No. 11-12013-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAHALA AULT, *et al.*,

Plaintiffs-Appellees

v.

WALT DISNEY WORLD COMPANY,

Defendant-Appellee

v.

DISABILITY RIGHTS ADVOCATES FOR TECHNOLOGY, *et al.*,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REMAND

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Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, counsel for amicus curiae, United States of America, files this Certificate of Interested Persons And Corporate Disclosure Statement. The following persons, law firms, associations, and corporation may have an interest in the outcome of this case:

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STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether 28 C.F.R. 36.311, the Department of Justice's recently promulgated regulation governing the use of Segways[1] and other personal mobility devices in public accommodations, is a reasonable interpretation of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12182, and, therefore, entitled to deference.

2. Whether the Walt Disney World Company's (Disney's) assertion that it has a legitimate safety defense under 28 C.F.R. 36.311(b) is meritless.

3. Whether the district court abused its discretion in approving the settlement agreement.

INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

The United States has a direct interest in this appeal because the district court held that 28 C.F.R. 36.311(b), a recently promulgated regulation governing the use of Segways and other personal mobility devices in public accommodations, is not entitled to deference. The Department of Justice (Department) promulgated

[1] The Segway® Personal Transporter (Segway) is a gyroscopically-stabilized, two-wheeled motorized device that a person rides in a standing position.

Section 36.311 in September 2010 pursuant to its statutory authority to issue regulations interpreting Title III of the ADA, 42 U.S.C. 12181-12189. See 42 U.S.C. 12186(b). The Department has an interest in defending the validity of the regulation and in ensuring its proper interpretation.

STATEMENT OF FACTS[2]

This appeal addresses the district court's approval of a class settlement agreement that permits Disney to continue its ban on Segway use at its Disney World and Disneyland resorts (collectively, Disney resorts), at all times, by all guests, including guests with a disability who use a Segway as a mobility device.[3] These resorts include six theme parks, two water parks, 21 hotel complexes, several shopping and entertainment districts, and various transportation systems. See Disney Parks, http://disneyparks.disney.go.com (last visited Sept. 16, 2011). Under the agreement, Disney must develop and provide 15 four-wheeled, electronic stand-up vehicles (ESVs) for individuals with mobility disabilities to use at the Disney resorts instead of their own Segways. See R.82-2 at 4-6. Moreover,

[2] Given space limitations, this section highlights only certain aspects of the settlement agreement and this case's procedural history.

[3] The sole exception is Disney-conducted Segway tours for a limited group of patrons at certain theme parks before the facilities open to the general public. R.208 at 108-109, 114. Disney, however, permits its *employees* to use Segways in its tunnels beneath the parks; parking lots; and one theme park, when crowd capacity permits. R.208 at 110-111; R.209 at 287-289.

class members will forego any future claim for, at a minimum, injunctive relief regarding the Segway ban under any federal, state, or local law. See R.82-2 at 7.

In January 2009, the district court preliminarily approved the agreement subject to a fairness hearing. R.83 at 9-12. The court concluded that the named plaintiffs had not shown a likelihood of success on the merits. R.83 at 10-11. The court noted the *parties'* agreement that the ESV "would provide substantially the same relief as precluding Disney from enforcing its no-Segway policy," and concluded that plaintiffs received the "optimal" benefit along the "spectrum of possible outcomes." R.83 at 11.

The United States, approximately 100 class members, 23 state attorneys general, and several nonprofit organizations filed objections to the agreement. See R.228 at 1-2. During the two-day fairness hearing, individuals with mobility disabilities testified about their reliance on Segways as their primary mode of personal transportation, their use of Segways in various settings (including crowded, public places), and the physical and psychological reasons why they use Segways instead of other devices. *E.g.*, R.208 at 195-204, 205-208, 242-244, 259, 262-263; R.209 at 326-330, 343-349. For some class members, the ESV is useless because they physically cannot operate it due to their height or the nature of their disabilities, including limited manual dexterity. R.208 at 174; R.209 at 341, 356-357, 374, 397-398, 410. Other objectors could operate an ESV, yet felt

uncomfortable doing so because of unfamiliarity with the device, and greater difficulty with its maneuverability compared to the Segway. R.208 at 256-258, 265-266; R.209 at 327-330, 382-383, 395. One objector who could operate an ESV would feel "psychologically miserable" if required to do so, and would not visit Disney because of its Segway ban. R.208 at 241; see R.208 at 196-197, 244. Disney's chief safety official asserted that the ESV was safer than the Segway for use in Disney's theme parks. *E.g.*, R.208 at 83-84, 91.

