No. 98-757

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAYS INNS OF AMERICA, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 302 of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12182, prohibits discrimination on the basis of disability in the enjoyment of any "place of public accommodation," and requires those who own, lease, or operate such public accommodations to ensure that they meet certain non-discrimination requirements. Section 303 of the ADA, 42 U.S.C. 12183, makes unlawful (among other things) the "failure to design and construct" new public accomodations and commercial facilities that meet certain accessibility requirements, but does not identify the persons responsible for compliance. The question presented is:

Whether the obligations imposed by Section 303 of the ADA, 42 U.S.C. 12183, extend to persons or entities other than those responsible for complying with Section 302 of the ADA, 42 U.S.C. 12182(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is reported at 151 F.3d 822. The opinion of the district court (Pet. App. C1-C16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1998. The petition for a writ of certiorari was filed on November 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interrelationship between two sections of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (1994 & Supp. II 1996) (Title III). Section 302 of the ADA,

42 U.S.C. 12182, prohibits disability-based discrimination in "public accommodations," a term that is defined to include (among other things) any inn, hotel, motel, restaurant, theater, auditorium, health spa, station, museum, or park affecting commerce. 42 U.S.C. 12181(7). Section 302(a) provides the general rule against such discrimination:

> 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.

42 U.S.C. 12182(a). Section 302(b), in turn, clarifies the scope of Section 302(a), and sets forth types of discrimination that are encompassed within Section 302(a)'s general prohibition. 42 U.S.C. 12182(b). For example, Section 302(b) clarifies that denying participation to individuals with disabilities, providing them inferior participation, unnecessarily separating them, or failing to make certain reasonable accommodations for them are all unlawful. 42 U.S.C. 12182(b)(1)(A)(i)-(iii) and (2)(A)(ii)-(iv). Section 302(b) further specifies that failure to undertake certain corrective measures for existing public accommodations is unlawful; the failure to remove "architectural barriers * * * in existing facilities," for example, is deemed to be unlawful if "such removal is readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv).

While Section 302 of the ADA applies to all "public accommodations," Section 303 of the ADA, 42 U.S.C. 12183, is a special provision that applies only to newly constructed or newly altered "public accommodations,"

as well as to newly constructed or newly altered "commercial facilities" (which are not otherwise covered by Section 302). Section 303(a) provides, in relevant part:

> [A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title [Section 302(a) of the ADA] includes —
>
> > (1) a failure to design and construct facilities for first occupancy later than [January 26, 1993], that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter.

42 U.S.C. 12183(a). The "standards" Section 303 refers to are the Standards For Accessible Design (28 C.F.R. Pt. 36, App. A), issued by the Attorney General pursuant to 42 U.S.C. 12186(b).

The "commercial facilities" covered by Section 303 include a broader range of facilities than the "public accommodations" covered by Section 302. In particular, the term "commercial facilities" includes all facilities (built for first occupancy after January 26, 1993) "that are intended for nonresidential use" and "whose operations will affect commerce." 42 U.S.C. 12181(2). Congress understood that many "commercial facilities" that are covered by Section 303 would not have qualified as "public accommodations." See H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 116 (1990); H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. 53 (1990). For example, factories, warehouses, and many office build-

ings that qualify as "commercial facilities" might not qualify as "public accommodations." 28 C.F.R. Pt. 36, App. B, § 36.104. See H.R. Rep. No. 485, pt. 2, *supra*, at 117; H.R. Rep. No. 485, pt. 3, *supra*, at 53. Unlike Section 302, Section 303 does not specify the persons or institutions that are responsible for complying with its mandate.

2. Petitioners are the franchisors of the Days Inn hotel chain. In 1992, Richard and Karla Hauk entered into a franchise agreement with petitioners to open a new Days Inn hotel in Wall, South Dakota (the Wall Days Inn). Pet. App. B1-B3. Because the hotel was designed and constructed for first occupancy after January 26, 1993, it is subject to the new construction requirements of Section 303(a) of the ADA. Pet. 3; 42 U.S.C. 12183(a).

