remaining issue is whether Cohen was unlawfully denied readmission to the master's degree program on the basis of her disability.

Cohen contends that the University refused to readmit her to the School of Social Work because she has Tourette Syndrome. In contesting Cohen's claim, the University does not argue that having Tourette Syndrome automatically disqualifies an individual from eligibility for its masters degree program in clinical social work, nor does the University argue that Cohen's case of Tourette Syndrome in particular renders her incapable of succeeding in the clinical social work curriculum.[3] Instead, the University disputes Cohen's claim by asserting that her Tourette Syndrome was not a factor in its decision, and that she was denied readmission because she was not qualified for readmission for other reasons. The University further argues that its academic judgment that Cohen is not qualified for readmission, even if wrong, must be allowed to stand as an

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[2]For purposes of the ADA, undergraduate schools, post graduate schools, and other privately owned or operated places of education are explicitly included in the list of places of public accommodations covered by title III. 42 U.S.C. § 12181(7)(J); 28 C.F.R. § 36.104.

[3]Thus, this is not a case in which a public accommodation has established (or attempted to establish) that it has "eligibility criteria" that screen out individuals with disabilities, criteria which are nonetheless "necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." *See* 42 U.S.C. § 12182(b)(2)(A)(i).

exercise of academic freedom.[4] Cohen responds that the University's stated reasons for denying her application for readmission -- its contentions that she is not qualified -- are simply pretexts for illegal discrimination. As such, Cohen argues, the University's decision not to readmit her is not protected by principles of academic freedom. Because Cohen has presented substantial evidence that the University's claims about her lack of qualifications are pretextual, a genuine issue of material fact is raised and the University is not entitled to summary judgment.

B. *The Evidence Presented by the Parties*

The University argues that it denied Cohen readmission to the School of Social Work because she is not able to learn at a graduate level, and is not sufficiently empathetic to succeed in the School of Social Work's clinical curriculum. *See* Memorandum of Law of Trustees of Boston University in Support of Summary Judgment 14 (August 12, 1993). The University supports its contention with affidavits from the members of the faculty

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[4]Actually, the University makes these arguments in regard to Cohen's claim under section 504 of the Rehabilitation Act, and then simply contends that the ADA does not change the legal standards governing its conduct, such that -- the University contends -- its academic freedom defense to Cohen's claim under section 504 is also a defense to Cohen's claim under the ADA. Although the University may be correct that it is appropriate for the court to consider principles of academic freedom with respect to both of Cohen's claims, the University misconstrues certain language in the ADA in arguing that there are no differences between section 504 and the ADA. The University's errors in this regard are discussed below, in Part I.D.

committee which evaluated and rejected Cohen's application for readmission. *See* Affidavits of James Garland, Cheryl Hyde, Cassandra Clay, and Adrienne Asch (filed with Defendant's Motion for Summary Judgment (August 12, 1993)). Each avers that Cohen did not demonstrate the skills that the committee considers essential to success in the masters degree program, and each avers that Cohen's Tourette Syndrome was not a factor in, and did not influence, the committee's decision. Garland Affidavit ¶¶ 16, 22; Hyde Affidavit ¶¶ 5, 8; Clay Affidavit ¶¶ 6, 7; Asch Affidavit ¶¶ 6, 7.

Cohen's claim of pretext is supported by substantial evidence, even though she has not been allowed to complete discovery. Among other things, she has not been able to depose the members of the committee that considered and rejected her application for readmission, and whose affidavits are submitted in support of the defendants' motion for summary judgment.[5] Nevertheless, Cohen has produced evidence from several sources to support her contention that her disability indeed was a central factor in the committee's deliberations.

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[5]On June 7, 1993, Cohen gave notice of her intent to depose each of the members of the faculty committee, and made her first request for production of documents by the University. On July 14, 1993 the University moved for a protective order staying all discovery on the grounds that the discovery sought was not relevant to the issues raised by its motion for summary judgment. Memorandum of Defendant Trustees of Boston University in Support of its Motion for Protective Order 3 (July 14, 1993). The University's motion for a protective order is still pending before the Court.

