

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 09-cv-02757-WYD-KMT

COLORADO CROSS-DISABILITY COALITION, *et al.*

Plaintiffs,

v.

ABERCROMBIE & FITCH CO., *et al.*,

Defendants.

**THE UNITED STATES OF AMERICA'S STATEMENT OF INTEREST ON THE
PARTIES' MOTIONS FOR SUMMARY JUDGMENT**

The United States files this Statement of Interest because the pending motions for summary judgment raise questions about the proper interpretation and application of title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* (“ADA”), and the regulations implementing that statute. Specifically, this case focuses on whether the raised porches at Defendants’ stores comply with the 2010 ADA Standards for Accessible Design (2010 Standards), which are part of the title III regulations. As the author of the regulations in question (42 U.S.C. § 12186) and the officer mandated to enforce the ADA (42 U.S.C. § 12188), the Attorney General has an interest in ensuring the regulation’s proper implementation and therefore submits this second statement of interest, pursuant to 28 U.S.C. § 517, to explain the application of the Department’s regulations at issue in this case. The United States filed its first statement of interest in this case on May 31, 2011. ECF No. 97.

This Court previously found on partial summary judgment that two of Defendants’ clothing stores violated the ADA because their main entrances were on raised porches, which are

only reachable by steps. The steps make the raised porches inaccessible and unnecessarily relegate individuals who use wheelchairs to separate entrances. Order 12, Aug. 31, 2011, ECF No. 109. In finding an ADA violation, this Court concluded that the raised porches at Defendants' stores failed to comply with the requirements for accessible public entrances set forth in § 4.1.3(8) of the 1991 ADA Standards for Accessible Design (1991 Standards), which were in effect at the time of the Court's earlier decision. Since that ruling, a plaintiffs' class was certified and Plaintiffs now seek to apply the ruling to Defendants' remaining 249 stores nationwide that also have entrances on raised porches.

In seeking to vacate this Court's August 2011 Order, Defendants emphasize that certain language that appeared in the 1991 Standards was changed when the Department of Justice adopted the 2010 Standards. Defendants assert that, as a result of this wording change, the raised porches now comply with the 2010 Standards. Defendants' argument is misplaced. Many changes were made in the 2010 Standards after a section by section review of the 1991 Standards. The changes clarified and simplified the 2010 Standards as compared to the 1991 Standards. One of the significant goals of the changes was to eliminate duplication or overlap in Federal accessibility guidelines, as well as to harmonize the 2010 Standards with model codes that are the basis of many State and local building codes. *See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 75 Fed. Reg. 56,236, 56,245-46 (Sept. 15, 2010).

The Department of Justice's interpretive guidance accompanying the 2010 Standards specifically states that the revision regarding accessible public entrances is intended to achieve the same result as the 1991 Standards. Consequently, this Court's holding that the raised porches

failed to comply with the 1991 Standards compels the conclusion that they also violate the 2010 Standards.

Further, the raised porches at issue in this case function not only as entrances; they also are part of the public retail space of the store. As such, they are required to be accessible, under both the 1991 and 2010 Standards. Throughout this litigation, Defendants have emphasized the importance of the “in-store experience” for the Hollister brand. Defendants have indicated that the unique Hollister store design – including its raised porches, which are covered by a roof, feature a wooden floor, and include furniture and “props” such as lamps, plants, and oars – is at the core of creating this experience. Because the raised porches including these special features and attributes are used as both public retail spaces and public entrances, they must meet the requirements under the ADA for both uses.

DEFENDANTS’ RAISED PORCHES

Defendants own and operate clothing stores across the country, 249 of which have raised porches at the entrances. Defendants’ Motion for Summary Judgment, or in the Alternative, to Vacate August 31, 2011 Order (“Defs.’ Mot.”) 1 at ¶1, ECF No. 164; Plaintiffs’ Motion for Summary Judgment and Entry of Injunction and Entry of Judgment (“Pls.’ Mot.”) 3 at ¶5, ECF No. 162. The raised porches are accessed from the exterior of the stores by ascending two steps from ground level. From atop the raised porches, the interior of the store is reached by proceeding through an opening without a door and descending two steps. *See* Order 3, ECF No. 109. Because one has to negotiate steps to reach them, the raised porches are inaccessible to people with mobility impairments, including those who use wheelchairs. Defendants do not dispute that the raised porches can only be accessed by climbing up or down two steps. Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment and Entry

of Injunction (“Defs.’ Opp.”) ii, ECF No. 167. At each of the 249 stores in question, two public entrances with doors that are not part of the porch flank the raised porch. Plaintiffs’ Opposition to Defendants’ Motion for Summary Judgment or, In the Alternative, to Vacate August 31, 2011 Order and Plaintiffs’ Reply In Support of Motion for Summary Judgment (“Pls.’ Opp.”) 5 at ¶2, 7-10, ECF No. 171; Order 3, ECF No. 109. The parties assume, for purposes of their motions, that these two other public entrances with doors are accessible.¹ Order 3 n.2, ECF No. 109.

