Nos. 99-16468, 99-16497

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER A. LONG, et al.,

Plaintiffs-Appellants/Cross-Appellees

v.

COAST RESORTS, INC., et al.,

Defendants-Appellees/Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS IN PART AND APPELLEES IN PART

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INTEREST OF THE UNITED STATES

Plaintiffs allege that the Orleans Hotel and Casino in Las Vegas, Nevada, was designed and constructed in violation of Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189 (ER1).[1/] The Department of Justice enforces Title III. 42 U.S.C. 12188(b). Pursuant to 42 U.S.C. 12186(b) and 12206(c)(3), the Department has issued regulations and a Technical Assistance Manual interpreting Title III. See 28 C.F.R. Pt. 36; ADA Title III Technical Assistance Manual (1993). As required by 42 U.S.C. 12186(b), the Department's regulations establish standards for the new construction and alteration of

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[1/] "ER__" refers to the page number of the Excerpts of Record. Relevant portions of the ADA and of the regulations and interpretive guidance referred to herein are reproduced in the Addendum.

public accommodations, also known as the Standards for Accessible Design (the Standards). See 28 C.F.R. Pt. 36, App. A. The United States, therefore, has an interest in ensuring that the ADA and the Standards are properly construed and applied.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether the district court erred in refusing to order defendants to comply with the ADA by widening the bathroom doorways in their hotel rooms.

2. Whether the district court properly interpreted the Standards in determining whether various aspects of defendants' hotel and casino were accessible.

STATEMENT OF THE CASE

1. Section 303 of the ADA requires all places of public accommodation and commercial facilities that are designed and constructed for first occupancy after January 26, 1993, and those that are altered after January 26, 1992, to be

> readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet [these] requirements.

42 U.S.C. 12183(a)(1). To carry out this provision, Congress directed the Attorney General to "issue regulations * * * that include standards applicable to facilities" covered by Title III. 42 U.S.C. 12186(b). Such standards must "be consistent with the minimum guidelines and requirements issued by the Architectural

and Transportation Barriers Compliance Board" (Access Board).[2/] 42 U.S.C. 12186(c). Pursuant to this statutory authority, the Department of Justice has issued regulations that adopt the Access Board's guidelines as its Standards for Accessible Design (the Standards). See 28 C.F.R. 36.406; 28 C.F.R. Pt. 36, App. A. Persons who are subjected to discrimination in violation of Title III of the ADA -- including violations of the new construction requirements -- may file suit and obtain injunctive relief to correct the violations. See 42 U.S.C. 12188(a)(1); 42 U.S.C. 2000a-3(a).

2. Plaintiffs Roger A. Long and Ronald Ray Smith are individuals with disabilities who use wheelchairs (ER94). Plaintiff Disabled Rights Action Committee is a non-profit entity organized to promote the rights of individuals with disabilities (ER94-95). Defendants own and operate the Orleans Hotel and Casino in Las Vegas, Nevada (the Orleans) (ER95). The Orleans has 839 hotel rooms (ER95). It opened on December 18, 1996 (ER95), and is therefore subject to the new construction provisions of the ADA. See 42 U.S.C. 12183(a)(1).

3. On November 6, 1997, Plaintiffs filed suit alleging that the Orleans did not comply with the ADA in a number of ways (ER1). Plaintiffs claim that the following ADA violations are present: (1) 819 of the 839 hotel rooms have bathroom doorways

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[2/] The Access Board is a federal agency created by the Rehabilitation Act of 1973. See 29 U.S.C. 792(a). The ADA directed the Access Board to issue minimum guidelines for the accessibility of facilities covered by Title III. See 42 U.S.C. 12204(a).

that have a clear opening width of only 25 inches, rather than 32 inches as required by the Standards[3/] (ER95); (2) two of the four slot change kiosks that are scattered throughout the casino do not have accessible service counters (ER97); (3) the employee work areas at the four slot change kiosks are elevated four inches off the floor and are therefore inaccessible to wheelchair users (ER98); (4) two of the three casino bars do not have accessible bar counters or accessible table seating (ER98); and (5) three of the nine pool-side cabanas are not on an accessible route (ER96-97).

4. On August 31, 1998, plaintiffs and defendants filed cross-motions for partial summary judgment (ER16, 25). On January 7, 1999, the court granted each motion in part (ER153). The court found that the defendants' failure to provide a 32 inch wide doorway into the toilet and bathtub areas of 819 hotel bathrooms "may be considered a technical violation" of the Standards (ER168). The court noted that widening the doorway would permit a wheelchair user "to come somewhat closer to the toilet," making it easier for that person to transfer onto the toilet (ER163, 168).

