UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-B-2135

COLORADO CROSS-DISABILITY COALITION

and

JULIE REISKEN, and DEBBIE LANE, for themselves and all others similarly situated,

Plaintiffs,

v.

TACO BELL CORPORATION,

Defendant.

MEMORANDUM OF UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO TACO BELL'S SUMMARY JUDGMENT MOTION

INTRODUCTION

The Attorney General of the United States ("Attorney General") provides this memorandum as amicus curiae, to explain the requirements of the Americans with Disabilities Act ("ADA"), a statute which she is entrusted to administer, as it relates to Taco Bell's Motion for Summary Judgment. As argued more fully below, Federal law and the Department of Justice's regulations do not require Plaintiffs to give notice to State officials before filing suit in Federal Court, and do require Taco Bell's customer service queue lines to be accessible to people who use wheelchairs.

FACTS AND PROCEDURAL HISTORY

Named Plaintiffs Julie Reiskin and Debbie Lane have disabilities and use, respectively, a motorized wheelchair and an electric three-wheel scooter for mobility. Third Amended Class Action Complaint at ¶¶ 8, 9. Colorado Cross-Disability Coalition alleges that it has members who also use motorized wheelchairs and three-wheel scooters for mobility. Id. at ¶ 10. Plaintiffs allege that Taco Bell discriminated against them and members of a putative class on the basis of disability by (1) constructing two Taco Bell restaurants in Colorado after the effective date of the ADA in a manner that violates the ADA Standards for Accessible Design (hereinafter, "Standards"), and (2) failing to remove barriers to access for people with disabilities in an older Taco Bell facility when it is readily achievable to do so.[1] These allegations focus primarily on the width and configuration of customer service queues.

On December 21, 1998, Taco Bell filed a Motion for Summary Judgment.[2] Taco Bell

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[1/] Named Plaintiffs have sought class certification for others who use wheelchairs or electric scooters for mobility and who, during the two years prior to the filing of this suit, were discriminated against on the basis of disability by Taco Bell restaurants in Colorado.

[2/] In footnote 1 of its Memorandum in Support of its Motion for Summary Judgment, Taco Bell summarily seeks dismissal of any claims by Plaintiffs with respect to franchised Taco Bell facilities without providing a discussion of its franchise agreements or other essential information to determine the extent of Taco Bell's liability. Briefs on the issue of franchisor liability have not yet been filed in this case. It is impossible to determine whether Taco Bell is liable for ADA violations at franchised locations without facts showing whether Taco Bell had responsibility for "design and construction" of Taco Bell restaurants built for first occupancy after January 26, 1993, or, in the case of older facilities, whether they had control over the facilities sufficient to accomplish barrier removal. See United States v. Days Inns of Am., 151 F.3d 822, 824-25 (8th Cir. 1998); United States v. Days Inns of Am., Inc., 997 F. Supp. 1080 (C.D. Ill. 1998); cf. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, 516 U.S. 1045 (1996). Should the Court consider arguments on this issue, the United States respectfully requests the opportunity to fully brief it after reviewing the merits of the arguments in the context of specific facts in this case.

first argues that Plaintiffs' ADA claims should be dismissed for failure to notify the State prior to filing this suit. Taco Bell erroneously interprets title III of the ADA to require private plaintiffs to give State officials 30 days' notice prior to filing suit if the claims arose in States — like Colorado — that have anti-discrimination laws comparable to the ADA.

Second, Taco Bell incorrectly argues that the ADA does not apply to queue lines, so even queue lines that are inaccessible to some people with disabilities do not violate the law.

Third, Taco Bell argues that even if queue lines are covered by the ADA, it is in compliance.[3]

Taco Bell is wrong on all three counts. Its Motion should be denied.

On January 19, 1999, Plaintiffs filed a Motion for Partial Summary Judgment, arguing that a summary finding was appropriate that the two "new construction" facilities violate the ADA. The United States fully supports Plaintiffs' position and adopts it by reference.

ARGUMENT

I. Standard of Review

While Taco Bell terms its Motion as one for summary judgment, it is more properly characterized as a motion to dismiss with respect to the issues of whether there is a pre-suit notice requirement under title III and whether customer queue lines are covered by the ADA. Neither of these issues requires fact-finding. With respect to these issues, therefore, the Court should treat Taco Bell's Motion as a motion to dismiss and should dismiss the suit "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle him

[3/] The Department will not address Taco Bell's final argument — that Plaintiffs' claims under the Colorado Anti-Discrimination Act are barred for failure to exhaust administrative remedies.

to relief, accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." Yoder v. Honeywell, Inc., 104 F.3d 1215, 1224 (10th Cir.) (internal citations omitted), cert. denied, ___ U.S. ___, 118 S. Ct. 55, 139 L.Ed.2d 19 (1997).

