No. 10-55792

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TINA BAUGHMAN,

Plaintiff-Appellant

v.

WALT DISNEY WORLD COMPANY,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

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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

[1] The Segway® Personal Transporter (Segway) is a gyroscopically-stabilized, two-wheeled motorized device that a person rides standing. "The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle." Nondiscrimination on the Basis of Disability by Public Accommodations and in

(continued…)

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) alternative argument that it has a legitimate safety defense under 28 C.F.R. 36.311(b) is meritless.

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 Disney has challenged the validity of 28 C.F.R. 36.311, a recently promulgated regulation governing the use of Segways and other personal mobility devices in public accommodations. The Department of Justice (Department) promulgated 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.

(…continued)
Commercial Facilities (Title III Regulation), 75 Fed. Reg. 56,236, 56,262 (Sept. 15, 2010).

STATEMENT OF FACTS

Tina Baughman (Baughman) is a mother with muscular dystrophy who alleges that she currently relies on a Segway for mobility. ER 118. With intentions of bringing her children to the Disneyland Resort, Baughman asked Disney representatives whether they would permit her attendance with her Segway.[2] ER 118-122. Disney responded that, due to "safety concerns," she could not attend Disneyland with her Segway. ER 123. Pursuant to Disney policy, Baughman could bring or rent a wheelchair or motorized scooter to use at Disneyland. ER 259. Baughman chose not to go to Disneyland because of Disney's refusal to allow her to use her Segway at the resort. See ER 59.

In 2007, Baughman filed suit in state court, alleging that Disney's failure to permit her use of her Segway violated Title III of the ADA and various state laws. Disney removed the case to federal court. In early 2010, the parties filed cross-motions for summary judgment.

In her lawsuit, Baughman asserted that her request to use her Segway was reasonable and would not fundamentally alter Disneyland's operations. ER 81-83. Baughman also argued that a wheelchair and scooter were inadequate alternatives

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[2] The Disneyland Resort includes the Disneyland Theme Park; California Adventure Park; three hotels; and Downtown Disney, which includes Disney's shopping, dining, and entertainment complex. See www.disneyland.disney.go.com.

compared to her Segway because she could not rise independently from a sit-down device; a sit-down device would not provide the same line-of-sight as a Segway, which was important for her to watch her children's movements and see her surroundings; and she would not be as comfortable operating a scooter that she had never used before. ER 75, 83.

Disney argued that a modification of its Segway ban was not necessary because Disney permits patrons to use motorized scooters or wheelchairs at the Disneyland Resort. ER 246-248. Disney also claimed that Baughman had filed three prior lawsuits alleging violations of the ADA where she attested to her reliance on a wheelchair and scooter. ER 247. Disney contended that, in light of Baughman's positions in those prior lawsuits, she was judicially estopped from asserting here that she relies solely on a Segway. ER 247-248. Disney also argued that Baughman's request was not reasonable because, according to Disney, Segways are a safety risk. ER 249.

On February 26, 2010, the district court granted Disney's motion for summary judgment on the ADA claim and denied Baughman's motion for summary judgment. ER 707-717. The court noted that Baughman had claimed in her prior lawsuits that she had "a physical impairment which causes her to rely upon a power scooter or wheelchair for her mobility," and that she successfully settled the suits and received relief. ER 712. Finding that Baughman's prior

claims were inconsistent with her current claims, the court held that she was judicially estopped from asserting here that she was unable to use a wheelchair or scooter, or that she never had used a wheelchair. ER 712-715.

The court also stated that "[f]or a requested modification to be necessary [under the reasonable modifications requirement of 42 U.S.C. 12182(b)(2)(A)(ii)], a plaintiff must show that she would be effectively excluded from the public accommodation without the modification." ER 711 (citing *Lentini* v. *California Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004)). The court noted Disney's arguments that a modification is not necessary under Title III if an alternative mobility device is available to provide access, and that Baughman could not demonstrate necessity because she could use a wheelchair or scooter to enter and travel around the Disneyland Resort. *Ibid.* Apparently adopting Disney's arguments, the district court concluded that, "[a]s Ms. Baughman is judicially estopped from claiming that she cannot use a wheelchair, her requested modification is not necessary and Disney is entitled to summary judgment on her ADA claim." ER 715.