For example, the evidence shows Hubert Jones, the Dean of the School of Social Work, to have expressly stated that Cohen's disability was at least part of the reason for the school's initial decision in 1987 to dismiss Cohen from the program. In December 1991, Dean Jones wrote that although Cohen had "good intellectual abilities and positive experiential background," a faculty committee voted to dismiss Cohen from the program because "her disability and associated medication difficulties impeded her performance, particularly in field education." Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, Exhibit B.[6] Cohen has thus produced evidence that her Tourette Syndrome was a factor in the initial decision to dismiss her. The committee that evaluated Cohen's application for readmission was supplied with, and reviewed and considered, all of the material and documents from the 1987 proceedings. Hyde Affidavit ¶¶ 3, 4; Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, Exhibit I (confidential memorandum from Mindy Sitton to faculty review committee forwarding an "extensive folder" of "back-up material" regarding Cohen's previous dismissal from the program).

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[6]It is important to note that Cohen does not now challenge her dismissal from the School of Social Work in 1986. Cohen Affidavit ¶¶ 11, 12, 14. The question raised by Cohen's current claim under the ADA is whether in 1992, five and a half years after she was dismissed from the program, Cohen was qualified to be readmitted.

In addition to the material relating to her 1987 dismissal, there also is evidence that the committee members were presented with a memorandum from Professor Carolyn Dillon, written in June, 1992, expressly addressing Cohen's application for readmission and her disability. Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, Exhibit H. In reference to Cohen's Tourette Syndrome that memorandum stated: "If she is still uttering in this manner, I do not see a place for her in clinical social work." Three of the four committee members now aver -- in identical language -- that they disagreed with Professor Dillon and that her memo "played no role" in their deliberations or decision. Garland Affidavit, ¶ 21; Hyde Affidavit, ¶ 10; Asch Affidavit, ¶ 8. Of course, to accept those averments at face value would require the Court to make a determination about the credibility of the committee members, a determination not properly made in the context of a motion for summary judgment.

In addition, the averments in the University's affidavits that Cohen's Tourette Syndrome was not a factor in the committee's decision are further placed in controversy by the evidence that on the two occasions when the committee interviewed Cohen, the committee members repeatedly questioned Cohen about her disability. Cohen was asked how she handled her disability in working with people, how she would handle her clients' concerns or fears about her disability, how stress affected her tics and how that would affect her interaction with her clients,

and how her disability affected her ability to form meaningful relationships. Cohen Affidavit ¶¶ 28, 29, 30. Her employer, who accompanied her to the interviews, was asked how Cohen's disability affected her work with him and her clients at the independent living center. Cohen Affidavit ¶ 29. This obvious concern about Cohen's Tourette Syndrome raises substantial questions about the credibility of the University's affidavits.

Aside from the evidence which tends to undermine the averments of the committee members that Cohen's disability was not a factor in their decision, Cohen has also produced substantial evidence which indicates that she is in fact qualified for readmission to a clinical social work curriculum and supports her position that the University's claims about her inability to learn at a graduate level and her lack of empathy are pretextual. For instance, there is persuasive evidence of Cohen's intellectual ability. She had excellent grades as an undergraduate at Boston University. *See* Cohen Affidavit ¶ 4. She had excellent grades in the classwork portions of her first year at the School of Social Work. *Id.* at ¶ 10. Indeed, Dean Jones stated in his 1991 letter that Cohen had "good intellectual abilities." Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, Exhibit B.