Nevertheless, the court refused to order the defendants to correct the violation (ER168-169). The court stated that requiring the bathroom doorways to be widened would have no

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[3/] Although the bathroom doorways are 28 inches wide (ER95), the opening is partially obstructed by the door and the clear opening width is only 25 inches (ER65).

"appreciable benefit" for persons with disabilities and would be a "meaningless gesture" (ER163, 168). The court also found that modifying all 819 bathroom doors would cost $800,000 (ER163). Weighing what it termed "the enormous expense required to modify the structure" against what it characterized as a "minimal inconvenience to wheelchair users," the court determined that the defendants had no obligation to correct the violation (ER168).

The court also rejected plaintiffs' contentions that accessible counters were necessary at the slot change kiosks or that the employee work areas at the kiosks were inaccessible (ER170-171, 174-175). The court also concluded that having six of nine pool-side cabanas on an accessible route was sufficient to comply with the ADA (ER169-170). However, the court held that two of the three casino bars were not accessible because there was no accessible bar counter and the bars did not offer service at accessible tables in the same area (ER172-173).

5. The court entered a final judgment on January 12, 1999 (ER176). Plaintiffs filed a timely motion for reconsideration on January 26, 1999 (ER177).[4/] While that motion was pending, the United States moved to participate as amicus curiae, but its motion was denied (ER201, 215). After the court denied the

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[4/] Plaintiffs' motion tolled the time for filing a notice of appeal. See Fed. R. App. P. 4(a)(4)(A); Ranch Ass'n v. California Coastal Zone Conservation Comm'ns, 537 F.2d 1058, 1061 (9th Cir. 1976).

motion for reconsideration (ER206), plaintiffs and defendants appealed (ER219, 226).

SUMMARY OF ARGUMENT

As the district court recognized, the defendants' hotel bathroom doorways do not provide wheelchair accessibility and, therefore, are in violation of Section 303 of the American with Disabilities Act and its implementing regulations. The district court erred in refusing to order defendants to widen the bathroom doorways. The effect of that refusal is to leave in place a clear violation of the statute. The court's decision places the burden of the owner's noncompliance on the individuals with disabilities, rather than on the violator. That result cannot be squared with the language and purposes of the ADA.

In enacting the ADA, Congress concluded that while only modest changes would be required for most existing facilities, new construction should be made accessible in the first instance. Congress directed the Department of Justice to establish standards for new construction which were to be followed for all new construction, without exception. Congress directed the courts to remedy any failure to comply by ordering that the facility be brought into compliance. Although the cost of making changes in a facility would be greater than the cost of designing the building correctly in the first instance, that cost was to be absorbed by the violator.

Once this scheme is understood, it becomes clear that the district court had no authority to deny relief based on its view that the benefit to persons with disabilities did not justify the cost to the owner. The court's conclusion that widening the bathroom doorways would not significantly benefit persons with disabilities was both beyond its authority and wrong. The inaccessible bathroom doorways, which in many cases will make it extremely difficult if not impossible for persons with disabilities to use the hotel bathrooms, will seriously impede access by persons with disabilities.

While a district court has broad discretion to fashion the most effective remedy for a statutory violation, the remedy must be sufficient to cure the problem. A court does not have discretion to ignore a violation altogether. Because the only way to remedy the violation here was to order the defendants to widen the bathroom doorways, the court erred in not granting that relief.

The court also erred in concluding that the slot change kiosks did not violate the ADA. The court correctly held, however, that the defendants were required to provide an accessible bar counter or accessible table seating in each of their three casino bars. The court also correctly held that placing two-thirds of the cabanas on an accessible route was sufficient to comply with the ADA.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FAILING TO ORDER DEFENDANTS TO WIDEN THE INACCESSIBLE BATHROOM DOORWAYS

A. Defendants' Bathroom Doorways Violate The ADA

Among the most important purposes of the ADA was to allow persons who use wheelchairs to travel more easily by making hotels accessible. The legislative reports accompanying passage of the statute made clear that it would require

> all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms to be sufficiently wide to allow passage by individuals who use wheelchairs [and] making a percentage of each class of hotel rooms fully accessible (e.g., including grab bars in bath and at the toilet, accessible counters in bathrooms).

H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 118 (1990) (emphasis added); S. Rep. No. 116, 101st Cong., 1st Sess. 69 (1989) (emphasis added).