On April 4, 2011, the district court gave final approval to the class certification and the settlement agreement. R.252. The court adopted its initial assessment that the settlement was fair, and again concluded that plaintiffs' "likelihood of success at trial [was] questionable." R.252 at 4-5, 9. The court also concluded that 28 C.F.R. 36.311(b), the Department's new regulation governing the use of personal mobility devices at public accommodations, "conflict[s] with the plain language of Title III, which requires that a requested modification be necessary for a disabled individual to be afforded goods or services." R.252 at 7. Consequently, the court held that the regulation was "not entitled to any deference." R.252 at 7.

The court also stated that, even if it gave deference to the regulation, Disney "would likely be able to maintain its ban on Segways in light of its legitimate safety concerns." R.252 at 8. The district court also held that the Department's

interpretation of "necessary" in 42 U.S.C. 12182(b)(2)(A)(ii) was "unreasonable, and, therefore, not entitled to deference." R.252 at 8-9.

SUMMARY OF ARGUMENT

1. The Department's regulation governing the use of Segways and other personal mobility devices in public accommodations, 28 C.F.R. 36.311, is a reasonable interpretation of Title III of the ADA and, therefore, is entitled to deference. See *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). The district court erroneously concluded that the regulation dispenses with the statutory requirement that a modification be necessary. In fact, a plaintiff who brings a Title III claim alleging a violation of Section 36.311(b) must show that she has a disability-based need for a mobility device.

In promulgating the regulation, the Department reasonably decided that a person with a mobility disability need not show that her chosen device is the only one that would provide access to a public accommodation. The regulation's rebuttable presumption, which permits an individual's device of choice absent a valid safety or other affirmative defense, is consistent with the ADA's goal of protecting the dignity and autonomy of individuals with disabilities. This interpretation also furthers Title III's goal of ensuring that reasonable modifications are made to afford persons with disabilities the "full and equal

enjoyment" of the "privileges," "advantages," and other benefits that a public accommodation makes available to the general public. 42 U.S.C. 12182(a), 12182(b)(2)(A)(ii).

2. The district court failed to apply the factors set forth in 28 C.F.R. 36.311(b) before concluding that Disney "likely" can establish a safety defense to warrant its absolute ban on Segway use at the Disney resorts. The court erroneously assumed that a modification must allow unrestricted use of Segways. In fact, Section 36.311(b) allows Disney to impose reasonable time, place, or manner restrictions on Segway use to ensure safe operation. In addition, the Disney resorts include a variety of facilities (*e.g.*, theme parks, hotels, entertainment districts); yet Disney did not conduct a facility-specific assessment of the safety issue, as required by the regulation, to support its Segway ban.

3. The district court's conclusion that the agreement is fair was based on an erroneous interpretation of the law and incorrect view of critical facts. Accordingly, a remand for reconsideration is warranted.

ARGUMENT

I

28 C.F.R. 36.311 IS ENTITLED TO DEFERENCE BECAUSE IT IS A REASONABLE INTERPRETATION OF TITLE III OF THE ADA AS APPLIED TO PERSONAL MOBILITY DEVICES

A. Principles Of Judicial Deference

The Department's regulations interpreting Title III are entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). See *Bragdon* v. *Abbott*, 524 U.S. 624, 646, 118 S. Ct. 2196, 2209 (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.") (citing *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782-2783). Congress authorized the Department to issue regulations implementing Title III, see 42 U.S.C. 12186(b), and the Department promulgated 28 C.F.R. 36.311 through notice-and-comment rulemaking pursuant to that statutory authority. Where, as here, Congress has given "express delegation of authority to [an] agency to elucidate a specific provision of [a] statute by regulation," such a regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-844, 104 S. Ct. at 2782.

The *Chevron* standard is highly deferential. *Chevron* requires a court to accept a "reasonable" construction of the statute, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecomm. Ass'n* v. *Brand X Internet Serv.*, 545 U.S. 967, 980, 125 S. Ct. 2688, 2699 (2005) (citing *Chevron*, 467 U.S. at 843-844, 104 S. Ct. at 2782). This standard imposes a "low threshold of judicial scrutiny" to defer to an agency's regulation. *Shotz* v. *City of Plantation, Fla*, 344 F.3d 1161, 1179 (11th Cir. 2003).

Applying *Chevron*, this Court has properly deferred to the Department's regulations implementing Title II of the ADA. See *Shotz*, 344 F.3d at 1179; *Bledsoe* v. *Palm Beach Cnty. Soil & Water Conservation Dist.*, 133 F.3d 816, 822-823 (11th Cir. 1998). Upon a showing of reasonableness, the same deference is warranted for the Department's Title III regulations since Congress authorized the Department to issue regulations implementing both Title II, 42 U.S.C. 12134, and Title III, 42 U.S.C. 12186(b). See *Johnson* v. *Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1060-1061 (5th Cir. 1997) (deference to Title III regulations on service animals, 28 C.F.R. 36.302(c)(1)).