Only the third issue — whether Taco Bell has complied with title III — is properly the subject of a motion for summary judgment. As to this issue, summary judgment is appropriate if the pleadings and supporting documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c). When applying this standard, the Court should examine the factual record and draw reasonable inferences in the light most favorable to the party opposing summary judgment. Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996). "[T]he relevant inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Bingaman v. Kansas City Power & Light Co., 1 F.3d 976, 980 (10th Cir. 1993) (quotation marks and citation omitted).

II. Title III does not require individuals alleging disability discrimination to file pre-suit notice with State agencies.

The first issue before the Court is whether title III contains a requirement that private citizens provide notice to State agencies before filing suit. It does not. The majority of courts addressing this issue -- including this Court -- has correctly rejected Taco Bell's argument that title III contains a pre-suit notice requirement. Colorado Cross-Disability Coalition v. Hermanson Family Ltd. Partnership I, slip op. at 5-11 (D. Colo. Civil No. 96-WY-2492-AJ, Mar. 3, 1997); Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547 (7th Cir. 1996), cert. denied, 117 S. Ct. 771 (1997) ("there is no first obligation to pursue administrative remedies" prior to bringing a

claim under title III of the ADA); Botosan v. Fitzhugh, 13 F. Supp.2d 1047 (S.D. Cal. 1998); Doukas v. Metropolitan Life Ins. Co., No. CV-4-478-SD, 1997 WL 833134 (D.N.H. Oct. 21, 1997); Bercovitch v. Baldwin School, 964 F. Supp. 597, 605 (D. P.R. 1997), rev'd on other grounds, 133 F.3d 141 (1st Cir. 1998); Coalition of Montanans Concerned with Disabilities Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1169 (D. Mont. 1997); Grubbs v. Medical Facilities of America, Inc., CV-A-94-0029-D, 1994 WL 791708, *2-3 (W.D. Va. Sept. 23, 1994). Copies of Doukas, Hermanson, and Grubbs are attached at Exhibit 1.

The few decisions on which Taco Bell relies are wrongly decided and have weak precedential value. See Howard v. Cherry Hills Cutters, Inc. 979 F. Supp. 1307, 1309 (D. Colo. 1997) ("Howard II"); Mayes v. Allison, 983 F. Supp. 923 (D. Nev. 1997); Daigle v. Friendly Ice Cream Corp., 957 F. Supp. 8 (D. N.H. 1997); Bechtel v. East Penn Sch. Dist. of Lehigh County, 1994 WL 3396 at *2 (E.D. Pa. Jan. 4, 1994).[4]

This Court is faced with inconsistent decisions within the Federal District Court for the District of Colorado. Compare Colorado Cross-Disability Coalition v. Hermanson Family Ltd.

[4/] Daigle and Bechtel have no real precedential value. Although Daigle held that plaintiffs must provide written notice to the appropriate State authorities as a prerequisite to bringing an action under title III of the ADA, the same judge rejected this very holding only eight months later. In Doukas v. Metropolitan Life Ins. Co., No. CV-4-478-SD, 1997 WL 833134 (D.N.H. Oct. 21, 1997) (attached hereto at Exhibit 1), the same judge held that "written notice to state authorities is not a requirement under title III of the ADA," expressly overruling his earlier opinion in Daigle and stating that "upon further consideration, the court finds that limiting the scope of reference to 2000a-3 to paragraph (a) is a better interpretation of the statute." Id. at *2 and n.2.

Bechtel is an unpublished decision under title II of the ADA, which only in dicta mentioned that title III adopted the administrative exhaustion requirements of the 1964 Civil Rights Act. In Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, the Federal District Court for the District of Colorado explicitly rejected Bechtel as having no precedential value. Slip op. at 8-9 (D. Colo. Civil No. 96-WY-2492-AJ, Mar. 3, 1997).