Defendants' failure to provide accessible doorways to toilet and bathtub facilities in its hotel rooms violates Section 303 of the ADA and the implementing regulations. Those regulations incorporate the Standards for Accessible Design as the substantive requirements for newly constructed facilities. See 42 U.S.C. 12186(b)-12186(c); 28 C.F.R. 36.406. Thus, the failure of a covered facility to comply with the Standards is a violation of the ADA. See Independent Living Resources v. Oregon Arena Corp., 1 F. Supp. 2d 1124, 1130 n.2 (D. Or. 1998); Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1168-1169 (D. Mont. 1997).

The Standards establish a three tiered regulatory structure governing the accessibility of hotel rooms. First, at least two percent of the hotel rooms in a hotel of the Orleans' size must be fully accessible. See 28 C.F.R. Pt. 36, App. A, § 9.1.2. Among other things, these hotel rooms must have doorways with a clear opening width of at least 32 inches, adequate maneuvering space for wheelchair users, and grab bars in the toilet and shower area. Ibid. Second, for hotel rooms in excess of 50 rooms, an additional one percent of the hotel rooms must be fully accessible as described above and must also have roll-in showers. Ibid.; 28 C.F.R. Pt. 36, App. B, § 36.406 at 670, 673; ADA Title III Technical Assistance Manual III-7.8600(1). Third, all other hotel rooms need not be fully accessible, but must, at minimum, have accessible doorways.[5/] See 28 C.F.R. Pt. 36, App. A, §§ 4.13.5, 9.4.

[5/] The parties stipulated -- and the court held -- that the Standards only required that two percent of the rooms in the Orleans be fully accessible and that having 20 fully accessible rooms was therefore sufficient (ER 95, 166). The parties and the court overlooked the requirement that an additional one percent of rooms must be fully accessible and have roll-in showers. See 28 C.F.R. Pt. 36, App. A, § 9.1.2. For a hotel with 839 rooms, the Standards require that at least 25 rooms be fully accessible, that 8 of these rooms have roll-in showers, and that all remaining rooms have accessible doors. Ibid.; 28 C.F.R. Pt. 36, App. B, § 36.406 at 673. The Orleans therefore does not have a sufficient number of fully accessible rooms and apparently has no roll-in showers (ER95). Because the plaintiffs did not allege these violations, we do not address them further, except to note that the parties' stipulation concerning the legal requirements of the ADA is not binding on this Court. See United States Nat'l Bank v. Independent Insurance Agents of Am., Inc., 508 U.S. 439, 446-448 (1993).

Defendants have not complied with the accessible doorway requirement. In 819 of its hotel rooms, the bathroom doorway leading to the toilet and bathtub has a clear opening width of only 25 inches (ER95). The Standards require all "doorways designed to allow passage into and within all sleeping units" to have "a minimum clear opening of 32 in[ches]." See 28 C.F.R. Pt. 36, App. A, §§ 4.13.5, 9.4. The only doors that are exempted from this requirement are "[d]oors not requiring full user passage, such as shallow closets." 28 C.F.R. Pt. 36, App. A, § 4.13.5.

Defendants' contention that the accessible doorway requirement does not extend to bathroom doors is without merit. The accessible doorway requirement applies to all doors that allow passage "into and within" a hotel room. The plain meaning of "doorways designed to allow passage * * * within" a hotel room includes doorways to bathrooms. Under defendants' interpretation that bathroom doorways are not covered by the requirement, hotels would have no obligation to make any bathroom doors accessible, even in rooms that were required to have accessible features within the bathroom, such as grab bars. See 28 C.F.R. Pt. 36, App. A, § 9.2.2(3). Neither Congress nor the Department of Justice could have intended such an anomaly.[6/]

[6/] Although the Standards are clear, the Department's interpretation of its Standards, including its considered views expressed in an amicus brief, are entitled to deference. See Auer v. Robbins, 519 U.S. 452, 461 (1997); PVA v. D.C. Arena

(continued...)

B. The Court Erred In Refusing To Order Defendants To Widen Their Bathroom Doorways

1. The Court Failed To Recognize That There Is No Undue Burden Defense To The New Construction Requirements Of The ADA

The district court erred in declining to order relief based on the cost (slightly less than $1000 a room) of widening the bathroom doorways in the defendants' hotel. The court was not free to make that judgment because Congress considered and rejected the notion that the new construction provisions could be avoided on the basis of costs. See Kinney v. Yerusalim, 9 F.3d 1067, 1074 (3d Cir. 1993) (addressing similar issue under Title II of the ADA), cert. denied, 511 U.S. 1033 (1994); cf. Baltimore Neighborhoods, Inc. v. Rommell Builders, Inc., 40 F. Supp. 2d 700, 706-707 (D. Md. 1999) (rejecting undue burden defense to design and construct provisions of Fair Housing Act).