Defendants use the raised porches as an important part of the Hollister experience, intended to invite customers in to interact with props displayed to advertise their brand and attract customers. Defs.’ Mot. 1 at ¶¶1-2, ECF No. 164. Defendants explain that “the Hollister brand exemplifies a Southern California beach lifestyle” and that the raised porches “create the aesthetic appearance of a Southern California surf shack.” *Id.* To produce that aesthetic, the raised porches are covered by a roof and have furniture such as chairs and lamps and are decorated with items such as plants and oars. Order 3, ECF No. 109; Pls.’ Opp. 6 at ¶¶3-5, 7-10, ECF No. 171. Marketing images and mannequins dressed in clothes that are for sale within the store are arranged on the raised porches. Pls.’ Opp. 6 at ¶5, 7-10, ECF No. 171. The entrances with doors that flank the raised porches are not similarly covered by a roof and do not have furniture, marketing items, and a wooden floor. *Id.* at 7-10.

ARGUMENT

What was true when this Court granted Plaintiffs’ Motion for Partial Summary Judgment – that Defendants’ stores with raised porches only accessed by steps violate the ADA – remains true today. The revisions to the ADA Standards for Accessible Design do not

¹ The United States believes the side entrances with doors are in fact not accessible. U.S. Statement of Interest 2 n.1, ECF No. 97.

change the outcome here because the 2010 Standards regarding public entrances are intended to achieve the same result as the 1991 Standards.

A. Overview Of The Relevant Statutory And Regulatory Provisions.

In 1990, Congress enacted the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). In enacting the ADA, Congress found that “historically, society has tended to isolate and segregate individuals with disabilities.” 42 U.S.C. § 12101(a)(2). Congress further found that “individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural . . . barriers, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(a)(5).

Title III of the ADA requires that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.”² 42 U.S.C. § 12182(a). It requires that new construction, such as Defendants’ stores, be “readily accessible to and usable by individuals with disabilities.”³ 42 U.S.C. § 12183(a)(1). Additionally, the ADA prohibits places of public accommodation from providing goods, services, facilities, privileges, and accommodations to people with disabilities that are “different or separate” than those provided to

² Defendants do not dispute that their stores are places of public accommodation and subject to title III of the ADA. *See* 42 U.S.C. § 12181(7)(E); Order 3-4, ECF No. 109.

³ The exception to this rule is in situations where it is “structurally impracticable” to do so. 42 U.S.C. § 12183(a)(1). That is not the case here. *See* Order 3, ECF No. 109.

other people⁴ and requires goods, services, facilities, privileges, and accommodations to be afforded to people with disabilities “in the most integrated setting appropriate to the needs of the individual.” 42 U.S.C. § 12182(b)(1).

The ADA directs the Department of Justice to issue regulations implementing title III of the ADA. 42 U.S.C. § 12186(b). It requires that architectural standards included in the regulations be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board (Access Board). 42 U.S.C. § 12186(c). On July 26, 1991, the Department issued rules implementing title II and title III, which are codified at 28 C.F.R. part 35 (title II) and 28 C.F.R. part 36 (title III). Appendix A of the 1991 title III regulation⁵ contains the ADA Standards for Accessible Design (“1991 Standards”) which were based upon the ADA Accessibility Guidelines (1991 ADAAG) published by the Access Board on the same date. The Access Board published updated ADA Accessibility Guidelines in 2004 (2004 ADAAG) as the culmination of a ten-year long effort to harmonize Federal accessibility requirements with each other and with model codes that are the basis of many State and local building codes. *See* 36 C.F.R. pt. 1191. In 2010, the Department of Justice revised its title II and title III regulations, which included the adoption of updated accessibility standards. For title III, the new standards (“2010 Standards”) consist of the 2004 ADAAG along with revised Subpart D of 28 C.F.R. part 36. *See* 28 C.F.R. § 36.104 (defining the term “2010 Standards”). Although

⁴ Separate or different accommodations are acceptable only where necessary to match effectiveness of the accommodation provided to others. 42 U.S.C. § 12182(b)(1)(A)(iii). Defendants do not argue that this exception applies.