Partnership I, slip op. at 5-11 (D. Colo. Civil No. 96-WY-2492-AJ, Mar. 3, 1997) ("Hermanson") with Howard v. Cherry Hills Cutters, Inc. 979 F. Supp. 1307, 1309 (D. Colo. 1997) ("Howard II"). The better reasoned decision — and the one this Court should follow — is Hermanson. In an earlier case, Howard v. Cherry Hill Cutters, Inc., 935 F. Supp. 1148 (D. Colo. 1996) ("Howard I"), the Court appeared to assume -- without analysis -- that the language of title III incorporated by reference all of section 204 of the Civil Rights Act, including the 30-day notice requirement of subparagraph (c). Howard I at 1150. Significantly, however, in Hermanson, after conducting an exhaustive analysis of the topic, the Court dismissed Howard I as having no precedential value on this issue, stating that it "misstates the applicable statutory language."[5] Hermanson at 8.

As discussed below, given the plain language of title III, well-settled canons of statutory construction, title III's legislative history, and the Department's positions articulated in its own title III regulation and Technical Assistance Manual, this Court should follow the Hermanson and Soignier line of cases and deny Taco Bell's motion.

1. The plain language of title III does not include any requirement for pre-suit notice.

Section 308(a)(1) of the ADA provides in relevant part:

> 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.

42 U.S.C. § 12188(a)(1). Subsection (a) of section 204 of the Civil Rights Act of 1964 -- the part

[5] In Howard II, which postdates Hermanson, the Court reiterated in dicta its earlier understanding that title III requires pre-suit notice to the State.

that Congress specifically incorporates by reference into title III -- defines the procedures applicable to private rights of action to include (1) intervention by the Attorney General in a case certified by the Attorney General to be of "general public importance" and (2) "[u]pon application by the complainant and in such circumstances as the court may deem just," appointment of an attorney for the complainant and the commencement of suit without the payment of fees, costs, or security.[6]

[6/] Section 204 provides in its entirety:

> (a) **Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees, costs, or security**. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.
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> (b) **Attorney's fees; liability of United States for costs**. In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.
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> (c) **State or local enforcement proceedings; notification of State or local authority; stay of Federal proceedings**. In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings. (cont.d….)

Neither the "remedies" nor the "procedures" of subsection (a) includes any requirement of notice to any State or local authority.

The notice requirement that Taco Bell seeks to impose comes from subsection (c) of section 204, but title III of the ADA, by its own terms, specifically incorporates only subsection (a).

Title III of the ADA is not a carbon copy of title II of the 1964 Civil Rights Act, although both prohibit discrimination in places of public accommodation. Congress addressed disability discrimination separately because it recognized that disability discrimination is manifested in ways that are distinct from discrimination on the basis of race, color, religion, or national origin. Congress could have simply amended title II of the 1964 Act to add disability as a prohibited basis for discrimination. Instead, it enacted a comprehensive statute addressing issues such as architectural and communication barriers, 42 U.S.C. § 12182(b)(2)(A)(iv), and the provision of

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(…cont'd.)

> (d) **References to Community Relations Service to obtain voluntary compliance; duration of reference; extension of period**. In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a) of this section: Provided, That the court may refer the matter to the Community Relations Service established by subchapter VIII of this chapter
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> for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: Provided further, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

42 U.S.C. § 2000a-3.

auxiliary aids and services necessary for effective communication, 42 U.S.C. § 12182(b)(2)(A)(iii), that were not relevant to the kinds of discrimination prohibited by the 1964 Act.

When crafting title III of the ADA, Congress borrowed only one narrow part of the Civil Rights Act's remedial structure: specifically, subsection (a) of section 204. Despite Taco Bell's protestations to the contrary, no other subsection of section 204 was incorporated into title III of the ADA by Congress. Soignier v. American Bd. of Plastic Surgery, No. 95 C 2736, 1996 WL 6553, at *1 (N.D. Ill., Jan. 8, 1996) ("[b]y the express terms of § 12188, the only provision adopted for subchapter III of the ADA is § 2000a-3(a). Although subsection (c) limits when subsection (a) may be invoked, Congress only cited the latter. Therefore, there is no requirement that parties provide notice to a State or local authority"), aff'd, 92 F.3d 547 (7th Cir. 1996), cert. denied, 117 S. Ct. 771 (1997). Congress could simply have repeated verbatim the language of section 204(a) in title III of the ADA to indicate the remedies and procedures it intended to provide to aggrieved persons. If it had done so, there would be no argument that Congress intended to require such persons to provide pre-suit notice to State or local governmental agencies. The fact that Congress used incorporation by reference to subsection (a) as a shorthand method to refer to the remedies and procedures it intended to provide should not change that result.