In addition, a court must defer to the Department's reading of its own regulation "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011) (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997)); *Vidiksis*

v. *E.P.A.*, 612 F.3d 1150, 1154-1155 (11th Cir. 2010). This deference is warranted even when the agency's interpretation is articulated for the first time in an amicus brief. *Chase Bank*, 131 S. Ct. at 880; see *Pugliese* v. *Pukka Dev., Inc.*, 550 F.3d 1299, 1305 (11th Cir. 2008).

B. Statutory And Regulatory Framework

1. Title III

Title III of the ADA prohibits discrimination on the basis of disability in places of public accommodation. 42 U.S.C. 12182. The statute's "[g]eneral rule" states that "[n]o individual shall be discriminated against on the basis of disability in the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a) (emphasis added). Congress identified several examples of conduct that constitute discrimination under Title III's "general rule," see 42 U.S.C. 12182(b), including the statute's reasonable modifications provision:

> For purposes of [Section 12182(a)], discrimination includes * * * a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. 12182(b)(2)(A)(ii).

2. 28 C.F.R. 36.311

In 1991, the Department issued regulations implementing Title III. See 28 C.F.R. Pt. 36. Since then, as a result of technological and other developments, individuals with mobility disabilities have increasingly been relying on devices other than wheelchairs and motorized scooters for mobility. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Title III Regulation), 75 Fed. Reg. 56,236, 56,259 (Sept. 15, 2010). One such device is a Segway.

In September 2010, after notice-and-comment rulemaking, the Department issued revised Title III regulations. 75 Fed. Reg. at 56,236-56,358. These regulations address, *inter alia*, the circumstances under which public accommodations must permit individuals with mobility disabilities to use their motorized mobility device of choice, including Segways. See 28 C.F.R. 36.104, 36.311. The regulation creates a rebuttable presumption that public accommodations must allow people with mobility disabilities to use "other power-driven mobility devices" (OPDMDs)[4], including Segways, in their facilities:

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[4] An OPDMD is

> any mobility device powered by batteries, fuel, or other engines – whether or not designed primarily for use by individuals with mobility disabilities – that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal

(continued…)

> A public accommodation shall make reasonable modifications in its policies, practices, or procedures to permit the use of [OPDMDs] by individuals with mobility disabilities, unless the public accommodation can demonstrate that the class of [OPDMDs] cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b).

28 C.F.R. 36.311(b)(1).[5]

A public accommodation must consider several factors to assess whether allowing a particular class of OPDMDs in a specific facility would be a reasonable modification. 28 C.F.R. 36.311(b)(2). These factors include the "size, weight, dimensions, and speed of the device;" the "volume of pedestrian traffic" (and any variation in such volume that may occur during a day, week, month, or year); the "design and operational characteristics" of the facility; whether legitimate safety restrictions and rules can be established to ensure safe operation of the device in the specific facility; and whether the use of the device creates a substantial risk of serious harm "to the immediate environment or natural or cultural resources" or

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(…continued)

> assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section.

28 C.F.R. 36.104.

[5] The OPDMD regulations, issued post-complaint, apply to plaintiffs' request for injunctive relief. See *Landgraf* v. *USI Film Prods*., 511 U.S. 244, 273, 114 S. Ct. 1483, 1501 (1994). The Department takes no position on plaintiffs' entitlement to attorney's fees in this case.

conflicts with federal land management. 28 C.F.R. 36.311(b)(2)(i)-(v). If a public accommodation can show that a class of device creates a safety risk or fundamental alteration in all circumstances, it need not permit any individual's use of that device. See 75 Fed. Reg. at 56,299.

If a public accommodation determines that allowing a class of OPDMDs is reasonable under Section 36.311(b), it "may ask a person using an [OPDMD] to provide a credible assurance that the mobility device is required because of the person's disability." 28 C.F.R. 36.311(c)(2). A credible assurance may be established by showing a state-issued disability parking placard or disability identification card, or by giving a verbal assurance that the device is used because of a mobility disability (so long as that verbal assurance is "not contradicted by observable fact"). *Ibid.* A public accommodation is not permitted to ask the individual about the "nature and extent" of her disability. 28 C.F.R. 36.311(c)(1).

In promulgating Section 36.311, the Department emphasized "that in the vast majority of circumstances, the application of the factors described in § 36.311 for providing access to other-powered mobility devices will result in the admission of the Segway." 75 Fed. Reg. at 56,263. The Department established a presumption for Segways, in part, because they "provide[] many [physical and psychological] benefits to those who use them as mobility devices." *Ibid.*; see also *id.* at 56,262. The Department explained that a Segway can be "more comfortable

and easier to use than more traditional mobility devices," that standing provides "secondary medical benefits," and that Segways provide "a measure of privacy with regard to the nature of one's particular disability." *Id.* at 56,262-56,263.