⁵ This Appendix was republished as Appendix D when the Department revised its ADA title III regulations in 2010.

the revised regulations took effect on March 15, 2011, covered entities were not required to comply with the 2010 Standards until March 15, 2012. 28 C.F.R. § 36.406.⁶

Defendants' stores were constructed after January 26, 1993, and before September 15, 2010, and therefore should have been constructed to comply with the 1991 Standards. 28 C.F.R. § 36.406(a)(1); Defs.' Opp. 1, ECF No. 167. However, after March 15, 2012, newly constructed facilities subject to the 1991 Standards that contain non-compliant elements, such as Defendants' raised porches, are required to be made accessible in accordance with the 2010 Standards. 28 C.F.R. § 36.406(a)(5)(ii).

B. The 2010 Standards Regarding Public Entrances Are Intended To Achieve the Same Result As the 1991 Standards Regarding Public Entrances.

As the Court previously held, Defendants' entrances on raised porches violate the provision of the 1991 Standards governing accessible public entrances. Order 11-12, ECF No. 109; *see* 1991 Standards, § 4.1.3(8)(a)(iii). That provision specified, among other things, that “[w]here feasible, accessible entrances shall be the entrances used by the majority of people visiting or working in the building.” 1991 Standards, § 4.1.3(8)(a)(iii). Defendants argue that because the language was changed in the 2010 Standards to state “Accessible routes shall coincide with or be located in the same area as general circulation paths,” the raised porches do not violate the 2010 Standards. 2010 Standards, § 206.3 (location of accessible routes); Defs.' Mot. 13, ECF No. 164; *compare* 2010 Standards, § 206.4.1 (“Public Entrances”), *with* 1991 Standards, § 4.1.3(8)(a)(iii).

Defendants' reading of the 2010 Standards is incomplete because it disregards the Department of Justice's interpretive guidance accompanying those Standards. The guidance to

⁶ “Newly constructed or altered facilities or elements . . . that were constructed or altered before March 15, 2012, and that do not comply with the 1991 Standards shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards.” 28 C.F.R. § 36.406(a)(5)(ii).

the 2010 Standards states that the Department intended for the 2010 public entrance provisions to achieve the same result as the 1991 provisions for public entrances. This guidance is entitled to deference because it represents the Department's authoritative interpretation of its own regulations. As the Supreme Court has held, an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted); *accord Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations.").

The guidance to the 2010 Standards, which was published with the 2010 Standards, addresses substantive changes between the 1991 Standards and the 2010 Standards. 28 C.F.R. pt. 36, App. B (2011) at 816-17. Discussing changes to the provisions regarding public entrances, the guidance to the 2010 Standards explains that the "revision is intended to achieve the same result as the 1991 Standards." *Id.* at 822-23. Therefore, applying the 2010 Standards to the entrances on raised porches results in the same consequence as the 1991 Standards – the inaccessible entrances on raised porches violate the Standards.

This outcome is supported not only by the Department's interpretive guidance regarding the revisions to the 2010 Standards but by the core principles of the ADA. The two types of entrances at issue here provide a very different experience to customers with and without disabilities. The two side entrances with doors for people with disabilities provide an experience devoid of any features found at the inaccessible entrance that is on a raised porch. People who use wheelchairs do not get to experience the Southern California surf shack aesthetic of the raised porches. They do not get to inspect the clothing displayed on the mannequins. They do not get to enter through an opening without a door and see the marketing images displayed on the porches

or to experience the furniture and “props” located there. Nor are they integrated with other nondisabled customers, who are entering over the porches.

The ADA requires that no one be discriminated against on the basis of disability in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.” 42 U.S.C. § 12182(a); *see also* 28 C.F.R. § 36.201 (regulatory language mirroring the statutory prohibition against discrimination on the basis of disability). To that end, the ADA requires that new construction, such as Defendants’ stores, be “readily accessible to and usable by individuals with disabilities,” except where an entity can demonstrate that it is “structurally impracticable” to do so. 42 U.S.C. § 12183(a)(1). The ADA states that it is discriminatory to provide an individual with a disability with a “good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual . . . with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.” 42 U.S.C. § 12182(b)(1)(A)(iii).

The inaccessible raised porches preclude the full and equal enjoyment of Defendants’ stores by people with mobility impairments, including those people who use wheelchairs. As the Court correctly held, “Defendants have unnecessarily created a design for their brand that excludes people using wheelchairs from full enjoyment of the aesthetic for that brand.” Order 12, ECF No. 109.

C. Raised Porches Are Part Of the Store That Must Be Made Accessible and Located On An Accessible Route.

The raised porches also violate the 2010 Standards because: (1) the porches are part of the store that must be accessible, and (2) they are not located on an accessible route.