In any inquiry into the meaning of a statute, "[t]he language of the statute [is] the starting place." Staples v. United States, 511 U.S. 600, 605 (1994). The Supreme Court has instructed "time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-

254 (1992). Here, title III only references subsection (a) of section 204 of the Civil Rights Act; the Court should not broaden title III's statutory provision beyond its plain language.

2. Well-settled canons of statutory construction require rejection of Taco Bell's arguments.

It is well-settled that when one statute is modeled on another, but omits a specific provision contained in the original, "a strong presumption exists that the legislature intended to omit that provision." Kirchner v. Chattanooga Choo Choo, 10 F.3d 737, 738-739 (10th Cir. 1993), citing Bank of America v. Webster, 439 F.2d 691, 692 (9th Cir. 1971); Crane Co. v. Richardson Constr. Co., 312 F.2d 269, 270 (5th Cir. 1973). See also Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947) (in construing a statute, "[o]ne must also listen attentively to what it does not say").

The assumption that Congress meant to borrow more than subsection (a) of section 204, even though it referred only to that subsection, leads to incongruous results. For example, subsection (d), recited above at n.6, which applies when alleged discrimination takes place in a State where there is no State law prohibiting such discrimination, allows a court to refer the matter to the Department of Justice's Community Relations Service ("CRS") for a limited time if it believes there is a "reasonable possibility of obtaining voluntary compliance." Congress could not have intended subsection (d) to apply when ADA title III actions are filed: the ADA did not expand the jurisdiction of the CRS to allow it to mediate issues of discrimination based on disability.

Additionally, it does not make sense to assume that Congress meant to incorporate subsection (b) when it referred only to subsection (a) of section 204. Subsection (b) allows a

court to award attorney's fees to a prevailing party other than the United States in an action brought pursuant to subsection (a). See subsection (b), which is set forth herein at n.6, above. The ADA contains a separate explicit mandate for attorney's fees, 42 U.S.C. § 12205, that is applicable to all civil actions and administrative proceedings brought pursuant to the ADA. Taco Bell's reading of the statute would render the attorney's fee provisions of the ADA superfluous, violating a fundamental tenet that statutes should be not be read so as to render terms meaningless. United States v. Campos-Serrano 404 U.S. 293, 301 n.14 (1971) ("(A) statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").

As courts have recognized, a statute "is as significant for what it omits as for what it says." In re TMI, 67 F.3d 1119, 1123 (3d Cir. 1995), cert. denied, Metropolitan Edison Co. v. Dodson, 517 U.S. 1163 (1996), quoting Williams v. Wohlgemuth, 540 F.2d 163, 169 n.30 (3d Cir. 1976). The inherent differences between title II of the 1964 Act and title III of the ADA demonstrate the error in Taco Bell's attempt to pick and choose, on its own, portions of the 1964 Act to incorporate into the ADA. Rather, the plain language of title III's section 308 restricts the incorporation by reference to the terms of subsection (a) of section 204 only.

Courts examining similar situations under other laws have likewise refused to "borrow" provisions which were not specifically incorporated into a new law by Congress. In Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463 (3rd Cir. 1994), the Third Circuit considered whether the filing of a representative complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), tolled the statute of limitations for unnamed employees to become members of the opt-in class. At the time the action was filed, the ADEA expressly incorporated the statute of

limitations contained in section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255. 29 U.S.C. § 626(e)(1) (1991). Hoffman-La Roche argued that the tolling question should be governed by section 7 of the Portal-to-Portal Act, 29 U.S.C. § 256, which was not incorporated specifically into the ADEA. Section 7 would have required employees who wished to opt-in to do so within the section 6 statute of limitations. The Third Circuit noted that "incorporation of selected provisions into section 7(b) of [the] ADEA indicates that Congress deliberately left out those provisions not incorporated." 24 F.3d at 470.

3. Legislative history illustrates that Congress did not intend to mandate any prerequisites to filing a federal action under title III.

