No. 01-11197

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SERGIO RENDON, *et al.*,

Plaintiffs-Appellants

v.

VALLEYCREST PRODUCTIONS, LTD., *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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Rendon v. *Valleycrest Productions, Ltd.*, No. 01-11197

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that, to the best of his knowledge, the following listed persons or entities have an interest in the outcome of this appeal:

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INTEREST OF THE UNITED STATES

This case concerns the proper interpretation and application of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.* The Department of Justice has primary enforcement authority for Title III and promulgates regulations interpreting the ADA. See 42 U.S.C. 12186(b), 12188(b); 28 C.F.R. Pt. 36.

ISSUE PRESENTED

Whether Title III of the Americans with Disabilities Act applies to the process by which a production company selects contestants to a television quiz show.

STATEMENT

Defendants produce the popular television quiz show "Who Wants to Be a Millionaire?"(R1-2-3)[1]. The contest is conducted in Defendants' production studio in New York City (R1A-1). The show's producers have created certain eligibility criteria for becoming a contestant, implemented through a multi-stage process (R1-2-3; R1A-1-10). In the first two stages, contest hopefuls must call a toll-free number and respond to questions asked by an automated telephone system (R1A-2-9). The recorded message asks the applicant a series of questions, permitting the applicant 10 seconds to respond by pressing the appropriate keys on the telephone's keypad. Those applicants who answer all the questions correctly in the first round are eligible for the next elimination stage (R1A-2-9). The second stage is similar to the first, conducted through an automated telephone system. The top ten performers in the second stage are eligible to participate in the contest in the television studio (R1A-6-9).

The automated telephone system effectively excludes from competition all individuals with hearing or upper body mobility impairments that severely limit or preclude the operation of a telephone keypad (R1-2-3). There is no alternative method by which individuals may qualify to participate in the televised contest (R1-2-3). For example, Defendants provide no live operators who could accept

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[1] References to "R__-__-__" are to the docket entry number and to the page or pages of the document in the record, as reproduced in Appellant's Record Excerpts. References to "R1A-__-__" refer to Exhibit A to the Complaint, which is docket number 1.

verbal responses from applicants with mobility impairments or who could communicate with deaf applicants over Telecommunications Devices for the Deaf (TDD)[2] or through a telecommunications relay service.[3]

Plaintiffs are individuals with hearing and upper body mobility impairments that preclude them from using Defendants' automated telephone system (R1-7-8). They filed a complaint charging violations of Title III and state law. Defendants moved to dismiss (R17), arguing that Title III does not apply to their process for selecting contestants because this process is not connected to a physical "place of public accommodation." While acknowledging that Title III could apply to activities in its studio, Defendants argued (R17-6-14) that because the selection process took place over the telephone, while Plaintiffs were in their homes, the ADA simply does not apply.

The district court agreed, dismissing Plaintiffs' ADA claims because "Plaintiffs do not raise any issue in their complaint involving any *place* that is subject to the public accommodation provisions of Title III" (R36-4) (emphasis in original). This appeal followed.

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[2] A TDD is a machine that transmits typed text over telephone lines. See 47 U.S.C. 225(a)(2).

[3] Title IV of the ADA created a national system of telecommunication relay services which permit hearing impaired individuals to use TDD devices to communicate with any ordinary telephone user through a relay operator who translates between verbal and TDD communications. 47 U.S.C. 225.

SUMMARY OF ARGUMENT

As the district court found, and Defendants conceded below, Defendants' studio at which its quiz show is conducted is a "place of public accommodation" within the meaning of Title III of the ADA. Title III, in turn, requires more than mere physical access to the studio building. In clear terms, the Act prohibits discrimination in the provision of "the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." There can be little question that participation in the televised quiz show is a "privilege" or "service" "of [a] place of public accommodation"; it is a privilege or service offered at a "place of exhibition or entertainment," 42 U.S.C. 12181(7), *i.e.*, the television studio.

Access to that service is limited through Defendants' implementation of certain eligibility criteria, namely the ability to successfully answer questions in a preliminary qualification process. The ADA clearly and specifically applies to the implementation of eligibility criteria that control access to the services or privileges of a place of public accommodation in a way that would "screen out or tend to screen out an individual with a disability." 42 U.S.C. 12182(b)(2)(A)(i).