C. The Regulation Is A Permissible Interpretation Of Title III Of The ADA

Contrary to the district court's conclusion (see R.252 at 7), Section 36.311(b) does not dispense with a plaintiff's burden under Title III to show that a proposed modification is "necessary." To prevail, a plaintiff who alleges a violation of Section 36.311(b) must show that she has a disability-based need for a personal mobility device.

Although Section 36.311 does not use the word "necessary," its language is consistent with the statutory requirement that a plaintiff prove necessity to prevail on a Title III reasonable modification claim. The regulation explicitly limits its coverage to "individuals with mobility disabilities," 28 C.F.R. 36.311(b)(1), and authorizes a public accommodation to "ask a person using an [OPDMD] to provide a credible assurance that the mobility device is *required* because of the person's disability," 28 C.F.R. 36.311(c)(2) (emphasis added).

These provisions confirm that Section 36.311(b) protects only individuals who need a mobility device for disability-related reasons. Thus, if a deaf person has no mobility impairment, he has no disability-based need to use an OPDMD, and a public accommodation can preclude him from using his OPDMD if non-

disabled persons are subject to the same restrictions. This interpretation of necessity is consistent with precedent holding that a defendant must provide a reasonable modification that "addresses a need created by the handicap" rather than a need caused by a condition shared by individuals without disabilities. *Schwarz* v. *City of Treasure Island*, 544 F.3d 1201, 1226-1227 (11th Cir. 2008) (interpreting the Fair Housing Act's reasonable accommodation requirement).

The district court's erroneous interpretation (R.252 at 6), is based, in part, on its misplaced reliance on one sentence of the regulation's commentary that explained, "the focus of the analysis [under Section 36.311(b)(2)] must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device." 75 Fed. Reg. at 56,299. This sentence refers to the analysis that a public accommodation must undertake under Section 36.311(b)(2) to determine whether a modification is "reasonable." See *ibid.* Because the reasonableness of a modification is distinct from whether it is "necessary," *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 682, 683 n.38, 688, 121 S. Ct. 1879, 1893 and n.38, 1896 (2001), the Department appropriately cautioned public accommodations not to conflate the two issues when analyzing the reasonableness of allowing OPDMDs. The commentary does *not* state that a plaintiff is relieved of the obligation to show the necessity of a modification if she alleges a violation of the regulation.

Although a plaintiff alleging a violation of Section 36.311(b) must show that she has a disability-based need for a mobility device, she is not required to prove that her device is the only one that would give her access to a public accommodation. Rather, the regulation creates a presumption that a person with a mobility disability who needs a mobility device should be able to use her OPDMD of choice – so long as allowing the use of that class of device is "reasonable" under Section 36.311, and the public accommodation has not established a valid safety or other affirmative defense justifying exclusion of that class of device. The Department's decision to honor the individual's chosen mobility device is a reasonable construction of the ADA because it promotes the statute's overarching goals of protecting the dignity, autonomy, and self-determination of people with disabilities. See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 102-103 (1990) (recognizing the need to respect the personal choices of individuals with disabilities); 135 Cong. Rec. 19,803 (statement of Sen. Harkin, primary Senate sponsor of ADA) (Sept. 7, 1989); *Tennessee* v. *Lane*, 541 U.S. 509, 537, 124 S. Ct. 1978, 1996 (2004) (Ginsburg, J., concurring); *Helen L.* v. *DiDario*, 46 F.3d 325, 335 (3d Cir. 1995); see generally 42 U.S.C. 12101(a).

The Department's regulation is also reasonable because it furthers the statutory requirement that persons with disabilities not be discriminated against "in the *full and equal enjoyment* of the goods, services, facilities, privileges,

advantages, or accommodations" that a public accommodation makes available to the general public. 42 U.S.C. 12182(a) (emphasis added). When individuals who have mobility disabilities are barred from bringing their OPDMDs into a place of public accommodation, they are likely to be denied the same opportunity to enjoy the overall experience that the public accommodation affords to the general public.

To understand why this is so, it is helpful to consider the experiences that a *non*-disabled person typically has when she shows up at a public accommodation. When she arrives at the entrance, she is virtually always permitted to travel into and through the facility using her usual means of locomotion – *i.e.*, walking. For most non-disabled persons, walking is accomplished without significant effort, attention, or distraction from their enjoyment of their surroundings. The ability of a non-disabled person to enjoy a public accommodation would almost certainly be adversely affected if she were forced, for example, to travel around the facility in a wheelchair. She would likely experience at least some degree of unease, anxiety, or inconvenience in learning to use the wheelchair and navigate without bumping into people or things. At the very least, using an unfamiliar means of locomotion would likely be distracting to the non-disabled person in a way that walking would not.