In enacting the ADA, Congress adopted two distinct schemes for regulating building accessibility: one to apply to existing facilities (those designed and constructed for first occupancy before January 26, 1993), and one to facilities designed and constructed for first occupancy after that date. Compare 42 U.S.C. 12183(a)(1) with 42 U.S.C. 12182(b)(2)(A)(iv). The ADA requires that existing facilities remove barriers to accessibility only to the extent that such removal is "readily

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[6/] (...continued)
L.P., 117 F.3d 579, 584 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 1184 (1998).

achievable." See 42 U.S.C. 12182(b)(2)(A)(iv). Congress permitted consideration of cost and burdens in determining the obligations of owners and operators of existing facilities. It did that by defining "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9).

Congress clearly chose a different approach for new construction, however. New construction must be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1). See S. Rep. No. 116, 101st Cong., 2d Sess. 65-66 (1989) (explaining distinction between "readily accessible and "readily achievable" standards); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 109-110 (1990) (same). Congress did not include a cost defense for new construction.[7/] As one House Report noted, although the ADA provides an undue burden defense for existing facilities, "[n]o other limitation should be implied in other areas." See H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 50 (1990).

By establishing different requirements for new construction and existing facilities, Congress made clear that while the ADA "only requires modest expenditures to provide access in existing facilities, * * * all new construction [must] be accessible."

[7/] The only defense to a new construction violation is structural impracticability. See 42 U.S.C. 12183(a)(1). Defendants have not raised that defense here.

H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 63 (1990). Congress recognized that "an undue burden defense for existing facilities serves as recognition that modification of such facilities may impose extraordinary costs." Kinney, 9 F.3d at 1074. No similar defense was necessary for new construction, however, because those who design and build after the effective date of the ADA have an opportunity to avoid the cost of renovation simply by complying with the Standards in the first place. See ibid.; H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 119 (1990). The district court completely disregarded Congress' carefully drawn distinction between existing and new construction.

2. The ADA Mandates That The Court Grant Injunctive Relief To Correct A Violation Of The New Construction Standards

Both the plain language of the statute and basic equitable principles required the court to order defendants to correct their violations of the Standards. The ADA provides that in cases where the defendant has violated the new construction provisions:

> injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter.

42 U.S.C. 12188(a)(2) (emphasis added). Thus, when a court finds that the Standards have been violated -- and thereby that discrimination under 42 U.S.C. 12182(a) has occurred -- the statutory language mandates that violations be remedied. See

Coalition of Montanans Concerned With Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166, 1168 (D. Mont. 1997) (plaintiffs "entitled" to injunction to bring airport into compliance). Sound policy reasons support Congress' decision to make injunctions mandatory. Requiring builders and designers to absorb the cost of corrections increases their incentive to comply with the Standards in the first place.[8/] Otherwise, builders and designers will be tempted to ignore parts of the Standards with which they disagree and then plead that it will cost too much to correct the violation.

The other courts that have found violations of the new construction standards have issued injunctions to correct the violations. Deck v. City of Toledo, 29 F. Supp. 2d 431 (N.D. Ohio 1998); Independent Living Resources v. Oregon Arena Corp., 1 F. Supp. 2d 1124 (D. Or. 1998); Coalition of Montanans, 957 F. Supp. 1166. Similarly, the legislative history makes clear that when a facility does not comply "an order to make [the] facility readily accessible to and usable by individuals with disabilities is mandatory." H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 64 (1990); see also 136 Cong. Rec. E1920 (daily ed. May 22, 1990) (statement of Rep. Hoyer).

Although courts typically have some discretion regarding the issuance of an injunction, Congress may "intervene and guide or

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[8/] Deterrence is one of the purposes of injunctive relief. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 310 (1982).

control [that] exercise of the courts' discretion." Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). The fact that "the court's discretion is equitable in nature * * * hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). The court's equitable discretion must be exercised in a manner that furthers the purposes of the underlying statute. See id. at 417.

The only remedy that will ensure that non-compliant facilities are made accessible is an injunction requiring the responsible party to make the necessary modifications.[9/] A failure to award injunctive relief will, therefore, eviscerate the very purpose of the statute, which is to create a fully accessible future for individuals with disabilities. See H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 63 (1990); 28 C.F.R. Pt. 36, App. B, Subpt. D at 654. Under these circumstances, "the statutory purposes [leave] little room for the exercise of discretion not to order" injunctive relief. See Albemarle, 422 U.S. at 414.