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.[3] See *Chevron, USA, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Disney erroneously asserts 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, however, 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. This 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, and not imposing others' views of what they think is best for individuals with disabilities. The Department's interpretation also furthers Title III's goal of ensuring that persons with disabilities are afforded "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). Forcing a person with a disability to operate a different mobility device than she typically uses for locomotion will

[3] The Department is presenting this brief in response to Disney's challenge to the validity of 28 C.F.R. 36.311. The Department takes no position on whether this Court must apply this regulation to resolve this case.

likely detract from her enjoyment of the overall experience that the public accommodation offers to the public.

2. There is no merit to Disney's alternative argument that it has established a legitimate safety defense under 28 C.F.R. 36.311(b) to warrant its blanket ban on Segways at the Disneyland Resort. Disney erroneously assumes that if it modifies its ban it must allow "unrestricted use" of Segways. In fact, Section 36.311 allows Disney to impose reasonable time, place, or manner restrictions on Segway use to ensure safe operation. Disney also failed to conduct a facility-specific assessment of the safety issue, as required by the regulation. The Disneyland Resort contains a wide variety of facilities. If Disney wishes to rely on a safety defense, it must make the requisite showing for each facility in which it imposes the Segway ban.

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

In September 2010, the Department of Justice issued a new regulation governing the use of Segways and other personal mobility devices in public accommodations. See 28 C.F.R. 36.311. The district court's decision, which was issued seven months before the regulation was promulgated, did not address Section 36.311. Nonetheless, Disney's brief as appellee challenges the validity of

Section 36.311, arguing (D. Br. 26 n.8) that it conflicts with 42 U.S.C. 12182(a)(2)(B)(ii), the reasonable modification provision of Title III of the ADA.

Contrary to Disney's argument, the Department's new regulation is a reasonable interpretation of Title III as applied to personal mobility devices and is thus entitled to deference from this Court. Disney's argument is premised on a misreading of the regulation and an erroneous interpretation of Title III's reasonable modification provision.

A. Principles Of Judicial Deference

The Department's regulations interpreting Title III are entitled to deference under *Chevron, USA, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (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). 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.

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 (2005) (citing *Chevron*, 467 U.S. at 843-844). Applying *Chevron*, this Court has properly deferred to a number of the Department's Title III regulations. See, *e.g.*, *Enyart* v. *National Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1162 (9th Cir. 2011) (28 C.F.R. 36.309), petition for cert. pending, No. 10-1304 (filed April 25, 2011); *Disabled Rights Action Comm.* v. *Las Vegas Events, Inc.*, 375 F.3d 861, 875-876 (9th Cir. 2004) (28 C.F.R. 36.104); *Botosan* v. *Paul McNally Realty*, 216 F.3d 827, 833-834 (9th Cir. 2000) (28 C.F.R. 36.201(b)).

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 (1997)); see *Miller* v. *California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (deferring to the Department's interpretation of another Title III regulation), cert. denied, 129 S. Ct. 1349 (2009). 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; *Balvage* v. *Ryderwood Improvement and Serv. Ass'n, Inc.*, 642 F.3d 765, 775-776, 779 (9th Cir. 2011).

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). One such example is 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. Part 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 Title III Regulation, 75 Fed. Reg. 56,259 (Sept. 15, 2010). One such device is a Segway. See p. 1 n.1, *supra*.

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 assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined

(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).

The regulation identifies several factors that a public accommodation must consider in assessing 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 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

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(…continued)

> pedestrian routes, but that is not a wheelchair within the meaning of this section.

28 C.F.R. 36.104.

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 of Justice 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 it "provides 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" and noted that riding a device in a standing position benefits people who suffer discomfort in sitting and

provides "secondary medical benefits." *Id.* at 56,262. In addition, the Department recognized that Segways also provide "a measure of privacy with regard to the nature of one's particular disability." *Id.* at 56,263.

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

Disney claims that 28 C.F.R. 36.311 "purport[s] on [its] face to dispense with the 'necessity' requirement set forth in 42 U.S.C. § 12182(b)(2)(A)(ii)" and, to that extent, is invalid. D. Br. 26 n.8 (citing *Ault* v. *Walt Disney World Co.*, No. 07cv1785, 2011 WL 1460181, at *3-4 (M.D. Fla. Apr. 4, 2011), appeal pending, No. 11-12013-BB (11th Cir.)). Disney is mistaken.

As an initial matter, Disney has misread the regulation. Section 36.311(b) does not dispense with a plaintiff's burden under Title III to show that a proposed modification is "necessary." 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 personal mobility device in order to prevail in litigation.[5] 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

[5] Outside of the context of litigation, the user of an OPDMD need only provide the operator of a public accommodation a "credible assurance that the mobility device is required because of the person's disability." 28 C.F.R. 36.311(c)(2).