Equally impressive is the evidence tending to show that Cohen not only has the ability to form empathic relationships, but that she has repeatedly done so. She has worked in the field

of human services since 1987, including the past two years at a center for independent living, counseling individuals with disabilities. *Id.* at ¶ 19. In her current and previous jobs she has routinely developed empathic relationships with those she was counseling. *Id.* at ¶ 37. She has recommendations from an internationally known physician, her psychologist, her employer, and an officer of the national Tourette Syndrome Association. *See* Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, Exhibits D (letter of recommendation from Harvey N. Dulberg, Ph.D.), E (letter of recommendation from Oliver Sacks, M.D.), F (letter of recommendation from Dennis D. Fitzgibbons), and G (letter of recommendation from Sue Levi-Pearl). These recommendations testify to the personal progress Cohen has made since she was dismissed from the school in 1987, and to her maturity, her intelligence, her sensitivity, her professionalism, her composure, her cooperativeness, her receptiveness and responsiveness to criticism, and her ability to form empathic relationships -- in short, the skills and abilities that qualify her to be a social worker and to be admitted to Boston University's School of Social Work.

In the face of all of this evidence -- and the possibility that more may emerge if Cohen is allowed to complete her discovery -- it simply is not possible to accept at face value the averments in the University's affidavits that Cohen's disability was not a factor in the denial of her application for

readmission, or that the real reasons she was denied readmission were lack of intelligence and ability to form empathic relationships. The University's affidavits do not establish that it is entitled to judgment as a matter of law.

C. *The University's Refusal to Readmit Cohen is not Protected by Principles of Academic Freedom*

The basis for the University's motion for summary judgment is that its faculty made a professional academic judgment that Cohen was not qualified for readmittance to the School of Social Work, and that judgment, even if wrong, is protected from review by principles of academic freedom.

The University is certainly correct that it is entitled "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1956) (Frankfurter, J., concurring in result). Indeed, the University is also correct that "[w]hen judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment." Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985). The University's freedom to make academic judgments, however, is not unlimited. For one thing, it extends only to "genuinely academic decisions," and may be overridden if the judgment is "such a substantial departure from accepted academic

norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.*

Moreover, the freedom to make academic judgments does not entitle an educational institution to discriminate. The Supreme Court has acknowledged that a university's tenure decisions are subject to the same prohibitions on discrimination that apply to other employment decisions, University of Pennsylvania v. EEOC, 110 S. Ct. 577, 582-83 (1990), and the First Circuit has recognized, in a case presenting claims of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, that "Congress has committed to the federal courts a duty which we may not abdicate: that of eliminating workplace discrimination, within educational settings as well as without. Academic freedom does not embrace the freedom to discriminate." Villanueva v. Wellesley College, 930 F.2d 124, 129 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 181 (1991) (citation omitted).[7]

This limit on a university's academic freedom does not obtain only in cases alleging employment discrimination, or in

[7]To the same effect is a First Circuit opinion in another case against Boston University which held that courts must take care to preserve the University's autonomy in making lawful tenure decisions, but "[a]t the same time, . . . an employee's right not to be denied tenure for discriminatory reasons prevents insulating the tenure process from any judicial review." Brown v. Trustees of Boston University, 891 F.2d 337, 346 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990).

cases alleging discrimination on the basis of race, gender, or age. The Supreme Court has rejected an attempt to exempt from judicial scrutiny the admissions decisions of universities. Cannon v. University of Chicago, 441 U.S. 677, 709 (1979) (holding that in passing laws prohibiting colleges and universities from discriminating on the basis of gender, Congress had rejected the suggestion that admissions decisions should be protected from scrutiny). And the First Circuit has held that the principles that apply in cases alleging race, gender, or age discrimination also apply in cases brought by students alleging discrimination on the basis of disability, noting that while "the same principle of respect for academic decisionmaking applies," the educational institution will not be entitled to summary judgment on the basis of affidavits from officials from the institution "if essential facts [are] genuinely disputed or if there [is] significantly probative evidence of bad faith or pretext . . . ." Wynne v. Tufts University School of Medicine, 932 F.2d 19, 25, 26 (1st Cir. 1991) (en banc), *appeal after remand*, 976 F.2d 791 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 1845 (1993). Instead, "further fact finding [will] be necessary." *Id.*