The franchise agreement required the Wall Days Inn to comply with petitioners' detailed design and construction standards. Pet. App. B3. The agreement also mandated that the hotel be built and maintained in compliance with the ADA, and authorized petitioners to terminate the franchise if the hotel failed to meet the requirements of the ADA. *Id.* at B3, B8. Petitioners had authority under the franchise agreement to review all architectural plans for the Wall Days Inn and to deny the hotel entry into the Days Inn system if it failed to comply with petitioners' design and construction standards. The franchise agreement also gave petitioners the authority to inspect the hotel, both during construction and after it opened for business, to ensure that it met their design and construction standards. *Ibid.*

The Wall Days Inn hotel, as both designed and built, violated ADA accessibility standards and petitioners' own design and construction standards. Petitioners,

however, did nothing during the design or the construction phase to cause the building to be brought into compliance with the ADA, and they allowed it to open as part of the Days Inn system despite its failure to meet the ADA's requirements. Pet. App. B4, C4.

3. The United States filed suit under Section 303(a) of the ADA against petitioners, as well as against the Hauks, the architectural firm that helped design the hotel, and the general contractor for the facility. Pet. App. B1-B2, C1-C2. The complaint alleged that the defendants violated Section 303 by "fail[ing] to design and construct" the new hotel to be readily accessible to and usable by persons with disabilities, 42 U.S.C. 12183(a). See Pet. App. B2. The district court entered consent decrees resolving the United States' claims against all defendants except petitioners. Pet. App. C2.

With respect to petitioners, the district court granted summary judgment against the United States. Petitioners, the court concluded, did not design or construct the Wall Days Inn for purposes of Section 303(a); nor were they the operators of the hotel. Pet. App. C8-C16. The court declined to decide whether Section 303's coverage is, like Section 302's, limited to owners, lessors, lessees and operators. See *id.* at C8-C10.

4. The court of appeals reversed the grant of summary judgment and remanded the case for further proceedings. Pet. App. B1-B10.

a. The court of appeals first rejected petitioners' construction of Section 303(a). Relying on Section 302(a) of the ADA, which prohibits discrimination on account of disability "by any person *who owns, leases (or leases to), or operates* a place of public accommodation," 42 U.S.C. 12182(a) (emphasis added), petitioners argued that liability for violations of Section 303(a) also

should be limited to owners, lessors, lessees and operators. Pet. App. B4-B6. That interpretation, the court explained, is inconsistent with the fact that the limitation to owners, lessors, lessees and operators does not appear in Section 303(a); it appears only in Section 302(a). Pet. App. B5. Moreover, since Section 302(a) by its terms applies only to owners, lessors, lessees and operators of "public accommodations," that reading "renders meaningless section 303's inclusion of commercial facilities," thus creating "an inexplicable gap in coverage of buildings that Congress clearly intended to include." *Id.* at B6. For commercial facilities that do not qualify as public accommodations, the court explained, there is no party who meets this description and thus "no entity liable for violations of the new construction accessibility standards for buildings which are commercial facilities only." *Id.* at B5-B6.

The court of appeals also rejected petitioners' proposed solution to this gap in coverage. The court noted that petitioners had advocated limiting the permissible defendants under Section 303 to owners, lessors, lessees and operators of public accommodations *or commercial facilities*. Pet. App. B6. But the court emphasized that such a reading does not comport with the plain language of Section 302(a), which expressly covers only a party "who owns, leases (or leases to), or operates a place of public accommodation," 42 U.S.C. 12182(a). See Pet. App. B6.

b. Having rejected petitioners' construction of the statute, the court of appeals concluded that, because Section 303 makes "failure to design and construct" properly accessible facilities unlawful, it is most natural to read Section 303 as applicable to anyone who, with requisite control and knowledge, violates the ADA by failing to "design and construct" facilities that meet the

ADA's accessibility requirements, whether or not they are the owner, operator, lessor, or lessee. A franchisor with significant authority to control the design and construction of a new facility, the court of appeals continued, might (depending on the facts) be held liable for failure to "design and construct" a properly accessible facility. Pet. App. B7-B8. In particular, the court of appeals held that a franchisor with significant control and authority over design and construction (but that did not exercise that control or authority) could be liable for violating the ADA, but only if it had actual knowledge of the violation. *Id.* at B9. In this case, the record was sufficient to show that petitioners had substantial control and authority over the design and construction of the Wall Days Inn. It did not, however, reveal whether petitioners had actual knowledge of the accessibility problems at the hotel. Accordingly, the court of appeals remanded the matter to the district court for further proceedings. *Id.* at B8-B10.