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.[6] Thus, for example, 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 in its facility if non-disabled persons are subject to the same restrictions. This interpretation of the necessity requirement is consistent with precedent holding that a defendant's obligation to provide reasonable modifications is limited to those modifications that "addresses a need created by the handicap" rather than a need caused by a condition shared by individuals without disabilities. *Schwarz* v. *City*

[6] The Department of Justice explained that "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 (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 brings a Title III claim alleging a violation of the regulation.

of Treasure Island, 544 F.3d 1201, 1226-1227 (11th Cir. 2008) (interpreting the Fair Housing Act's reasonable accommodation requirement).

Although a litigant 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 type of device is "reasonable" under the factors set forth in 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 choice of a 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) ("The ADA gives power to individuals with disabilities to make choices" about their lives); *Tennessee* v. *Lane*, 541 U.S. 509, 537 (1996) (Ginsburg, J., concurring) (emphasizing the ADA's goal of "respect[ing] the dignity of individuals with disabilities"); *Helen L.*

v. *DiDario*, 46 F.3d 325, 335 (3d Cir.) (noting statute's goal of ensuring "dignity" for persons with disabilities), cert. denied, 516 U.S. 813 (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. And 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,

self-consciousness, or inconvenience in learning to use the wheelchair and then navigating it through the facility without bumping into people or things. At the very least, having to use 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.

Being denied use of Segways can pose additional disadvantages for some people with mobility disabilities. Because a person uses a Segway in a standing position, his visual experience is virtually always superior to that available to a person who uses a wheelchair or other sit-down device. A key advantage that non-disabled people have in using a public accommodation's facilities – to experience the sights from a standing position – is not afforded to a person with a mobility impairment who is forced to use a wheelchair. In addition, for many people with disabilities, a Segway can be "more comfortable and easier to use than more traditional mobility devices." 75 Fed. Reg. at 56,262. Some people with mobility

impairments experience discomfort in sitting, see *ibid.*, 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. And for some individuals, being required to use a device other than a Segway may result in an invasion of their privacy concerning the nature or seriousness of their disabilities. See *id.* at 56,263. These considerations confirm the reasonableness of the Department's decision to create a presumption honoring the personal choices of individuals with disabilities in selecting the particular mobility devices that they believe best suit their needs.

Thus, under the Department's reasonable interpretation of Title III, allowing a person with a mobility disability to use a Segway can be a necessary modification under the ADA even if the defendant offers some alternative device that will permit the individual to have physical access to the public accommodation. See, *e.g.*, *McNamara* v. *Ohio Bldg. Auth.*, 697 F. Supp. 2d 820 (N.D. Ohio 2010). In *McNamara*, the court denied a motion to dismiss a Title II reasonable modification claim challenging the refusal to allow the plaintiff to use his Segway inside the defendant's office building. The court rejected the defendant's argument that the plaintiff's ability to reach his destination in the building without a Segway (he was required to use the defendant's wheelchair) precluded him from showing that a modification of the defendant's Segway ban

was "necessary" under Title II's reasonable modification regulation. See *id.* at 824, 828-829.

D. Disney's Attack On The Regulation Is Premised On An Erroneous Interpretation Of Title III

Disney suggests that 42 U.S.C. 12182(b)(2)(A)(ii) guarantees nothing more than access to a public accommodation. D. Br. 1-2, 8, 10-11, 19. Specifically, Disney argues that "a plaintiff must prove that unless the modification is made, access to the public accommodation is 'beyond their capacity.'" D. Br. 11. According to Disney, "[i]f other accommodations are available and afford access, * * * a plaintiff's demanded accommodation is not 'necessary' – even if the available accommodations are uncomfortable or difficult." D. Br. 11.

Disney's interpretation of Section 12182(b)(2)(A)(ii) conflicts with both the language and structure of Title III. 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.