It is immaterial that Defendants implement their eligibility criteria over the telephone instead of at the physical premises of its studio. Defendants' reliance on cases suggesting the need for a connection between the service at issue and a physical place is misguided. Even if such a connection were required, there is a clear and direct relationship in this case between the relevant "service * * * of [a]

place of public accommodation" (the contest) and a physical location (the studio). None of the cases Defendant relied upon below stands for the proposition that a public accommodation may deny access to services or privileges provided at its physical premises so long as it does so through eligibility criteria implemented off-site. Such an interpretation is inconsistent with the language of the statute and at odds with the plain purposes of the Act.

ARGUMENT

TITLE III OF THE ADA APPLIES TO THE IMPLEMENTATION OF ELIGIBILITY CRITERIA GOVERNING ACCESS TO THE SERVICES AND PRIVILEGES OF A PLACE OF PUBLIC ACCOMMODATION EVEN WHEN IMPLEMENTED THROUGH AN OFF-SITE AUTOMATED TELEPHONE SYSTEM

A. Statutory Background

Congress enacted the ADA in light of its findings that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. 12101(a)(5).[4]

[4] Unless otherwise noted, section citations in this brief refer to Title 42.

To address this broad range of discrimination in the context of public accommodations, Congress enacted Title III, which provides in part:

> No 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.

Section 12182. By its clear text, Title III requires a public accommodation to provide individuals with disabilities more than simple physical access to the accommodation's facilities. Congress recognized that "individuals with disabilities continually encounter *various forms of discrimination"* including not only barriers to physical access, but also other forms of exclusion and "relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." Section 12101(a)(5) (emphasis added); see also H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 35-36 (1990) ("lack of physical access to facilities" was only one of several "major areas of discrimination that need to be addressed"); H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 54 (1990) ("It is not sufficient to only make facilities accessible and usable; this title prohibits, as well, discrimination in the provision of programs and activities conducted by the public accommodation.").

For that reason, the Act applies not only to barriers to physical access to business locations, but also to any policy, practice, or procedure that operates to deprive or diminish disabled individuals' full and equal enjoyment of the privileges and services offered by the public accommodation to the public at large. Section 12182. Thus, a public accommodation may not have a policy that specifically

excludes individuals with disabilities from services. Section 12182(b)(1)(A)(i). The statute also defines "discrimination" as including:

> the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability * * * from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

Section 12182(b)(2)(A)(i). The commentary to the implementing regulations explains that this provision "makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, indirectly prevent or limit their ability to participate." 28 C.F.R. Pt. 36, App. B, p. 641 (commentary to 28 C.F.R. 36.301).

A public accommodation also may not refuse to make reasonable modifications to a policy or practice that has the consequence of denying such individuals access to its services unless making a reasonable modification to that policy would fundamentally alter the nature of the services. Section 12182(b)(2)(A)(ii). Nor may an accommodation effectively deny an individual with a disability privileges or services by failing to provide auxiliary aids or services needed to permit effective communication unless doing so would fundamentally alter the nature of its services or impose an undue burden. Section 12182(b)(2)(A)(iii).

B. Defendants' Process For Determining Eligibility To Participate In Its Contest At Its New York Studios Is Covered By Title III

This case concerns access to the services, privileges, and advantages of a place of public accommodation, namely participation as contestants in a quiz show that is conducted in a studio facility in New York City.

Defendants' studio is clearly a "place of public accommodation," as defined by Title III. The statute provides that "[t]he following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce" and lists "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment." Section 12181(7). As this Court has observed, "Title III * * * was intended to have a broad reach," *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1242 (11th Cir. 2000), and Defendants' New York studios, at which the contests are held, fall comfortably within the phrase "place of entertainment." The contests held at the studio are "services, facilities, privileges, advantages, or accommodations of [that] place of public accommodation." Section 12182. Thus, the district court concluded that "there are certain portions of Defendants' Show that are subject to Title III's public accommodation provisions, such as the theater where the Show is taped" (R36-4).