The Supreme Court addressed a similar issue in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Although Title VII

[9/] Injunctive relief is the only available remedy in a private suit to enforce Title III of the ADA. 42 U.S.C. 12188(a)(1). Even if damages were available (as they are in actions brought by the United States), an injunction would still be required to make the facilities accessible in the future.

provided that a court "may" award back pay, an equitable remedy, the Court held that courts could only deny back pay for reasons that, if applied generally, would not frustrate the statutory purpose. Albemarle, 422 U.S. at 421. Similarly, in other civil rights cases, courts have held that district courts were required to issue injunctions sufficient to remedy the statutory violation. See, e.g., Sandford v. R.L. Coleman Realty Co., 573 F.2d 173, 178-179 (4th Cir. 1978); United States v. Dallas County Comm'n, 850 F.2d 1433, 1440 (11th Cir. 1988), cert. denied, 490 U.S. 1030 (1989); Darnell v. City of Jasper, 730 F.2d 653, 655 (11th Cir. 1984).

Where a violation of a civil rights statute has occurred, the court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." See Albemarle, 422 U.S. at 418. The district court generally has discretion over the means by which the violation is corrected, including the discretion to deny or delay an injunction where other relief is likely to achieve compliance. See, e.g., Romero-Barcelo, 456 U.S. at 320; Hecht Co. v. Bowles, 321 U.S. 321, 328 (1944). The district court also generally has discretion concerning the time period by which a violation must be corrected or the manner of compliance. See H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 64 (1990). A court does not have discretion, however, to refuse an injunction when doing so will

permit a violation to go uncorrected. See TVA v. Hill, 437 U.S. 153, 173 (1978) (holding that court was required to enjoin construction of dam to prevent violation of Endangered Species Act); Romero-Barcelo, 456 U.S. at 314 (injunction mandatory where it is the "only means of ensuring compliance"). As this Court has noted in another context, where a defendant has violated or is about to violate a statute that authorizes injunctive relief, "an injunction should be granted to prevent that violation." Burlington Northern R.R. v. Department of Revenue, 934 F.2d 1064, 1075 (9th Cir. 1991).

Here, the court's refusal to order the defendants to widen the bathroom doorways leaves the ADA violation unremedied. The ADA does not permit that result.

3. The Court Wrongly Concluded That Widening The Bathroom Doorways Would Not Benefit Persons With Disabilities

The court opined that making the bathroom doorways seven inches wider would not provide an "appreciable benefit" to persons with disabilities (ER163). Thus, in the court's view, it would make no difference to wheelchair users whether they can get through the door and right next to the toilet and bathtub, or whether they have to heave themselves in from the other side of the door jamb. Even putting aside its flawed reasoning, the court had no authority to ignore the Standards.

A covered entity may not provide less access than the Standards require or make an independent assessment of what will be best for persons with disabilities. See Caruso v.

Blockbuster-Sony Music Entertainment Ctr., 174 F.3d 166, 179-180 (3d Cir. 1999); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 764 (D. Or. 1998). Congress made a judgment that public accommodations should be accessible to persons who use wheelchairs. It delegated to the Department of Justice the task of determining what features are necessary to make a building accessible. The Department's Standards, which reflect the technical knowledge and professional judgment of experts and were developed over time, are entitled to deference.[10/] It is not for courts, under the guise of exercising equitable jurisdiction, to reconsider cost-benefit determinations that have already been made by Congress and delegated to executive agencies. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609-610 (1952) (Frankfurter, J. concurring); Albemarle, 422 U.S. at 417.

In any event, the court's analysis of the benefits of the accessible doorway requirement is flawed and ignores the serious consequences of inaccessible bathroom doorways to persons with disabilities. Requiring doorways in all newly constructed hotel rooms to be accessible significantly benefits persons with

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[10/] Because the Department of Justice has authority to enforce the ADA's public accommodations provisions and to issue interpretive regulations, it is "likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation." See Martin v. OSHRC, 499 U.S. 144, 152-153 (1991). We note that the Civil Rights Division of the Department of Justice employs a number of licensed architects, as well as several other professionals, who work on technical issues involving ADA compliance.

disabilities. See 136 Cong. Rec. H2625 (daily ed. May 22, 1990) (statement of Rep. Morrison). It ensures that when all of the fully accessible hotel rooms are occupied, such as during conventions or other times of heavy demand or when the reservation is made on short notice, persons with disabilities will be able to obtain a room that they can use. See ibid. Use of toilet, bathtub, and shower facilities is part of the use of a hotel room. The accessible door requirement also ensures that persons with disabilities will be able to visit other hotel guests. See ibid.