The unambiguous language of title III obviates the need to examine its legislative history. Chevron , U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Salt Lake City v. Western Area Power Admin., 926 F.2d 974, 977 (10th Cir. 1991), rehearing denied (Apr. 18, 1991). However, a colloquy between Senator Harkin, one of the primary sponsors of the ADA and the floor manager of the bill, and Senator Bumpers, a co-sponsor, further establishes that there is no pre-suit administrative requirement under title III:

> MR. BUMPERS. * * * if somebody who is disabled goes into a place of business, and we will just use this hypothetical example, and they say, "You do not have a ramp out here and I am in a wheelchair and I just went to the restroom here and it is not suitable for wheelchair occupants," are they permitted at that point to bring an action administratively against the owner of that business, or do they have to give the owner some notice prior to pursuing a legal remedy?
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> MR. HARKIN. First of all, Senator, there would be no administrative remedy in that kind of a situation. The administrative remedies only apply in the employment situation. In the situation you are talking about --
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> MR. BUMPERS. That is true. So one does not have to pursue or exhaust his administrative remedies in title III if it is title III that is the public accommodations.

135 Cong. Rec. 19859 (1989). See also Botosan v. Fitzhugh, 13 F. Supp.2d 1047, 1050 (S.D. Cal. 1998) (finding that "the legislative history of the ADA does not indicate that Congress intended to adopt subsection(c)."); Grubbs v. Medical Facilities of America, Inc., CV-A-94-0009-D, 1994 WL 791708, at *2 (W.D. Va. Sep. 23, 1994) (noting that the legislative history of the ADA "indicates that Congress did not intend to require exhaustion of administrative remedies for persons with disabilities").

4. The Department of Justice's title III regulation and Technical Assistance Manual require rejection of Taco Bell's argument.

The Supreme Court recently held that the Department of Justice is entitled to substantial deference in its interpretations of the ADA. Bragdon v. Abbott, ___ U.S. ___, 118 S. Ct. 2196, 2208 (1998) ("As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference."). The Department of Justice's title III regulation implementing the statutory right of action for private citizens mandated by section 308(a) [42 U.S.C. § 12188(a)(1)] is codified at 28 C.F.R. § 36.501(a). Significantly, section 36.501(a) incorporates only those portions of section 204 of the Civil Rights Act that are contained in subsection (a) [42 U.S.C. § 2000a-3(a)] including (1) intervention by the Attorney General, and (2) appointment of an attorney for the complainant and the commencement of suit without the payment of fees, costs, or security.[7] The regulation provides:

Any person who is being subjected to discrimination on the basis of disability in violation

[7] See discussion at 6-8, above.

> of this Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in the civil action if the Attorney General or his or her designee certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security. Nothing in this section shall require a person with a disability to engage in a futile gesture if the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.

28 C.F.R. § 36.501(a). There is no mention whatsoever of any requirement for prospective title III plaintiffs to provide pre-suit notification to State agencies. The absence of any such mention is cogent evidence that the Department does not interpret either the statute or the regulation to require pre-suit notification to State agencies.

Likewise, the Department's Title III Technical Assistance Manual, which the Department publishes pursuant to a statutory requirement that the Attorney General provide technical assistance on ADA compliance obligations,[8] makes no mention of a need to exhaust administrative remedies. See The Americans with Disabilities Title III Technical Assistance Manual, §§ III-8.1000, 8.2000. Courts routinely defer to the Department's views as expressed in the Technical Assistance Manuals. Bragdon, 118 S. Ct. at 2208-09; Coalition of Montanans Concerned with Disabilities v. Gallatin Airport Authority, 957 F. Supp. 1166, 1169 (D. Mont. 1997); Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, 950 F. Supp. 389, 391-92 (D.D.C. 1996); Fiedler v. America Multi-Cinema, Inc., 871 F. Supp. 35, 36 (D.D.C. 1994).

[8/] 42 U.S.C. § 12206(c).

II. Taco Bell's customer service queues must comply with the ADA Standards for Accessible Design.

A. Coverage of Customer Service Queues Pursuant to the Title III Regulatory Standards for Accessible Design.

In the ADA, Congress directed the Attorney General to issue title III regulations and specifically required that the regulations include, or incorporate by reference, architectural accessibility standards. 42 U.S.C. §§ 12183(a), 12186(b). The Department of Justice issued the ADA Standards for Accessible Design ("Standards") as part of the title III regulation.[9] 28 C.F.R. pt. 36, Appendix A.

Section 3.5 of the Standards defines an "accessible route" in relevant part as "a continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures." Nowhere do the Standards say that this is an exhaustive list that precludes other things, like queue lines, that affect the usability of a space for persons with disabilities and allow them to move unrestricted from one element to another.