Although the question is not raised in the district court's opinion, it makes no difference that Plaintiffs seek to participate as contestants, rather than audience members. See *Daniel* v. *Paul*, 395 U.S. 298, 305-308 (1969) (rejecting claim that

under the public accommodations provision of the Civil Rights Act of 1964 "'place of entertainment' refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity"); *Miller* v. *Amusement Enters., Inc.*, 394 F.2d 342, 349-351 (5th Cir. 1968) (same); see also *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretation have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."). That the application of the ADA to a televised game show may seem unusual, or unforeseen by Congress, is not an argument against its application. See *Stevens*, 215 F.3d at 1241 ("[B]oth the Supreme Court and this Court have concluded previously that the ADA is applicable to contexts that may not have been particularly envisioned by Congress.").

Because Defendants operate a place of public accommodation, they may not discriminate against individuals with disabilities "in the full and equal enjoyment" of the contests they hold in their New York studios. This means, among other things, that Defendants generally may not impose or apply unnecessary "eligibility criteria that screen out or tend to screen out an individual with a disability" from participating in the contest. Section 12182(b)(2)(A)(i). They must make "reasonable modification in policies, practices, or procedures, when such modifications are necessary to afford such services [or] privileges * * * to

individuals with disabilities" unless doing so would fundamentally alter the contest. Section 12182(b)(2)(A)(ii).[5] And, when necessary to permit effective communication, they must provide needed auxiliary services unless doing so poses an undue burden or fundamentally alters the services. Section 12182(b)(2)(A)(iii).

This does not mean that every aspect of Defendants' operations is subject to Title III. For example, this Court has held, in the context of the ADA's barrier removal provisions, that even though a cruise ship may be a place of pubic accommodation, "parts of the ship, such as the bridge, crew's quarters, and the engine room, may not constitute public accommodations." *Stevens*, 215 F.3d at 1241 n.5; see also 28 C.F.R. Pt. 36 App. B, p. 624 (commentary to 28 C.F.R. 36.104). And a company that operates a number of businesses does not subject all of its businesses to Title III just because one of its enterprises is a covered place of public accommodation. *Ibid*.

For an aspect of a defendant's operation to be subject to Title III, there must be a connection between the service Plaintiffs are seeking and the place of public accommodation. In the words of the statute, the Act covers discrimination "in the full and equal enjoyment of the * * * services [or] privileges * * * *of* any place of public accommodation." Section 12182(a) (emphasis added). The question, then, is whether Plaintiffs alleged discrimination regarding a service "of" Defendants'

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[5] Because the district court concluded that Title III did not apply, there has been no occasion in this case to explore what modifications or auxiliary services might be employed and whether Defendants have valid defenses to such requests. The United States takes no position on these undeveloped issues.

place of public accommodation.[6] It would seem clear that the contest is a service "of" Defendants' place of public accommodation (its studio). After all, the contest is what makes Defendants' studio a "place of entertainment" falling under the Act.

Once this is understood, the applicability of Title III to Defendants' process for selecting contestants is straight-forward. Defendants have imposed eligibility criteria for participating as a contestant on the quiz show (applicants must be able to answer correctly a series of questions). These criteria in themselves are unobjectionable. Plaintiffs allege (R1-10), however, that the criteria are being implemented in a way that tends to screen out individuals with disabilities not because these individuals lack the necessary qualifications to be contestants, but because the questions are asked in a way that prevents Plaintiffs from answering them. See Section 12182(b)(2)(A)(i). Plaintiffs have alleged (R1-11) that Defendants' failure to modify this practice, or provide auxiliary services necessary to ensure effective communication, has resulted in their complete exclusion from the contest. See Section 12182(b)(2)(A)(ii)-(iii).

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[6] At one point, the district court seems to imply that the challenged practice or policy must itself meet the definition of a "public accommodation" (see R36-5 ("The Title III definition of 'public accommodation' is not broad enough to encompass a process for selecting individuals to be participants on a game show.")). This is clearly not correct. Given that Title III defines a "public accommodation" as an "entity," Section 12181(7), no challenged *practice* or *policy* could ever qualify as a "public accommodation" itself. The question is whether *Defendants* qualify as a public accommodation, see Section 12181(7); 28 C.F.R. 36.104, and, if so, whether their selection process results in discrimination in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of [the] place of public accommodation." Section 12182(a). See also Section 12181(7); 28 C.F.R. 36.104.