Of course, non-disabled people are almost never required to abandon their usual means of locomotion as a condition of using a public accommodation. But

that is what happens to a person with a mobility disability who uses an OPDMD for locomotion but is barred from bringing it into a public accommodation. Having to use a different device to enter and travel through the public accommodation will, at a minimum, likely distract that person from fully enjoying the overall experience offered by the public accommodation.

Requiring a public accommodation to honor an individual's chosen device (Segway or otherwise) absent an affirmative defense is comparable to the Department's determination that a public accommodation must allow an individual to bring a qualified service animal into a facility absent an affirmative defense or special circumstances. See 28 C.F.R. 36.104, 36.302(c); see also *Sheely* v. *MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007) (defendant's failure to accommodate her service animal in a medical facility was not rendered moot by defendant's new policy permitting service animals); *Johnson* v. *Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052, 1059-1065 (5th Cir. 1997) (modifying a no-animal policy to permit a service dog on a brewery tour was reasonable under Title III). Under Section 36.302(c)(1), a public accommodation may not require that an individual use a different form of assistance rather than her service animal. In both instances, an individual's choice (an animal or OPDMD), is highly personal and integral to her daily life, and must be honored unless the requested

modification is unreasonable or unless the defendant can establish an affirmative defense.

While a comparison of mobility devices is not appropriate in assessing necessity, that comparison confirms that people with mobility disabilities who are forced to use a device besides their Segway likely will be disadvantaged in their experience at a public accommodation. Because a person rides a Segway while standing, his visual experience is virtually always superior to that of a person who uses a wheelchair or other sit-down device. Some people with mobility impairments experience discomfort in sitting, see 75 Fed. Reg. at 56,262, and thus requiring them to use a wheelchair rather than a Segway can significantly interfere with their full and equal enjoyment of the benefits offered by the public accommodation. While an individual stands while using an ESV (Disney's alternative device), not everyone can operate an ESV. See p. 4, *supra*. For others, the ESV is either more difficult to operate than a Segway, or the ESV will cause unease from unfamiliarity that would be absent with their own Segway. See pp. 4-5, *supra*. Finally, being required to use an ESV rather than a Segway may result in an invasion of the person's privacy concerning the nature or seriousness of her disabilities, particularly if she needs to explain why operating an ESV would be unpleasant, difficult, or impossible for her. See 28 C.F.R. 36.311(c)(1).

These considerations confirm the reasonableness of the Department's decision to create a presumption respecting each individual with a disability's selection of a mobility device, even if the entity offers some alternative device that will permit the individual to have physical access to the public accommodation. See *McNamara* v. *Ohio Bldg. Auth.*, 697 F. Supp. 2d 820, 824, 828-829 (N.D. Ohio 2010) (denying motion to dismiss a Segway user's ADA Title II reasonable modification claim, even though plaintiff reached his destination by a forced alternative (*i.e.*, the defendant's wheelchair)).

D. The District Court's Conclusion That The Regulation Is Invalid Is Premised On An Erroneous Interpretation Of Title III And The Regulation

The district court's narrow interpretation of Title III, including its suggestion that 42 U.S.C. 12182(b)(2)(A)(ii) ensures only access to a public accommodation conflicts with both the language and structure of Title III. R.252 at 8.

The statutory language makes clear that Section 12182(b)(2)(A)(ii) does not just guarantee *access* to a public accommodation. It also requires reasonable modifications necessary to afford the "goods, services, facilities, privileges, advantages, or accommodations" of a public accommodation to persons with disabilities. 42 U.S.C. 12182(b)(2)(A)(ii). These broad, overlapping terms encompass everything (tangible or intangible) that a public accommodation makes available to the general public.

Section 12182(b)(2)(A)(ii)'s cross-reference to the general anti-discrimination rule of 42 U.S.C. 12182(a) confirms that the reasonable-modification requirement should be interpreted in light of Section 12182(a)'s overarching goal that people with disabilities have "full and equal enjoyment" of whatever a public accommodation provides to the general public. This analysis is consistent with the "fundamental canon of statutory construction" that statutory provisions must be read, not in isolation, but "in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133, 120 S. Ct. 1291, 1300-1301 (2000) (citation omitted). The court's cramped interpretation also ignores the well-established principle that "remedial" legislation must "be construed broadly to effectuate its purposes." *Jefferson Cnty. Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 159, 103 S. Ct. 1011, 1018 (1983); see *Martin*, 532 U.S. at 675, 121 S. Ct. at 1889 (Title III imposes a "broad mandate" with a "sweeping purpose"); *Steger* v. *Franco, Inc.*, 228 F.3d 889, 894 (8th Cir. 2000).