[9/] The Standards are adopted by the Department of Justice relying upon minimum guidelines as adopted by a separate Federal agency, the Architectural and Transportation Barriers Compliance Board ("Access Board"). 42 U.S.C. § 12204. The Access Board's ADAAG — or the ADA Accessibility Guidelines — are minimum accessibility specifications that do not carry the weight of law unless and until they are adopted as the Standards by the Department of Justice through the regulatory process. Once adopted by the Department of Justice, whether in their original state or modified, they are fully enforceable as an integral part of the Department's title III regulation. The Department of Justice — not the Access Board nor any of its Advisory Committees — has the authority to interpret the title III regulation. Paralyzed Veterans Association v. Ellerbe Becket Architects & Engineers, 950 F. Supp. 389, 392 (D.D.C. 1996).

Section 4.3.3 of the Standards generally requires a route to be at least 42" wide when people who use wheelchairs must make a 180-degree turn around an obstruction and illustrates the situation facing people who use Taco Bell's customer service queues in Fig. 7(b):

Taco Bell's queue lines — at least at the restaurants for which discovery has taken place — are substantially narrower than the 42" minimum width. According to Plaintiffs, the "existing facility" has queue lines approximately 25" wide, while the queue lines at the two "new construction" facilities are approximately 36" wide. None of these provides adequate space for users of electric wheelchairs to negotiate the twists and turns of the queue.

In defense of its maintenance of customer service queues that do not comply with the accessible route provisions of the Standards, Taco Bell argues that they do not fall within the definition of "accessible route." Memorandum In Support of Motion for Summary Judgment at 10-12. Taco Bell argues, therefore, that it complies with title III even if its queue lines do not meet the minimum width requirements applicable to accessible routes. Taco Bell's assertion is without merit. Taco Bell does not contest that service counters are one form of "element" that is subject to the Standards. Queue lines, therefore, fall squarely within the definition of "accessible

route" because they provide the route from the restaurant's entrance to the service counter. Moreover, Taco Bell has chosen to use queue lines as its preferred way to move the public from one element — the entrance — to another — the service counter.[10]

Taco Bell also argues that it provides a separate accessible route from the entrance to the service counter for people with disabilities, rather than making them proceed through the queue. The "separate" route is anything but accessible: during at least the busiest hours, a chain blocks the access for all. People with disabilities who try to use the "chained" access must remove the chain or summon help. People who do not have the physical ability to unhook the chain are completely unable to approach the service counter unassisted. They are forced to impose themselves on others and to become objects of attention, perhaps even hostility, simply to have the access that others effortlessly enjoy. This violates a concept incorporated throughout the

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[10/] In its Memorandum In Support of the Motion for Summary Judgment at 11, Taco Bell puts undue emphasis on the fact that in its 1996 report, the ADAAG Review Federal Advisory Committee of the U.S. Architectural and Transportation Barriers Compliance Board ("Access Board") proposes adding a section to ADAAG to specifically require queue and waiting lines serving accessible counters or check-out aisles to comply with the accessible route provisions. See "Recommendations for a New ADAAG," para. 227.5, September 1996 (attached as Exhibit 10 to Taco Bell's Motion for Summary Judgment). Taco Bell infers from this recommendation that queues are not covered under the current definition of accessible route. In fact, however, this recommendation is merely a clarification of the current ADAAG language.

Section 504 of the ADA, 42 U.S.C. § 12204, gives the Access Board responsibility to develop the ADAAG. No recommendations by the Access Board's ADAAG Review Federal Advisory Committee are adopted -- even as part of the Access Board's guidelines — until voted on by the full Access Board (of which the Department of Justice is one of 25 members). After such a vote, they will go through the full regulatory process, including a notice of proposed rulemaking and a published final rule, before being considered by the Department. Then they will go through another round of regulatory processes before being incorporated into the Department of Justice's regulation. Public comment and extensive analysis are integral to the process, both before the Access Board and the Department. Recommendations made by an advisory committee to the Access Board do not reflect or predict the Department's interpretation of the law.

ADA that people with disabilities generally should not be dependent on others to access the goods and services available to others. See, e.g., 42 U.S.C. § 12101(a)(8) (one of the Nation's proper goals is to assure "equality of opportunity" and "independent living"); Standards § 4.11.3 ("If platform lifts are used then they shall facilitate unassisted entry, operation, and exit from the lift . . . ") (emphasis added); Department of Justice's Title II Technical Assistance Manual at II-5.2000 (carrying an individual with a disability is not an acceptable alternative to providing full accessibility as it is "contrary to the goal of providing accessible programs, which is to foster independence.").