These are precisely the sorts of claims Title III was intended to cover. The process for selecting contestants for the show is no different than the implementation of eligibility criteria in other contexts that are clearly covered by the Act. For example, there is no question that the administration of admission testing by a private secondary school falls within the scope of Title III. See Section 12189; 28 C.F.R. 36.309. And there would be little question that the ADA would apply, and would be violated, if Defendants screened contestants as they entered the studio, sending home otherwise qualified contestants on the grounds that they were deaf or physically disabled or suffered from diabetes or HIV. See 28 C.F.R. Pt. 36 App. B, p. 640 (commentary to 28 C.F.R. 36.301) ("It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course or all individuals with cerebral palsy from attending a movie theater * * * ."). That disabled individuals are screened out by an automated telephone system, rather than by an admission policy administered at the studio door is of no consequence under the statute.[7]

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[7] Although Section 12182(b)(2)(A)(i) is the most clearly applicable provision, the failure to modify policies requiring applicants to use a touch-tone phone to qualify as contestants and the failure to allow for other means of communication may also violate other provisions of Title III. See Section 12182(b)(2)(A)(ii)-(iii). Because the district court held that none of Title III's requirements could ever apply to Defendants' selection process, it did not reach the question of which specific prohibitions might or might not apply in this context. Therefore, this Court need only decide whether the selection process is subject to Title III and leave the Act's application in this particular case to the district court in the first instance.

C. It Does Not Matter That Defendants' Eligibility Criteria Are Administered Off-Site, Over The Telephone

The district court nonetheless concluded that Title III was not implicated by this case because "Plaintiffs do not raise any issue in their complaint involving any *place* that is subject to the public accommodations provisions of Title III" (R36-4 (emphasis in original)).

1. Plaintiffs' Challenge To Defendants' Selection Process "Involves" A Place of Public Accommodation

As an initial matter, this statement is difficult to understand. Plaintiffs raise the issue of whether Defendants' telephone eligibility process violates, among other things, the prohibition against discriminatory eligibility criteria in Section 12182(b)(2)(A)(i). The purpose of the automated telephone system is to implement a set of criteria for eligibility to participate in Defendants' contest (R1-2-3; R1A-2-9;R36-1-2). That contest is conducted in Defendants' studio (R1A-1). The district court and Defendants agree that this studio is a place of public accommodation.

The complaint, then, does *involve* a place covered by Title III because it alleges discrimination in access to the full enjoyment of privileges or services conducted on the premises of Defendants' public accommodation. The denial of services or privileges in this case is no different than if a night club refused to let people with HIV participate in a dance contest on its premises or a private college

refused to let students in wheel chairs participate in quiz bowl competitions in the school auditorium.[8] Surely such claims *involve* a place of public accommodation.

It appears, however, the district court believed that to fall under Title III, the discriminatory eligibility process must not only *involve* a place of public accommodation, it must occur *at* or *on the premises of* the place of public accommodation. However, there is nothing in the statutory language, regulations, or purposes of the Act that support such a narrow construction.

2. Title III Prohibits Discrimination Even When The Discrimination Occurs Off-Site Or Over The Telephone

The statutory text makes clear that Title III applies to discriminatory policies and eligibility criteria regardless of how or where they are implemented. Where the discrimination occurs is irrelevant so long as it deprives disabled individuals of the full and equal enjoyment of the "services [or] privileges * * * of any place of public accommodation." Section 12182(a). Thus, the prohibition against discriminatory imposition or implementation of eligibility criteria, Section

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[8] Thus, this case is fundamentally different than *Stoutenborough* v. *National Football League, Inc.*, 59 F.3d 580 (6th Cir.), cert. denied, 516 U.S. 1028 (1995), cited by the district court and Defendants below. That case involved a challenge to an agreement between the National Football League and television networks, under which certain football games would be broadcast on radio, but not televised. The Court reasoned that the NFL and media companies could not qualify as running a "place of public accommodation" such as a "place of entertainment" because they did not run any facility, such as a football stadium. *Id*. at 583. In this case, however, it is conceded that Defendants run a place of public accommodation and it is the services and privileges of that facility Plaintiffs are seeking. That is, Plaintiffs seek access to the contest administered in Defendants' studio, just like sports fans or athletes would seek admission to the football stadium in *Stoutenborough*.

12182(b)(2)(A)(i), contains no restriction on the location or means of the discrimination. And Section 12182(b)(2)(A)(ii) requires "reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such * * * services [or] privileges * * * to individuals with disabilities," regardless of whether the policies and practices are implemented *at* the public accommodation's facilities.