As the district court acknowledged, the 25 inch wide doorways prevent wheelchair users from getting their chair into the doorway. Widening the bathroom doorways to the required width will make it much easier for a wheelchair user to use the toilet, because it will allow that person to enter the toilet area and to get at least a foot closer to the commode (ER65, 81-84, 163, 168). Even defendants' expert agreed that without this modification, there was a danger that persons who use wheelchairs would fall and injure themselves if they attempted to transfer to the toilet from the other side of the inaccessible doorway (ER34, 120). Requiring persons with disabilities to transfer to and from the toilet with the door open, as is now necessary (ER85), also raises privacy and dignity concerns.

The court apparently relied on the conclusory testimony of defendants' expert that even if the doorways were widened,

without grab bars "many wheelchair users" would still have difficulty transferring to the toilet (see ER35, 168). The extent of physical limitations among persons who use wheelchairs, however, varies greatly. See H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d. Sess. 103 (1990). Some persons who use wheelchairs have very limited upper body strength, while others have unusual strength and agility in their upper bodies; some have limited use of their legs. The Standards properly recognize that many persons who use wheelchairs will be able to move without considerable difficulty onto a toilet without the use of grab bars, but would benefit significantly from being able to move the chair into the bathroom. See 28 C.F.R. Pt. 36, App. A, Fig. A6 at 607 (illustration showing person in wheelchair transferring to toilet without use of grab bars); accord Independent Living, 1 F. Supp. 2d at 1142.

In addition, persons who use wheelchairs are not the only persons with disabilities who would benefit from making the bathroom doorways accessible. Persons with disabilities who use scooters or crutches or other mobility aids[11/] need the clear opening width of an accessible doorway but may not require other accessibility features in a bathroom. See, e.g., Veterans Administration, Barrier Free Design Handbook 3 (1986). The 32 inch door-width requirement is based in part on the width

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[11/] For example, plaintiffs submitted a 1998 Wall Street Journal article describing a new "rolling walker" that would apparently not fit inside a 28 inch doorway (ER145).

necessary to accommodate a person who uses crutches. See ibid. The court considered none of these benefits.

4. There Is No Good Faith Defense To The Issuance Of An Injunction To Correct A Violation Of The ADA

The court also claimed that the defendants had acted in good faith (ER168). The court did not explain what it meant by good faith. Nor did it make any findings that would support a finding of good faith as that term is normally understood, i.e., a reasonable belief that the defendant was complying with the law. See Wyatt v. Cole, 504 U.S. 158, 165 (1992).

In any event, there is no "good faith" exception to the injunctive remedy. See Albemarle, 422 U.S. at 422-423; United States v. West Peachtree Tenth Corp., 437 F.2d 221, 228 (5th Cir. 1971). Under Title III, "good faith" is to be considered in cases brought by the Attorney General when a "civil penalty" is sought. See 42 U.S.C. 12188(b)(2) & 12188(b)(5). Applying the statutory interpretation principle expressio unius est exclusius alterius (the expression of one thing is the exclusion of the other), the absence of a similar defense for injunctive relief mandates the conclusion that good faith is not a relevant consideration. See Albemarle, 422 U.S. at 423 n.17. Moreover, the failure to design and construct an accessible facility frustrates the ADA's purposes of making facilities accessible, regardless of whether the defendants' actions were taken in good faith. See id. at 422.

5. The Court Erred In Concluding That Defendants' Violations Were Merely "Technical" And That Defendants Were In Substantial Compliance

Finally, the court stated, without explanation, that the defendants' actions constituted only a "technical violation" of the Standards and that "there has been substantial compliance with the spirit of the law" (ER168). The court may have been referring to the equitable doctrine of substantial compliance, a "doctrine designed to avoid hardship in cases where the party does all that can reasonably be expected of him." See Sawyer v. Sonoma County, 719 F.2d 1001, 1008 (9th Cir. 1983). It may be applied to excuse statutory violations only when doing so would not defeat the purpose of the statute. Ibid.; In Re San Joaquin Food Serv., Inc., 958 F.2d 938, 940-941 (9th Cir. 1992).

The defendant has designed over 800 hotel rooms with bathroom doorways that will make it difficult, if not impossible, for persons with disabilities to stay in or visit defendant's hotel. The violation is in no sense trivial or "technical," nor is there any suggestion that the defendants did all that could be reasonably expected. They could have easily avoided the problem by designing and constructing the hotel correctly in the first instance. See Independent Living, 1 F. Supp. 2d at 1135. Moreover, failure to remedy the violation will defeat the statutory purpose of ensuring an accessible future for persons with disabilities.