ARGUMENT

Petitioners argue that the court of appeals erred in holding that the parties responsible for complying with Section 303 of the ADA are not limited to the owners, operators, lessees and lessors covered by Section 302 of the ADA. Review of this issue by the Court would be premature at the present time, and in any event the decision of the court of appeals is correct.

1. As an initial matter, the Eighth Circuit is the only court of appeals that has addressed whether Section 303's coverage is limited to owners, operators, lessors or lessees of new facilities.[1] Petitioners acknowledge

[1] Two other courts of appeals may consider the issue in the future in cases brought by the United States against Days Inns of America, each of which rests on distinctive factual allegations that

that this case does not present an inter-circuit conflict (Pet. 8), and they do not contend that the court of appeals' holding conflicts with any decision of this Court. Given the relative novelty of the question petitioners raise, and the absence of any other court of appeals decision addressing it, review by this Court would be premature.

2. Moreover, the interlocutory nature of the court of appeals' decision also counsels against further review at this time. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying petition for certiorari because court of appeals had remanded the case and it was thus not ripe for review); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases," review on certiorari is reserved for final judgments); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). The court of appeals did not hold that petitioners were liable under Section 303 of the ADA. Instead, it remanded to the district court for further proceedings, specifying that petitioners cannot be held responsible unless they had "actual knowledge" of the accessibility problems at the Wall Days Inn. Pet. App. B8-B10. As a result, petitioners may prevail on remand, rendering their current contentions academic; and if petitioners do not prevail on remand, they can appeal the final judgment, which

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may be relevant to the issue. In *United States* v. *Days Inns of America*, No. 98-15433 (9th Cir.), the parties have filed briefs but argument has not yet been scheduled; moreover, other issues in the case may obviate the need to address the question. In *United States* v. *Days Inns of America*, No. 98-6610 (6th Cir.), the parties have not yet filed briefs.

would then be subject to review with the benefit of a complete record.

3. In any event, the court of appeals' decision is correct, and the interpretation urged by petitioners is inconsistent with the text and history of the statute.

Section 303 by its own terms does not expressly limit the class of actors to which its prohibitions extend. Instead, Section 303(a) broadly provides that, with respect to both public accommodations and commercial facilities, the "failure to design and construct facilities for first occupancy later than [January 26, 1993], that are readily accessible to and usable by individuals with disabilities" violates the ADA. 42 U.S.C. 12183(a). Because there is no express limitation on the persons who may be held liable for violating Section 303(a), Section 303(a) is most naturally read as applying to anyone who engages in the prohibited conduct, *i.e.*, anyone who, with the requisite interest, authority and control, fails to "design and construct" public accommodations or commercial facilities that meet the ADA's accessibility requirements. Here, the court of appeals concluded that a franchisor that has substantial control and authority over design and construction, and that has actual knowledge that the facility violates the ADA, is a sufficient participant in the "design" and "construction" of that facility to be liable for failure to meet the requirements of the ADA. Pet. App. B8-B9.

Petitioners argue that Section 303 must be read as incorporating the same list of potential defendants set forth in Section 302(a), *i.e.*, "any person who owns, leases (or leases to), or operates a place of public accommodation." See Pet. 10 (arguing that Section 303's reference to Section 302 "makes clear that the prohibitions * * * apply to the same persons as do [the prohibitions] of Section 302"). In this case, peti-

tioners contend, they did not own, lease, or operate the hotel.[2] Petitioners' argument, however, cannot be squared with the fact that Section 303 differs from Section 302 in two critical respects: first, it imposes with respect to newly constructed facilities a different kind of responsibility—for design and construction—not applicable to facilities covered by Section 302 alone; and second, with respect to newly constructed facilities, it extends the reach of the statute to cover "commercial facilities" that would not constitute "places of public accommodation" covered by Section 302. Nor can it be squared with the legislative history of those two provisions. All of these factors counsel against wholesale importation of the list of responsible persons from Section 302 into Section 303.