If this were not true, the Act could be easily circumvented and would not apply to the application of eligibility criteria in some of the most common situations Congress must have envisioned. Eligibility criteria are frequently implemented off-site, through the mail, or over the telephone. Private schools and summer camps require applications through the mail. Doctors accept (or reject) new patients over the telephone. Hotels make reservations over the internet. Amusement parks, sports stadiums, and theaters frequently sell tickets through the mail, over the phone, or via the internet. Under the district court's apparent interpretation any of these public accommodations could impose eligibility criteria that screen out individuals with disabilities and then claim that the process of accepting applications, making reservations, or acquiring tickets was not a covered service because it did not occur at the accommodation's physical facility.

The absurdity of such interpretations becomes even more obvious once it is acknowledged that the same theory would apply under the public accommodations provisions of the Civil Rights Act of 1964, which prohibits discrimination in "the full and equal enjoyment of the * * * services * * * of any place of public

accommodation" on the basis of race. Section 2000a(a). If off-site eligibility determinations are not covered by a law prohibiting discrimination in the provision of the services of a "place of public accommodation," accommodations would be free to require potential customers to meet racial criteria administered through an off-site process. A health club could, for example, require applications through the mail and accept only those meeting a "whites-only" criteria. See *Rousseve* v. *Shape Spa for Health & Beauty*, *Inc.*, 516 F.2d 64 (5th Cir. 1975) (plaintiff's application to join health club rejected on account of race), cert. denied, 425 U.S. 911 (1976); *Smith* v. *YMCA of Montgomery*, 462 F.2d 634 (5th Cir. 1972) (application to summer camp denied on account of race); *Stout* v. *YMCA of Bessemer*, 404 F.2d 687 (5th Cir. 1968) (application to join YMCA not accepted on account of race). It is impossible to imagine that Congress intended to create such an exception to these important civil rights laws.

3. Title III Applies To Privileges And Services Even When Provided Off-Site Or Over The Telephone

A contrary result is not required by cases like *Parker* v. *Metropolitan Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997), cert. denied, 522 U.S. 1084 (1998); *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998), and *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), which Defendants cited below. These cases do not apply to the application of discriminatory eligibility criteria for enjoyment of services provided on the premises of a place of public

accommodation. And even if they did, such an interpretation of Title III would be inconsistent with the language of the statute and its purposes.

First, *Parker*, *Ford*, and *Weyer* do not stand for the broad proposition that a place of public accommodation may exclude individuals with disabilities from services or privileges performed within the premises of the public accommodation so long as the discrimination occurs off-site or over the telephone. All of these cases arise in the very different context of challenges to the content of insurance policies. At most, they can be read to require a nexus between the challenged service and the premises of a place of public accommodation.[9] But such a nexus is surely satisfied here, where Plaintiffs seek access to services or privileges provided within Defendants' facility. None of the insurance cases would, for example, countenance refusing to let individuals in wheelchairs into the insurance office so long as the company did so by refusing to make telephone appointments with disabled customers. But that is the equivalent of what Defendants are alleged to have done in this case: Plaintiffs assert that Defendants are effectively denying them access to the contest conducted on the premises of their studio through an eligibility process that discriminates on the basis of disability.

Defendants may argue, however, that Plaintiffs are not seeking access to the on-site contest (which clearly has a nexus with the studio), but rather to a

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[9] See *Weyer*, 198 F.3d at 1114 (statutory context "suggests that *some connection* between the good or service complained of and an actual physical place is required") (emphasis added); *Ford*, 145 F.3d at 612-613 (requiring a "nexus" or "connection"); *Parker*, 121 F.3d at 1011 & n.3 ("nexus").

separate and independent service or privilege (participating in the phone quiz) which must be analyzed separately and lacks a physical nexus (see R1-9, 13-14). Such a view ignores the plain import and scope of Section 12182(b)(2)(A)(i) and the factual context of this case. Plaintiffs clearly allege (R1-8-10) that they are seeking to participate in the phone quiz only because it is a necessary prerequisite to participating in the televised contest at which they could potentially win large sums of money.