The University argues that this case is like Wynne, and that like the district court in Wynne, this Court should grant summary judgment in favor of the University based on affidavits from university faculty and administrators. This case, however, is

readily distinguishable from Wynne. In Wynne the plaintiff's evidence of pretext "consist[ed] of unsubstantiated conclusions, backed only by a few uncoordinated evidentiary fragments." 976 F.2d at 796. Cohen's evidence cannot be similarly described. She has provided both direct and indirect evidence that the University's claims about her lack of qualifications are specious, and that the committee's real concern was her Tourette Syndrome.

Put differently, Cohen -- unlike Wynne -- does not ask this Court to review a "genuinely academic decision." Rather, the issue raised by the University's motion for summary judgment and Cohen's evidence of pretext is no more than a garden-variety credibility determination. The question is whether the averments of the committee members can be accepted, and summary judgment granted thereon, in the face of Cohen's evidence that they have discriminated against her on the basis of her disability. The University's affidavits expressly disavow any consideration of Cohen's disability; the University does not, and cannot, argue that those affidavits somehow embody a professional academic judgment that it is necessary to exclude individuals with Tourette Syndrome from the masters degree program at the School of Social Work. The University has chosen instead to rely on the credibility of its faculty, and their assertions that Cohen's disability was irrelevant. While the University is certainly entitled to pursue such a defense, that defense is not one

amenable to summary judgment where the plaintiff has produced evidence of pretext. Nothing in Wynne is to the contrary.

In sum, the University's attempt to foreclose Cohen's ADA claim before she has even completed discovery must be rejected. There is substantial evidence that the School of Social Work applied discriminatory eligibility criteria in evaluating her application for readmission, and the conclusory denials of the faculty members do not provide a sufficient basis for judgment as a matter of law. Whether the School of Social Work denied Cohen's application for the reasons it has stated, or whether those reasons are merely pretexts for discrimination, is a disputed factual question which can only be resolved by a trier of fact.

D. *The Relationship Between Title III of the ADA and Section 504 of the Rehabilitation Act Has No Relevance To This Issue*

The University argues -- briefly -- that title III of the ADA "does not change the applicable legal standard governing the University's conduct as set forth in § 504 of the Rehabilitation Act." Memorandum of Law of Trustees of Boston University in Support of Summary Judgment 18 (August 12, 1993). The University cites only two provisions from title III of the ADA and the Department of Justice's regulation implementing title III in support of this contention, and neither of the provisions cited by the University stands for the proposition for which it is cited.

The University first cites 42 U.S.C. § 12201(a). That section provides, in its entirety, that

> [e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a). *See also* 28 C.F.R. § 36.103(a). All this section says is that the ADA is not to be construed to lessen the protections of section 504; in no way does it foreclose the possibility that covered entities might be held to higher standards of conduct under the ADA.

Similarly, the University misreads a section of the Department of Justice's implementing regulation which states that

> [t]his part does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and regulations issued by Federal agencies implementing section 504.

28 C.F.R. § 36.103(b). As above, this provision simply states that nothing in the ADA regulations promulgated by the Department of Justice relieves recipients of federal financial assistance of their obligations to comply with section 504. It has nothing to say about whether the requirements of the ADA are the same as, or greater than, the requirements of section 504.

In any case, the Court need not now decide whether or to what extent title III of the ADA differs from section 504. Cohen has stated valid causes of action under both statutes, and the

University is not entitled to judgment as a matter of law on either claim.

III. COHEN HAS STATED A VALID CAUSE OF ACTION UNDER SECTION 504, AND FACTS MATERIAL TO THAT CLAIM ARE GENUINELY IN DISPUTE.

In addition to her claim under title III of the ADA, Cohen has asserted a claim under section 504 of the Rehabilitation Act of 1973. As with Cohen's claim under title III of the ADA, the University is not entitled to judgment as a matter of law on Cohen's claim under section 504.