a. First, petitioners' argument ignores the fact that Sections 302 and 303 address different subject matters. Section 302 is directed to a wide range of potentially discriminatory practices at public accommodations, such as improper segregation of the disabled, provision of inferior facilities, and failure to remove unnecessary and easily-removed architectural obstacles. 42 U.S.C. 12182(b)(1)(A)(i)-(iii) and (2)(A)(ii)-(iv). Liability for

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[2] Petitioners do not in their petition dispute that, *if* Section 303 is not limited to owners, lessors, lessees and operators, *then* a person with substantial control and authority over design and construction, who is aware of the ADA violation, is properly held liable therefor. The International Franchise Association (IFC), as Amicus Curiae, does appear to question that holding, at least insofar as the party with control, authority and knowledge is a franchisor. See International Franchise Ass'n Amicus Br. 5-12. IFC, however, identifies no circuit conflict on the extent of participation necessary to make a party liable, and review of such a fact-intensive question would in any event best be addressed in a case that has a full record.

such practices most logically falls on those who control and engage in them, namely the owners, lessors, lessees, and operators of the public accommodation. Section 303, in contrast, is not directed at practices occurring at pre-existing public accommodations. Instead, it is addressed to the failure to design and construct new and newly-altered facilities that meet ADA accessibility requirements. Responsibility for the failure to design and construct ADA compliant facilities most logically falls on those with significant control over those activities, whether or not they own, lease, or operate the facility themselves.

Moreover, Section 302 addresses public accommodations built before the ADA was passed. It would have made little sense (and perhaps would have been somewhat unfair) to hold the original designers and constructors of pre-existing accommodations responsible for bringing them into compliance with that 1990 law. See, *e.g.*, 42 U.S.C. 12182(b)(2)(A)(iv) (requiring removal of architectural barriers to access where feasible). Such an approach, for example, would require a company that designed and built a public accommodation such as a private museum in 1890 to bring the facility into compliance with the ADA in the 1990s, even though the company that built the facility parted with it decades earlier. Accordingly, Congress placed the burden of bringing existing public accommodations into compliance with the ADA not on their builders and designers but rather on those who currently benefit from them, *i.e.*, those who currently own, lease, or operate them. Unlike Section 302, however, Section 303 addresses *new* construction of commercial facilities and public accommodations for first use 30 months *after* the ADA was passed. It is neither awkward nor unfair to hold those with significant control over the design and

construction of public accommodations and commercial facilities after the ADA's passage liable when their design and construction violates the ADA's clearly articulated accessibility requirements. To the contrary, imposing liability on the very people who commit the prohibited act—here, those who fail to design and build properly accessible facilities—is the most logical way of ensuring compliance.

b. Second, petitioners' proposal to incorporate into Section 303 the list of potentially liable parties from Section 302 would effectively nullify Congress's express effort to bring "commercial facilities" within Section 303's scope. Unlike Section 302, which applies to "place[s] of public accommodation," Section 303 extends both to "public accommodations" and "commercial facilities." Petitioners' proposal to limit those responsible for complying with Section 303 to the potential defendants listed in Section 302 would have the effect of reading the words "commercial facilities" out of Section 303, because Section 302 imposes liability only on "any person who owns, leases (or leases to), or operates a place of *public accommodation*," 42 U.S.C. 12182(a) (emphasis added), and makes no mention of owners, lessors, lessees, and operators of "commercial facilities." As the court of appeals explained, "[t]he practical application of [petitioners'] interpretation would leave no entity liable for violations of the new construction accessibility standards for buildings which are commercial facilities" and not public accommodations, thereby creating "an inexplicable gap in coverage of buildings that Congress clearly intended to include." Pet. App. B5-B6. The resulting nullification of the term "commercial facilities" in Section 303 would contravene "the 'elementary canon of construction that a statute should be interpreted so as not to render one part

inoperative.'" *Department of Revenue* v. *ACF Indus.*, 510 U.S. 332, 340-341 (1994) (citation omitted).