But even if the selection process is viewed as a separate and independent privilege or service, it need not occur on-site to be covered by Title III. Limiting Title III to discrimination regarding services provided on the premises of a public accommodation would exclude a wide variety of services provided by quintessential public accommodations whenever they provide privileges or services in locations other than their premises. It is true that Congress used the word "place" in parts of Title III and that the definition of "public accommodation" includes many examples of physical facilities.[10] However, the critical limitation in

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[10] However, the word "place" does not necessarily exclude a non-physical location. See *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (Posner, C.J.) (suggesting that Title III applies to a "facility (whether in physical or in electronic space)" such as a web site), cert. denied, 528 U.S. 1106 (2000). Moreover, the definition also includes words susceptible of broader meaning, such as "establishment" and "entities." See Section 12181(7)(B), (F), (K). Even if all of the specific examples in the definition of "public accommodation" were of businesses providing services in their facilities, this would not require reading the general terms of the statute in a way that yields absurd results and undermines the plain purposes of the Act. As this Court has instructed in a similar context, "[a]lthough we recognize that *ejusdem generis* is an old and accepted rule of statutory construction, we do not believe that it compels us to accord words and

Title III is not embodied in the word "place," but rather in the phrase "services [or] privileges * * * of." That is, the Act covers discrimination in the services "of" a place of public accommodation, not the services "at" or "in" a place of public accommodation. See *Pallozzi* v. *Allstate Life Ins. Co.*, 198 F.3d 28, 33 (2d Cir. 1999) ("We find no merit in Allstate's contention that, because insurance policies are not used in places of public accommodation, they do not qualify as goods or services 'of a place of public accommodation.' The term 'of' generally does not mean 'in' * * * ."). Cf. *Stevens*, 215 F.3d at 1241 ("Very important, Congress made no distinctions – in defining 'public accommodation' – based on the physical location of the public accommodation.").

Many businesses provide services over the telephone or through the mail, including travel agents, banks, insurance companies, catalog merchants, and pharmacies. Many other businesses provide services in the homes or offices of their customers, such as plumbers, pizza delivery and moving companies, or cleaning services. In each case, this is a service "of" the place of public accommodation even though it is not provided "at" the accommodation's premises. Reading an on-site limitation into the statute would permit all the above firms to refuse service to individuals with disabilities whenever the service was offered off-

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phrases embodied in the statute a definition or interpretation different from their common and ordinary meaning; or that the rule requires us to interpret the statute in such a narrow fashion as to defeat what we conceive to be its obvious and dominating general purpose." *Miller*, 394 F.2d at 350 (interpreting public accommodations provisions of Civil Rights Act of 1964).

site, even though Congress specifically included many such businesses as examples of covered public accommodations in the statute. See Section 12181(7)(B) (restaurant); *id.* at (7)(E) (sales establishment); *id*. at (7)(F) (travel service, bank, insurance office, or pharmacy). As the First Circuit observed, "[i]t would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not." *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994). See also *Stevens*, 215 F.3d at 1243 ("The idea that Congress intended to apply Title III to only domestic [and not foreign-flag] cruise ships, in light of the breadth of the ADA, seems strange.").[11]

[11] To the extent *Parker*, *Ford,* or *Weyer* can be read to support the opposite conclusion, they are inconsistent with the language and purposes of the ADA. Cf. *McNeil* v. *Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000); *Pallozzi*, 198 F.3d at 33; *Carparts Distribution Ctr.*, 37 F.3d at 20; *Doe*, 179 F.3d at 559, 563.

CONCLUSION

Because the court erred in dismissing the case on the grounds that Title III did not apply at all,[12] this Court should reverse the judgment of the district court and remand for appropriate further proceedings.

Respectfully submitted,

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[12] Below Defendants also argued (R17-15-16) that Plaintiffs' complaints regarding the automated telephone system are effectively pre-empted by the implementing regulations for Title IV of the ADA. Because the district court did not address this argument, this Court need not, and should not, address that question in this appeal. If the question were considered, however, the Department of Justice would welcome the opportunity to file a brief on this issue.

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d) and Eleventh Circuit Rule 29-2, the attached amicus brief was prepared using WordPerfect 9 and contains5,210 words of proportionally spaced type.

_____
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for the United States as Amicus Curiae in Support of Appellant were sent by first class mail this 23d day of April, 2001, to the following counsel of record:

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