Furthermore, the court overlooked the fact that the Standards provide only two narrow exceptions to their technical requirements, neither of which is applicable. First, the Standards permit "[e]quivalent [f]acilitation," i.e., "[d]epartures from particular technical and scoping requirements of [the Standards] by the use of other designs and technologies * * * where the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility." 28 C.F.R. Pt. 36, App. A, § 2.2. This provision "does not allow facilities to deny access under certain circumstances, [it only] allows facilities to bypass the technical requirements laid out in the Standards when alternative designs will provide 'equivalent or greater access to and usability of the facility.'" See Caruso v. Blockbuster-Sony Music Entertainment Ctr., 174 F.3d 166, 179 (3d Cir. 1999). Defendants offer no alternative design to provide access. They simply seek an exemption from the requirement that they provide access to hotel bathrooms. That is inferior access, not equivalent facilitation.

Second, the Standards adopt the architectural concept of "[d]imensional [t]olerances" and excuse minor deviations that are within "conventional building industry tolerances for field conditions." 28 C.F.R. Pt. 36, App. A, § 3.2. A defendant bears the burden of proving that any such deviations are within acceptable construction tolerances. See Independent Living, 1 F.

Supp. 2d at 1135. Defendants do not claim that having bathroom doorways with a clear opening width of only 25 inches come within the scope of the dimensional tolerance defense in the Standards.

II

THE COURT WRONGLY HELD THAT DEFENDANTS' SLOT CHANGE KIOSKS WERE ACCESSIBLE; BUT IT CORRECTLY HELD THAT THE CASINO BARS WERE NOT ACCESSIBLE AND THAT THE POOL CABANAS WERE IN COMPLIANCE

A. The Employee Work Areas In The Slot Change Kiosks Are Not Accessible

The court misapplied Section 4.1.1(3) of the Standards, which provides, in relevant part:

> Areas Used Only by Employees as Work Areas. Areas that are used only as work areas shall be designed and constructed so that individuals with disabilities can approach, enter, and exit the areas. These guidelines do not require that any areas used only as work areas be constructed to permit maneuvering within the work area or be constructed or equipped (i.e., with racks or shelves) to be accessible.

28 C.F.R. Pt. 36, App. A, § 4.1.1(3). Each of the kiosks has a work area for the cashier that is elevated four inches off the ground. The defendants stipulated that the four-inch elevation would not permit a cashier using a wheelchair "to independently approach, enter and exit the area" (ER158). Indeed, an elevated work area is one of the more common barriers to accessibility that the ADA was intended to prevent. See ADA Title III Technical Assistance Manual III-7.3110.

The court wrongly assumed that the plaintiffs had conceded that the work areas were accessible except to the extent that they prevented supervisors from entering the kiosks (ER175). Plaintiffs consistently maintained that the four inch step would

bar any disabled employee -- which would include cashiers -- from approaching, entering, and exiting the work area (ER38).

While conceding that the slot change kiosks would be inaccessible to cashiers using wheelchairs (ER48-49), defendants argued that because the main cashier cage, which is located in another part of the casino, was accessible, they did not have to make the kiosk work areas accessible as well. Section 4.1.1(3), however, applies to all areas used as employee work areas not merely to a selected percentage of them. The provision is intended to "ensure accessibility of new facilities to all individuals, including employees." See 28 C.F.R. Pt. 36, App. B, § 36.401 at 657. That purpose would be frustrated if certain work areas were exempted from the requirements, thereby narrowing the employment options of persons with disabilities at the facility.

The defendants also erroneously relied on explanatory guidance to the Standards that relates to maneuvering room for persons with disabilities within a work station. See 28 C.F.R. Pt. 36, App. A, § A4.1.1(3); 28 C.F.R. Pt. 36, App. B, § 36.401 at 670. The maneuverability guideline, which recommends that five percent of identical work stations have sufficient maneuvering room, is separate from the requirement that all work areas at least allow disabled employees to approach, enter, and exit the area. See Independent Living, 1 F. Supp. 2d at 1133; 28 C.F.R. Pt. 36, App. B, § 36.406 at 670. The approach of the

Standards to employee work areas is based on the principle that as long as an employee can approach, enter, and exit all work areas, individual modifications that would permit the employee to maneuver about the work area can be addressed by the employer on an individual basis. See 28 C.F.R. Pt. 36, App. A, § A4.1.1. When, as here, a barrier prevents employees who use wheelchairs from even entering a work area, that barrier violates Section 4.1.1(3) and must be corrected.