The Supreme Court has interpreted Section 12182(b)(2)(A)(ii) to require public accommodations to "make '*reasonable modifications* in policies, practices, or procedures, when such modifications are necessary' to provide disabled individuals *full and equal enjoyment*." *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128, 125 S. Ct. 2169, 2176 (2005) (dictum) (emphasis added) (citing 42

U.S.C. 12182(b)(2)(A)(ii) and 12184(b)(2)(A)); accord *Fortyune* v. *AMC, Inc.*, 364 F.3d 1075, 1083 (9th Cir. 2004). Similarly, this Court held that an ADA Title II violation "does not occur only when a disabled person is *completely* prevented from *enjoying* a service, program, or activity." *Shotz* v. *Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (emphasis added). Access to a program "in some fashion" does not satisfy Title II's requirement that a program, be "readily accessible." *Ibid*.

Moreover, the district court's few citations do not support its narrow interpretation of a necessary modification under Section 12182(b)(2)(A)(ii). The district court's reliance on *Martin* is misplaced because the Supreme Court in that case "ha[d] no occasion to consider" what constitutes a "necessary" modification. See 532 U.S. at 683 n.38, 121 S. Ct. at 1893 n.38. The district court nonetheless cited (R.252 at 8 n.8) the latter portion of the following passage from *Martin*:

> Petitioner does not contest that a golf cart is a reasonable modification that is necessary if Martin is to play in its tournaments. Martin's claim thus differs from one that might be asserted by players with less serious afflictions that make walking the course uncomfortable or difficult, but not beyond their capacity. In such cases, an accommodation might be reasonable but not necessary.

Martin, 532 U.S. at 682, 121 S. Ct. at 1893. This passage does not support the court's suggestion that the necessity element of the statute requires a plaintiff to show that without a modification, access would be 'beyond [plaintiff's] capacity.'" *Ibid*. The portion of *Martin* on which the district court relied is dictum. See *ibid*.

In addition, *Martin* involved a professional sporting event where fatigue was designed to be one element of the competition – a context that has no application to individuals with disabilities seeking to enjoy the amenities at Disney resorts with family or friends. See 532 U.S. at 669-671, 690, 121 S. Ct. at 1886-1887, 1897. In any event, four years after *Martin*, the Supreme Court stated that Section 12182(b)(2)(A)(ii) requires modifications that are necessary to provide individuals "full and equal enjoyment" of what a public accommodation offers, *Spector*, 545 U.S. at 128-129, 125 S. Ct. at 2176 (dictum) – a standard far broader than mere access.

Lentini v. *California Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004), also does not support the district court's narrow reading of Title III.[6] See R.252 at 8-9. In *Lentini*, the Ninth Circuit concluded that a modification of the defendant's no-pets policy was "necessary" where the plaintiff "would effectively be excluded from future performances at the Center" if her service animal was barred from the premises. 370 F.3d at 845. *Lentini* never held that a modification is unnecessary so long as the person with a disability otherwise has access to the public accommodation. Indeed, the court held that Lentini needed a modification to allow

[6] The district court also cited *Baughman* v. *Walt Disney World Co.*, 691 F. Supp. 2d 1092, 1095 (C.D. Cal. 2010), which cited *Lentini*, and is currently on appeal, No. 10-55792 (9th Cir.).

her to bring her service animal into the public accommodation, even though the defendant's alternative means of assistance (*i.e.*, specially trained ushers) plainly would have given her physical access to the facility. *Ibid.*[7]

The relevant question under *Chevron* is not whether the Department's interpretation of Title III is the *only* permissible reading of the statute or whether this Court believes it is the best reading. Rather, the pertinent inquiry is whether the Department's interpretation, as reflected in 28 C.F.R. 36.311, is reasonable. It is. As addressed herein, this regulation is consistent with the statutory elements of

[7] In arguing that a public accommodation may force a person with a disability to use an alternative mobility device, Disney relied on decisions addressing an employer's discretion under Title I of the ADA to choose an accommodation for an employee. See R.50 at 13-14. That reliance on Title I case law was misplaced. The Equal Employment Opportunity Commission's (EEOC's) commentary to its Title I regulations addresses an employer's "ultimate discretion to choose between effective accommodations" in certain circumstances. 29 C.F.R. Pt. 1630, App., § 1630.9 at 384 (2010). Yet the EEOC has not promulgated a regulation like 28 C.F.R. 36.311, and has not officially addressed whether an employer must permit an employee's use of his own Segway or other OPDMD in the workplace. Consequently, we express no view on whether Title I or its implementing regulations would impose such a requirement.