This reading is confirmed by Section 12182(b)(2)(A)(ii)'s cross-reference to the general anti-discrimination rule of 42 U.S.C. 12182(a). Section

12182(b)(2)(A)(ii)'s reasonable-modification requirement must be construed in light of Section 12182(a)'s overarching goal of ensuring that people with disabilities have "full and equal enjoyment" of whatever a public accommodation provides to the general public. This interpretation 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 (2000) (citation omitted). Consistent with the language and structure of Title III, 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, 128-129 (2005) (dictum) (emphasis added) (citing 42 U.S.C. 12182(b)(2)(A)(ii) and 12184(b)(2)(A));[7] accord *Fortyune* v. *AMC, Inc.*, 364 F.3d 1075, 1083 (9th Cir. 2004) ("Because [plaintiff] requires an attendant to *enjoy* the viewing of a film, the modification that he requested, *i.e.*, that [defendant] ensure that his companion could be seated next to him, was *necessary*.") (emphasis added).

[7] Section 12184(b)(2)(A) provides that, in the transportation context, discrimination includes the failure of a covered entity to "make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii)."

Disney's cramped reading of Section 12182(b)(2)(A)(ii) also fails to heed the well-established canon of statutory construction that "remedial" legislation must "be construed broadly to effectuate its purposes." *Jefferson Cnty. Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 159 (1983). Title III is undoubtedly "a remedial statute," *Steger* v. *Franco, Inc.*, 228 F.3d 889, 894 (8th Cir. 2000), which, as the Supreme Court has recognized, imposes a "broad mandate" with a "sweeping purpose." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001). Accordingly, Title III "should be broadly construed to effectuate [this] purpose." *Steger*, 228 F.3d at 894 (applying this principle in interpreting Title III); see also *McGary* v. *City of Portland*, 386 F.3d 1259, 1268 (9th Cir. 2004) (same in interpreting Title II of the ADA).

In arguing that Section 12182(b)(2)(A)(ii) guarantees nothing more than access to a public accommodation, Disney relies on the Supreme Court's decision in *Martin*. See D. Br. 11. That reliance is misplaced because the Court did not decide in *Martin* what "necessary" meant in the context of Section 12182(b)(2)(A)(ii). The Court stated in *Martin* that Title III's reasonable modification provision "contemplates three inquiries: whether the requested modification is 'reasonable,' whether it is 'necessary' for the disabled individual, and whether it would 'fundamentally alter the nature of' the competition." 532 U.S. at 683 n.38 (quoting 42 U.S.C. 12182(b)(2)(A)(ii)). *Martin* emphasized,

however, that because the defendant had conceded that the requested modification was both "reasonable" and "necessary," the Court "[h]ad no occasion to consider" either of those issues. *Id.* at 683 n.38.

Disney nonetheless cites *Martin* for the proposition that a plaintiff must show that, without the requested modification, "access to the public accommodation is 'beyond [plaintiff's] capacity.'" D. Br. 11. Presumably, Disney is relying on 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. This passage does not support Disney's position. It is dictum, see *Martin*, 532 U.S. at 682, and, at any rate, the context in which *Martin* arose is far different from a person's enjoyment of the amusement parks and related facilities at issue here. *Martin* involved a professional sporting event where fatigue was designed to be one element of the competition. See *id.* at 669-671, 690. Nothing suggests that the Court's comments about a professional athlete's fatigue and discomfort during competition in major tournaments has any application to individuals with disabilities seeking to enjoy the attractions and amenities at Disney resorts with family or friends. In any event, four years after *Martin*, the 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 (dictum) – a standard far broader than mere access.

Nor does this Court's decision in *Lentini* v. *California Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004), support Disney's narrow reading of Title III. See D. Br. 11. In *Lentini*, this Court 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. But *Lentini* never held that a modification is unnecessary so long as the person with a disability otherwise has access to the public accommodation. Indeed, this Court held that the plaintiff in *Lentini* needed a modification to allow her to bring her service animal into the public accommodation, even though the alternative means of assistance offered by the defendant (*i.e.*, specially trained ushers) plainly would have given her physical access to the facility. *Ibid*.

As this Court made clear in *Fortyune*, 364 F.3d at 1083, the relevant inquiry is not simply whether the plaintiff has access to a public accommodation, but also whether the denial of a requested modification would interfere with his full and equal enjoyment of the benefits that the public accommodation offers to the general public. In *Fortyune*, this Court held that a quadriplegic patron's ability to

fully and equally enjoy the movie experience required a movie theater to ensure that he would be seated next to his companion. 364 F.3d at 1080, 1082, 1085. The quadriplegic patron's companion did more than ensure the disabled individual's presence or access to the theater; she provided assistance and companionship by sitting next to him. As this Court recognized in *Fortyune*, "[b]ecause [plaintiff] requires an attendant to *enjoy* the viewing of a film, the modification that he requested, *i.e.*, that [defendant] ensure that his companion could be seated next to him, was *necessary*." *Id*. at 1083. *Fortyune* thus refutes Disney's contention that Title III's reasonable-modification provision guarantees nothing more than access to a public accommodation.