Petitioners argue that nullification of the term "commercial facilities" can be avoided by reading Section 303's reference to Section 302 as limiting the permissible defendants under Section 303 to owners, lessors, lessees and operators of public accommodations *or commercial facilities*. That reading, however, conflicts with the plain language of both Sections: It is inconsistent with the text of Section 303, which contains no express limit on the responsible parties whatsoever, and irreconcilable with the text of Section 302, which limits its coverage to owners, lessors, lessees and operators "of any place of public accommodation," 42 U.S.C. 12182(a). In effect, petitioners' proposed solution is to judicially amend the language of Section 302 (in the context of Section 303 actions) to include the phrase "or commercial facilities." But, as the court of appeals correctly recognized, such a rewriting of Section 302 "violates the maxim of statutory interpretation that courts should give effect to the plain language of the statute." Pet. App. B6. More than once this Court has recognized that federal courts are under a "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

c. Contrary to petitioners' contention (Pet. 13-14), the court of appeals' interpretation gives full effect to Section 303's cross-reference to Section 302(a). Section 303's reference to Section 302(a) makes it clear that the failure to design and construct commercial facilities and public accommodations that meet accessibility requirements is a type of "discriminat[ion] * * * on the basis of disability," 42 U.S.C. 12182(a), prohibited by the

ADA. There is no suggestion that Section 303's reference to Section 302(a) was intended to incorporate into Section 303 any or all of the limits on the persons who may be liable under Section 302(a).

To the contrary, the evolution of Sections 302 and 303 confirm that no such limit was intended. The provision that became Section 303 was originally a subsection of the general prohibition against discrimination now contained in Section 302(a), Pet. 17-18, at a time when that general prohibition did not include any language limiting its application to owners, operators, lessors and lessees. See S. 933, 101st Cong. § 402(a) and (b)(6) (May 9, 1989); H.R. 2273, 101st Cong. § 402(a) and (b)(6) (May 9, 1989). Congress then placed the provision relating to new construction and alterations in a separate section of the statute, and labeled it Section 303. See S. 933, 101st Cong. §§ 302, 303 (Oct. 16, 1989). But even then Section 303's cross-reference to Section 302 could not have been thought to incorporate a limit on the persons who could be liable under Section 303, as Section 302 at that time (like Section 303 today) still contained no such limit. *Ibid.* Finally, when Congress did add a limit on those who could be held liable months later, it added that limit only to Section 302, and did not add it to Section 303. See H.R. Rep. No. 485, pt. 3, *supra*, at 11; H.R. Rep. No. 488, 101st Cong., 2d Sess. 30 (1990). It is, of course, a fundamental principle of statutory construction that "Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Keene Corp.*, 508 U.S. at 208 (quotation marks and citation omitted).[3]

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[3] For similar reasons, petitioners are incorrect to contend that, because Section 302(b)(2) of the ADA, 42 U.S.C. 12182(b)(2), covers only parties identified in Section 302(a), the same limitation should

Moreover, the floor debates and hearings show that Congress was well aware that omitting the owner, lessor, lessee or operator limit from Section 303 would make it possible for persons other than owners, lessors, lessees and operators to be held liable. Thus, Representative DeLay specifically noted that the ADA would permit "suit against * * * contractors" who were about to build an inaccessible facility, 136 Cong. Rec. 10,457 (1990), and groups representing architects and contractors recommended certain modifications to the Act to give them greater certainty regarding the specific design requirements being imposed. See H.R. Rep. No. 485, pt. 2, *supra*, at 125-126; *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 308-309, 314-315, 444-446 (1989) (American Institute of Architects); 136 Cong. Rec. 11,475 (1990) (Rep. Hoyer); *id.* at 11,461-11,462 (Rep. Schroeder).

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be read into Section 303. Pet. 11-12. That argument ignores the fact that Congress inserted the limitation to owners, lessors, lessees and operators only into Section 302, and not into Section 303, after the two provisions had been separated into separate sections. It ignores the different purposes and substantive scope of the two provisions. See pp. 10-12, *supra*. And it ignores the fact that—because Section 302(a) and (b) cover the same entities, while Section 303 covers additional entities (commercial facilities) not covered by Section 302—the limitation of Section 302(a) can be applied to Section 302(b) without untoward effect, whereas applying it to Section 303 would produce an incongruous gap in coverage. See pp. 12-13, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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