The EEOC's requirements under Title I in the employment context are irrelevant here. This is a Title III case involving public accommodations. The Department exercised its statutory authority to issue Section 36.311. The Department can reasonably interpret Title III to impose obligations on public accommodations to allow use of OPDMDs, regardless of whether the EEOC decides to impose similar obligations on employers under a different statutory provision.

a reasonable modification claim, it protects the dignity of persons with disabilities to use a chosen mobility device and it ensures their "full and equal enjoyment" of all of the benefits that the public accommodation makes available to the public, 42 U.S.C. 12182(a), 12182(b)(2)(A)(ii). This regulation easily survives the "low threshold" of scrutiny under the deferential *Chevron* standard. See *Shotz*, 344 F.3d at 1179.

II

DISNEY'S ALTERNATIVE ARGUMENT THAT IT HAS ESTABLISHED A LEGITIMATE SAFETY DEFENSE UNDER 28 C.F.R. 36.311(b) IS MERITLESS

The district court stated, in the alternative, that Disney "likely" can show a valid safety defense under 28 C.F.R. 36.311(b) justifying its blanket exclusion of Segways from the Disney resorts. R.252 at 8. In fact, Disney has not made the requisite showing under Section 36.311(b).

The regulation requires a public accommodation to make reasonable and necessary modifications to allow the use of OPDMDs unless it "can demonstrate that the class of [OPDMDs] cannot be operated in accordance with legitimate safety requirements that the public accommodation has adopted pursuant to § 36.301(b)." 28 C.F.R. 36.311(b)(1). Section 36.301(b), in turn, authorizes a public accommodation to "impose legitimate safety requirements that are necessary for safe operation," and that are "based on actual risks and not on mere

speculation, stereotypes, or generalizations about individuals with disabilities." 28 C.F.R. 36.301(b). Under these regulations, Disney bears "the burden of proof to demonstrate that [the Segway] cannot be operated in accordance with legitimate safety requirements." Title III Regulation, 75 Fed. Reg. 56,236, 56,260 (Sept. 15, 2010).

The relevant question under the regulation is not whether "unrestricted" Segway use would raise safety concerns, see R.208 at 124, but "[w]hether legitimate safety requirements can be established to permit the safe operation of [Segways] in the specific facility." 28 C.F.R. 36.311(b)(2)(iv). The regulation permits a public accommodation to impose reasonable time, place, or manner restrictions on the use of OPDMDs to ensure safe operation. See 28 C.F.R. 36.311(b)(2); 75 Fed. Reg. at 56,299. Specifically, the regulation prescribes several factors that a public accommodation must consider in determining whether permitting use of a particular class of OPDMDs is safe and reasonable. See 28 C.F.R. 36.311(b)(2). Among those factors are the vehicle's speed, the design and operational characteristics of the facility, and the volume of pedestrian traffic, including variations in such volume during the day, week, month, or year. 28 C.F.R. 36.311(b)(2)(i), (ii), & (iii). In its commentary interpreting the regulation, the Department explained that "[o]f course, public accommodations may enforce legitimate safety rules established for the operation of [OPDMDs] (e.g.,

reasonable speed restrictions)." 75 Fed. Reg. at 56,299. The Department further emphasized that "public accommodations should not rely solely on a device's top speed when assessing whether the device can be accommodated; instead, public accommodations should also consider the minimum speeds at which a device can be operated and whether the development of speed limit policies can be established to address concerns regarding the speed of the device." *Ibid*.

Other safety-related restrictions may be permissible, depending on the circumstances and the particular facility. For example, Segway users may be required to use elevators, but not escalators, to move between floors, and they may be banned from using cell phones or headphones while operating Segways. See *McElroy* v. *Simon Prop. Grp., Inc.*, No. 08-4041-RDR, 2008 WL 4277716, at *5, *7 (D. Kan. Sept. 15, 2008) (upholding such restrictions imposed by a shopping mall). It may also be reasonable in some facilities to temporarily suspend Segway use during periods of heavy crowds until the congestion clears. See *ibid*. And in some circumstances, a public accommodation might legitimately require an individual with a disability to perform a brief field test to show his ability to maneuver a Segway prior to using it in the public accommodation's facility, particularly if the individual wishes to use the Segway when the facility is especially crowded.

Disney also failed to present a facility-specific analysis to establish the safety defense. As noted, the relevant inquiry is "[w]hether legitimate safety requirements can be established to permit the safe operation of the [OPDMDs] in the *specific facility*." 28 C.F.R. 36.311(b)(2)(iv) (emphasis added); accord 75 Fed. Reg. at 56,299. "Facility" is broadly defined to include "any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. 36.104.