Section 504 provides that

> [n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C.A. § 794(a) (West Supp. 1993). To prevail on her claim under section 504, Cohen must establish 1) that she is an individual with a disability within the meaning of the statute, 2) that she is "otherwise qualified" for admission to the School of Social Work, 3) that she is being excluded from the school solely on the basis of her disability, and 4) that the position she seeks is part of a program or activity receiving federal financial assistance. Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979); Doe v. New York University, 666 F.2d 761, 774 (2d Cir. 1981). There is no dispute here that Cohen is an individual with a disability, and there is no dispute that the position she sought at the School of Social Work is part of a

program or activity receiving federal financial assistance. The only questions are whether Cohen is otherwise qualified to be a student at the School of Social Work, and whether she has been denied that position solely on the basis of her disability. As with her claim under title III of the ADA, these are disputed questions of fact, and cannot appropriately be resolved upon a motion for summary judgment, especially when Cohen has not been able to complete discovery.

The University again maintains, relying heavily on Wynne, that this Court must simply defer to the academic judgment of its faculty -- as expressed in their affidavits -- that Cohen is not an otherwise qualified applicant for the School of Social Work, and that Cohen was not denied admission solely on the basis of her disability. As discussed above, however, this Court is not presented with a case calling for deference to academic judgment; the questions here are factual ones turning on credibility determinations. In view of the substantial evidence that Cohen has already produced in support of her claim of pretext, and the possibility that she will develop more if she is allowed to continue her discovery, this is not a case like Wynne, and the University's affidavits do not entitle it to summary judgment.

This case more closely resembles Pushkin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981), a case brought under section 504 by a medical doctor with multiple sclerosis who was denied admission to a Psychiatric Residency

Program at the University of Colorado. *Id.* at 1376. The university claimed that Dr. Pushkin was not admitted because he was unqualified. The university's position was based on interviews by four faculty members, each of whom expressed concerns about how Dr. Pushkin's disability would affect his patients and his ability to treat his patients. *Id.* at 1387. One of the interviewers was concerned that Dr. Pushkin would not be able "to empathize with his patients and their problems." *Id.* at 1388. In response, Dr. Puskin offered 1) the fact that he had been practicing medicine with an emphasis on psychiatry at the time he applied for admission, *id.* at 1387, 2) a letter of recommendation from his supervisor during a one year residency in psychiatry, *id.*, and 3) the testimony of his psychiatrist that he would be an "exceptional" psychiatrist. *Id.* at 1389. The university argued that it was entitled to judicial deference, especially in making "academic decisions relating to admissions criteria." *Id.* at 1383.

The trial court refused to defer to the university's evaluation of Pushkin's qualifications, and the Tenth Circuit affirmed. "The trial court weighed the credibility of the conflicting evidence and rejected the after the fact testimony that Dr. Pushkin was not qualified for the program . . . . The record supports the findings that the trial court made that the reason for rejecting Dr. Pushkin was entirely his affliction." *Id.* at 1382. The Court of Appeals noted that

> [t]he memorandum opinion of the trial court included far reaching and extensive findings of fact. . . . [The trial court] weighed all of the defendants' allegations at trial that Dr. Pushkin was not qualified for the program apart from his handicap and found that the evidence intended to show that the plaintiff was rejected as being unqualified due to his handicap was more persuasive.

Id.

Cohen is entitled to no less. The evidence she has presented raises a substantial issue about the basis of the University's refusal to readmit her, and she is entitled to have the evidence, and the credibility of the University's affiants, weighed by the trier of fact. The University is not entitled to judgment as a matter of law on Cohen's claim under section 504.

Conclusion

For the foregoing reasons, the United States respectfully urges the Court to deny the defendants' motion for summary judgment.

Respectfully submitted,

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Dated: October 7, 1993

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by mail on October 7, 1993.

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