Even if, however, Taco Bell employees never engage the chain and the "alternative" access is always available, Taco Bell still has not complied with the Standards. Consistent with the overarching ADA preference for integration over segregation of people with disabilities, the Standards require that "the accessible route shall, to the maximum extent feasible, coincide with the route for the general public." Standards § 4.3.2. Taco Bell's "separate" route by its very nature does not meet this requirement.

1. "Newly constructed" facilities.

Title III defines discrimination to include the failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by persons with disabilities. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.401(a)(1). Newly constructed facilities must comply with the Standards, 28 C.F.R. § 36.406, including the requirement that the accessible route and the route for the general public are one and the same, to the maximum extent feasible. Standards § 4.3.2. Drawing all inferences in the light most favorable to Plaintiffs, as the Court must for the purposes of this Motion, Taco Bell has not demonstrated that it could not

meet the "to the maximum extent feasible" standard of making fully accessible customer service queues, which would have ensured that the accessible route and the route for the general public coincide. In fact, it appears that it would have been easy to design and construct fully accessible Taco Bell facilities — that would have included accessible customer service queues. Taco Bell has not put forth a single piece of evidence — whether by affidavit, deposition, or otherwise — which would substantiate any claim that it could not meet the standard "to the maximum extent feasible" and make the accessible route and the route for the general public -- the customer service queues -- one and the same.

Taco Bell asserts that it has complied with the Standards by providing "equivalent facilitation" for the minimum width requirements of section 4.3.2. Newly constructed facilities are able to depart from strict adherence of the design specifications of the Standards if they provide a substantially equivalent or greater level of access for people with disabilities. Standards § 2.2. Taco Bell wrongly argues that its alternative of allowing persons who cannot negotiate the narrow customer service queues to proceed directly to the counter provides equivalent facilitation. The mere fact that their "alternative" access is blocked — even intermittently — by a chain which must be unhooked plainly defeats this argument.

The concept of "equivalent facilitation" is designed to allow public accommodations the flexibility to design new and more effective ways for providing access to people with disabilities.[11] Standards § 2.2. However, flexibility is not a loophole. "Equivalent facilitation"

[11/]One example of appropriate "equivalent facilitation" is for child care centers to build accessible toilet rooms to children's dimensions: strict compliance with the Standards would result in the installation of "accessible" toilets that were too high to permit children with disabilities to transfer onto the toilet without assistance. Scaling down the size, while ensuring

should not be used to undermine other provisions of the Standards, such as the requirements that the accessible route and the route for the general public coincide "to the maximum extent feasible," Standards § 4.3.2, and that people with disabilities be afforded independent access. It is not intended to provide a means for businesses to circumvent the architectural and design specifications of the Standards to justify "business as usual," or to circumvent the substantive anti-segregation provisions of title III (see discussion, below, at 22-24). If the concept of "equivalent facilitation" allowed businesses such as Taco Bell to provide segregated customer service queues where it would have been easy to construct fully accessible integrated service lines, one of the main purposes of the ADA would be significantly undermined: "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2).

2. Summary judgment is premature for restaurants that are "existing facilities" because barrier removal must be evaluated upon specific facts not yet developed.

Title III does not require public accommodations to bring all "existing" facilities -- those designed and constructed for first occupancy prior to January 26, 1993 -- into immediate and comprehensive compliance with the Standards. Instead, public accommodations are required to modify existing facilities to be more accessible when it is "readily achievable" to do so. 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304. Taco Bell requests the Court to hold, in a summary judgment, that it is not readily achievable to reconfigure or widen the customer service queue in its existing facility to make it comply with Fig. 7(b) of the Standards. Taco Bell's

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accessibility with appropriate grab bars, adequate maneuvering space, etc., will better effectuate the Standards' underlying purpose of ensuring that the facilities are readily accessible to and usable by persons with disabilities.

Memorandum In Support of Motion for Summary Judgment at 13-16. However, genuine issues of material fact remain as to this issue that make summary judgment inappropriate.

Readily achievable means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9); 28 C.F.R. § 36.104. In determining whether a particular act of barrier removal is readily achievable, the finder of fact must consider factors including, but not limited to: the nature and cost of the action, the financial resources associated with the particular facility, Taco Bell Corporation's overall financial resources, the number of employees, and the effect of the change on expenses and resources. Id.