Even if legitimate safety concerns might justify a ban (or partial ban) on Segway use at one Disney facility, those concerns would not necessarily mean that Disney could establish a valid safety defense for other facilities that differ in size, configuration, or levels of pedestrian traffic. Disney's Segway ban applies to a wide variety of facilities within its resorts, including six theme parks (and the multiple facilities found in each park), hotel complexes, restaurants, shopping districts, and individual stores. R.208 at 124-126. Disney's evidence of Segways' purported safety risk was limited the devices' use at its theme parks. *E.g.*, R.208 at 92, 94-95, 110-111; R.209 at 301-302. Disney's general assertion that Segways, by design, pose a risk in a crowded venue is insufficient to establish that at every time of day, every day, all of Disney's facilities have a crowd capacity that would

preclude the safe operation of Segways. See R.208 at 77-78, 80-81, 88, 115-116. The district court thus erred in concluding that Disney's evidence "likely" would establish this safety defense. R.252 at 8.

III

A REMAND IS WARRANTED TO REASSESS THE FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE SETTLEMENT

A court may approve a settlement that binds class members if the court considers numerous factors and finds after a hearing that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); see *Bennett* v. *Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).[8] Examining the relief in an agreement vis-à-vis the plaintiff's likelihood of success is "'by far the most important factor' in evaluating a class action settlement." *Figueroa* v. *Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1323 (S.D. Fla. 2007) (quoting *Knight* v. *Alabama*, 469 F. Supp. 2d 1016, 1032-1033 (N.D. Ala. 2006), aff'd, 271 F. App'x 896 (11th Cir. 2008)); *Synfuel Techs., Inc.* v. *DHL Express (USA) Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). The district court's assessment of an agreement also must be "based on adequate and careful analysis of 'the facts of the case in relation to the relevant principles of applicable law.'" *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212

[8] The factors include "the likelihood of success at trial; (2) the range of possible recovery; * * * [and] the substance and amount of opposition to the settlement." *Bennett*, 737 F.2d at 986.

(5th Cir. 1981) (citing *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)); see *Mirfasihi* v. *Fleet Mortg. Corp.*, 450 F.3d 745, 749-751 (7th Cir. 2006) (remand warranted due to the district court's inadequate analysis of a subclass's claims).

The district court's approval of the settlement was based on several legal errors. Cf. *Bennett*, 737 F.2d at 987-988. As explained above, the court erroneously interpreted Section 36.311 and Title III, failed to defer to the regulation, and failed to apply the correct standard in analyzing Disney's safety defense. These errors infected the court's conclusion that plaintiffs had little likelihood of success on the merits, which, in turn, was the dominant factor influencing its determination that the agreement was fair.

The district also failed to address evidence that challenged its pre-hearing conclusion (which it affirmed post-hearing), that Disney's ESVs would provide persons with disabilities the same benefits that they would enjoy if they were allowed to use their personal Segways. See R.252 at 4, 9; R.83 at 11. Specifically, the court ignored that some class members cannot physically operate an ESV; for others, the ESV was less maneuverable than a Segway; and still other class members would be adversely affected psychologically if forced to give up their Segways. See pp. 4-5, *supra*.

The plaintiff's likelihood of success is particularly critical in assessing a class settlement where, as here, (1) the class members are forced to waive federal,

state, and local claims; and (2) the class action has been certified under Federal Rule of Civil Procedure 23(b)(2) and, thus objecting class members cannot opt out of the agreement. Here, the objectors presented evidence that some class members (particularly, those who are physically incapable of using the ESV) would receive absolutely no benefit from the settlement, and yet must waive federal, state, and local claims regarding Disney's Segway ban. Moreover, other members who are capable and willing to use an ESV are not even guaranteed an opportunity to use one given the ESV's limited availability, unspecified allocation throughout the resorts, and the absence of any reservation system. A remand is warranted given that the primary factor supporting the court's ruling (the purported fairness of the agreement) was based on an erroneous understanding of the law and given that the court ignored significant evidence presented at the fairness hearing. See *In re Corrugated Container Antitrust Litig.*, 643 F.2d at 214-215.

CONCLUSION

This Court should (1) hold that 28 C.F.R. 36.311 is a permissible interpretation of Title III of the ADA and is thus valid; (2) hold that Disney has not established a safety defense under Section 36.311 justifying a ban on Segways in all facilities of the Disney Resorts at all times; and (3) vacate the district court's approval of the settlement agreement and remand for reconsideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached Brief Of The United States As Amicus Curiae Supporting Appellants And Urging Remand:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6,965 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: September 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2011, I electronically filed the foregoing Brief Of The United States As Amicus Curiae Supporting Appellants and Urging Remand with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate EDF system. I further certify that all participants in the case are registered EDF users and that service will be accomplished by the appellate EDF system.

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