Finally, to support its position that the availability of an alternative mobility device defeats a claim of necessity, Disney relies on case law interpreting Title I of the ADA, which prohibits disability-based employment discrimination. Specifically, Disney cites Title I decisions holding that an employer is not required to provide an employee's accommodation of choice as long as it provides an effective accommodation to permit the employee to perform the essential functions of the job. D. Br. 22-23; see *EEOC* v. *UPS Supply Chain Solutions*, 620 F.3d 1103, 1110-1112 (9th Cir. 2010). This general rule in employment cases is derived from the Equal Employment Opportunity Commission's (EEOC's) commentary to its Title I regulations, particularly the following passage, see *id.* at 1111:

> If more than one * * * accommodation[] will enable the individual to perform the essential functions [of a job] * * * the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.

29 C.F.R. Pt. 1630, App., § 1630.9 at 384 (2010).

The EEOC has not promulgated a regulation like 28 C.F.R. 36.311 to implement Title I, and has not officially addressed whether an employer would have an obligation to 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.

But what the EEOC requires under Title I in the employment context is irrelevant here. This is a Title III case involving public accommodations. The Department of Justice has exercised its statutory authority to issue regulations interpreting Title III, including Section 36.311. The Department can reasonably interpret Title III to impose obligations on public accommodations to allow use of personal mobility devices, regardless of whether the EEOC decides to impose similar obligations on employers under a different statutory provision.

The relevant question under *Chevron* is not whether the Department of Justice'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 we have explained, the Department's regulation helps protect the dignity and autonomy of persons with disabilities and ensures that they have "full and equal enjoyment" of what a public accommodation offers, 42 U.S.C. 12182(a), and are afforded the same "advantages," "privileges" and other benefits that the public accommodation makes available to the general public, 42 U.S.C. 12182(b)(2)(A)(ii). Because the regulation is consistent with the language and broad remedial purposes of Title III and the ADA as a whole, it easily survives scrutiny under the deferential *Chevron* standard.

II

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

As an alternative ground for affirmance, Disney suggests that it has established a valid safety defense under 28 C.F.R. 36.311(b) justifying its blanket exclusion of Segways from the entire Disneyland Resort. D. Br. 25-29. In fact, Disney has not made the requisite showing under Section 36.311(b).[8]

[8] The Department is responding to Disney's interpretation of the safety defense under 28 C.F.R. 36.311(b). The Department takes no position on whether this Court must interpret this provision to resolve this case.

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," so long as those requirements 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. 56,260 (Sept. 15, 2010).

Disney's arguments about safety are flawed in two major respects. Disney incorrectly assumes that if it modifies its policy, it would be required to allow "unrestricted" or "unfettered" use of Segways in the Disneyland Resort. See D. Br. 2, 8, 23-24, 28. In addition, Disney has failed to present a *facility-specific* analysis of whether Segways pose an unacceptable safety risk.

First, the relevant question under the regulation is not whether "unrestricted" Segway use would raise safety concerns, 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 Department's 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. 56,299. Specifically, the new OPDMD 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.*

In addition to speed limits, other safety-related restrictions may be permissible, depending on the circumstances and the particular facility at issue. Some examples are requirements that Segway operators use elevators, but not escalators, to move their devices between different floors of a facility, and that individuals not use 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 congestion 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.

Second, Disney has failed to present a facility-specific analysis of the safety issues. As previously noted, the regulation emphasizes that 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, that 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 all parts of its Disneyland Resort, which includes a wide variety of facilities, including two theme parks (and the multiple facilities found in each park), hotel complexes, restaurants, shopping districts, and individual stores. A general assertion that Segways 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. If Disney wishes to rely on a safety defense, it must make the requisite showing for each facility in which it imposes the ban. It failed to do so.

CONCLUSION

If this Court addresses the merits of Disney's arguments regarding 28 C.F.R. 36.311, it should hold that (1) the regulation is a permissible interpretation of Title III of the ADA and is thus valid, and (2) Disney has not established a safety defense under Section 36.311 justifying a blanket ban on Segways in all parts of the Disneyland Resort at all times.

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 Neither Party:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6,996 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.

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Dated: August 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I electronically filed the foregoing Brief Of The United States As Amicus Curiae Supporting Neither Party with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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