Here, Taco Bell argues that it will lose some seating capacity if it reconfigures the existing facility to include an accessible customer service queue. Taco Bell's Memorandum in Support of Motion for Summary Judgment at 14. It also argues that it will cost $10,000 per facility to modify the balustrades, ropes, and chains, and repair the tile. Id. Plaintiffs will no doubt contest these claims. Even if they are accurate, they are not the sole measure of whether the barrier removal is readily achievable. For instance, Taco Bell has provided no information about the resources available to that entity or to Taco Bell Corporation as a whole. If Taco Bell can demonstrate that there are few or no resources to accomplish these changes, then it is probably not readily achievable to widen the customer service queues. If, on the other hand, Taco Bell has a wealth of resources, then significant barrier removal may be readily achievable. There is insufficient information on the record to make a determination that barrier removal at the "existing" facility is not readily achievable.

When barrier removal is not readily achievable, public accommodations must take whatever alternative measures are readily achievable to provide their goods and services to

people with disabilities in a non-discriminatory manner. 42 U.S.C. § 12182(b)(2)(A)(v); 28 C.F.R. § 36.305. After arguing that it is not readily achievable to reconfigure or widen the customer service queues in the existing facility,[12] Taco Bell states that it has taken the readily achievable alternative of providing people with disabilities with direct access to the service counter. Taco Bell's Memorandum In Support of Motion for Summary Judgment at 16-18. The Court need not reach this issue since summary judgment is inappropriate with respect to whether barrier removal is readily achievable. Nevertheless, even if the Court were to address this issue, the alternative access is not accessible, as it is routinely blocked by a chain that physically cannot be removed by many people with disabilities.

B. Inaccessible customer service queues discriminate against people with disabilities.

When passing the ADA, Congress replaced "business as usual," which often excluded persons with disabilities or treated them as second class citizens, with an integration mandate under which people with disabilities are provided equal opportunities to fully enjoy all the benefits of modern American society. It made specific statutory findings that are relevant here:

- "individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural . . . barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," 42 U.S.C. § 12101(a)(5); and

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[12/] Other quick service restaurants that traditionally rely on customer service queues have agreed to reconfigure their queues in newly constructed and existing facilities to make them accessible to persons with disabilities, or to remove the queues altogether. See Settlement Agreement Regarding Access for Individuals with Disabilities To Wendy's Restaurants, entered into by the United States, Wendy's International, Inc., and the States of Arizona, California, Florida, Illinois, Kansas, Massachusetts, Minnesota, Pennsylvania, and West Virginia, attached hereto at Exhibit 2.

- "the Nation's proper goals regarding individuals with disabilities are to ensure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals," 42 U.S.C. § 12101(a)(8).

Plaintiffs have eloquently articulated this point in their Motion for Partial Summary Judgment. Based on the statutory and regulatory language, the ADA's legislative history, and case law, Plaintiffs properly assert that Taco Bell's reluctance to change their way of doing business violates title III's anti-segregation provisions, including 42 U.S.C. § 12182(b)(1)(B) and 28 C.F.R. § 36.203 (people with disabilities must be served in the most integrated setting appropriate to their needs); 42 U.S.C. § 12182(b)(1)(A)(iii) and 28 C.F.R. § 36.202(c) (different or separate goods or services are discriminatory unless necessary to provide a person with a disability a good, service, or other opportunity that is as effective as that provided to others); and 42 U.S.C. 12182(b)(1)(C) and 28 C.F.R. § 36.203(b) (persons with disabilities may not be denied the opportunity to participate in non-segregated programs or activities). See Plaintiffs' Memorandum In Support of Motion for Partial Summary Judgment at 13-15.

Plaintiffs also correctly argue that Taco Bell's "alternative" method of serving people with disabilities — having them bypass the customer service queue — subjects them to unequal service in violation of 42 U.S.C. § 12182(b)(1)(A)(i); 28 C.F.R. § 36.202)(b). It deprives them of the "stress-free" environment Taco Bell asserts is the very reason for maintaining the customer service queues. Plaintiffs' Memorandum In Support of Motion for Partial Summary Judgment at 15-17.

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CONCLUSION

The United States respectfully urges the Court to deny Taco Bell's Motion for Summary Judgment.

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Respectfully submitted,

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