B. The Court Erred In Holding That Defendants' Slot Change Kiosks Were Not Required To Have Accessible Counters

The Court also misapplied Section 7.2(2) of the Standards, which provides, in relevant part:

> At ticketing counters, teller stations in a bank, registration counters in hotels and motels, box office ticket counters, and other counters that may not have a cash register but at which goods or services are sold or distributed, either:
>
> > (i) a portion of the main counter which is a minimum of 36 in[ches] [] in length shall be provided with a maximum height of 36 in[ches] []; or
> >
> > (ii) an auxiliary counter with a maximum height of 36 in[ches] [] in close proximity to the main counter shall be provided; or
> >
> > (iii) equivalent facilitation * * *.

28 C.F.R. Pt. 36, App. A, § 7.2(2) (emphasis added).

This provision does not allow a public accommodation to designate one counter its "main" counter, and thereby avoid the accessibility requirements at all other counters that are dispersed throughout its facility. The plain language of the provision applies to all "counters * * * at which goods or

services are sold or distributed", see ibid., not a selected percentage thereof. See 28 C.F.R. Pt. 36, App. A, § 7.1 (requirements apply to "all areas used for business transactions with the public"). The term "main counter" simply differentiates it from the auxiliary counter that must be provided if a counter is not 36 inches long and no more than 36 inches high. If any counter does not meet that requirement, the public accommodation may establish a smaller auxiliary counter in close proximity to the main counter for use by persons with disabilities which is no more than 36 inches in height, or it may offer some other equivalent facilitation. 28 C.F.R. Pt. 36, App. A, § 7.2(2)(ii)-7.2(2)(iii). Public accommodations often provide an auxiliary counter by simply attaching a smaller fold out counter at an accessible height to the main counter. It is generally inexpensive and easy for a public accommodation to provide such auxiliary counters. Because defendants do not claim that accessible auxiliary counters are available, or that equivalent facilitation is offered, the defendants must bring the two slot change kiosks that do not have accessible counters into compliance.

C. The Court Properly Held That Two Of The Casino Bars Were Not Accessible

The court properly applied Section 5.2 of the Standards, which provides:

> Where food or drink is served at counters exceeding 34 in (865 mm) in height for consumption by customers seated on stools or standing at the counter, a portion of the main

> counter which is 60 in (1525 mm) in length minimum shall be provided in compliance with 4.32 or service shall be available at accessible tables within the same area.

28 C.F.R. Pt. 36, App. A, § 5.2. That provision requires that if a bar counter is not accessible, then the public accommodation must provide service at accessible tables "within the same area."

The defendants have provided three different bars in the casino so that their guests can have ready access to a bar as they travel throughout the casino. One bar, the Mardi Gras bar, has an accessible bar counter, but the other two bars, the Crawfish and Alligator bars, do not (ER98). The Mardi Gras bar also has table seating, but it is not clear from the stipulation whether this table seating is accessible to persons using wheelchairs (ER98). There is no accessible table seating at the other two bars (ER98).

In order to comply with the Standards, the defendants would have to show that they offered service at accessible table seating in the same area as each bar without an accessible bar counter. Even assuming that the Mardi Gras bar offered accessible table seating, defendants did not present any evidence that this seating was in the same area as the other bars or that these bars offered service at these tables. We note, however, that the defendants can bring the bars into compliance simply by moving accessible tables into the same areas as the bars and providing service at those tables.

D. The Cabanas Are In Compliance

Although we do not necessarily endorse the district court's reasoning, we agree that the pool cabanas are in compliance. The Standards do not establish specific scoping requirements (i.e., how many features must be accessible) for pool cabanas. If there are no applicable scoping requirements for a particular type of facility, "then a reasonable number, but at least one, must be accessible." ADA Title III Technical Assistance Manual III-5.3000. Placing six of the nine cabanas on an accessible route is reasonable and complies with the Standards.

CONCLUSION

The judgment dismissing plaintiff's claims concerning the inaccessible bathroom doorways and slot change kiosks should be reversed and the defendants ordered to correct those violations. The judgment ordering defendants to modify the casino bars and finding the cabanas to be in compliance should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R 32-1, I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS IN PART AND APPELLEES IN PART is monospaced, has 10.5 characters per inch, and contains 6985 words.

_____

TIMOTHY J. MORAN
Attorney

September 7, 1999

CERTIFICATE OF SERVICE

I hereby certify that on September 7, 1999, I served the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS IN PART AND APPELLEES IN PART, by mailing two copies, by first class mail, postage pre-paid, to counsel at the following addresses:

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