1. Defendants' raised porches are part of the store and must be accessible.

The raised porches violate the 2010 Standards because they are part of the store itself that must be made accessible. An analysis under the 2010 Standards starts with the requirement that *all* spaces must be accessible unless specifically exempted. 2010 Standards, § 201.1. The advisory note to Section 201.1 states that “[t]hese requirements are to be applied to all areas of a facility unless exempted” 2010 Standards, § 201.1 (Advisory). Moreover, where a space contains more than one use, “each portion shall comply with the applicable requirements for that use.” 2010 Standards, § 201.2. The requirements for accessible spaces are set forth in the 2010 Standards at Chapter 3: Building Blocks. Pursuant to Chapter 3, accessible spaces must have compliant floor surfaces, compliant turning space, and compliant clear floor space, among other requirements. 2010 Standards, §§ 301-309.

Defendants admit that the raised porches are used as more than just entrances. They state that the porches are designed to “create the aesthetic appearance of a Southern California surf shack.” Defs.’ Mot. 1 at ¶2, ECF No. 164. They use the porches as interactive advertising to draw the attention of shoppers.⁷ The raised porches are a unique space that invites customers to pass through, inspect clothes for sale and enjoy furniture and decorations in an interactive way not available to customers viewing a window display. As stated, Defendants’ raised porches are part of the public retail space of the store.

Because the raised porches are used as both public retail space and public entrance, they must meet the requirements for both uses. 2010 Standards, §§ 106.5 (definition for “entrance”

⁷ Defendants further admit that displays such as those on the raised porches are critical to their business because “[r]ather than advertise through traditional methods, [Defendant] markets virtually exclusively through its in-store experience.” Defs.’ Mot. 1 at ¶1, ECF No. 164.

and “space”), 201.2. Therefore, the raised porches are required to be accessible as public spaces⁸ and as public entrances. *See* 2010 Standards, § 201.1.⁹

2. Defendants’ raised porches must be on an accessible route.

The raised porches must be located on an accessible route. The 2010 Standards require that all spaces required to be accessible – such as the raised porches – be connected by an accessible route. 2010 Standards, § 206.2.4. The requirements for accessible routes are set forth in the 2010 Standards at Chapter 4: Accessible Routes. Pursuant to Chapter 4, Section 403, accessible routes must have compliant walking surfaces, slopes no greater than 1:20 in the direction of travel and cross slopes no greater than 1:48, vertical changes in level no higher than ¼”, and sufficient clear width and passing spaces, among other requirements. 2010 Standards, §§ 401-410. Raised areas such as raised porches are specifically addressed in an advisory note that states, “Accessible routes must connect all spaces and elements required to be accessible including, but not limited to, raised areas and speaker platforms.” *Id.* at § 206.2.4 (Advisory). The raised porches do not meet any of the exceptions that would allow them to remain unconnected by an accessible route. *See, id.* §§ 206.2.3 (listing exceptions for multi-story

⁸ Although not applicable to Defendants’ raised porches, there are thirteen exemptions to the requirement that public spaces must be accessible. 2010 Standards, § 203. The four exemptions addressing raised spaces are inapplicable here:

- “Raised Areas. Areas raised primarily for the purposes of security, life safety, or fire safety, including but not limited to, observation or lookout galleries, prison guard towers, fire towers, or life guard stands shall not be required to comply with these requirements or to be on an *accessible* route.” 2010 Standards, § 203.3.
- Raised refereeing, judging, and scoring areas. *Id.* at § 203.10.
- Raised boxing or wrestling rings. *Id.* at § 203.13.
- Raised diving boards and diving platforms. *Id.* at § 203.14.

⁹ Defendants’ raised porches are similarly covered by the analogous provisions of the 1991 Standards regarding public and common use areas. *See* 1991 Standards, §§ 3.5 (defining “public use” as “spaces that are made available to the general public” and “common use” as spaces that are “made available for the use of a restricted group of people”), 4.2.3 (turning space), 4.2.4 (clear floor space), 4.2.4.3 (surfaces), etc.

facilities), 206.2.4 (listing three general exceptions). However, Defendants' raised porches are not located on an accessible route because each is only reachable by steps having a vertical change in level greater than 1/4".¹⁰

CONCLUSION

Defendants' raised porches violate both the letter and the spirit of the ADA. They embody precisely the kind of segregated, second-class treatment of people with disabilities the ADA was intended to combat. They, in essence, send people with disabilities through the "back" door.

As already held by this Court, the raised porches do not comply with the 1991 Standards. The raised porches also do not comply with the 2010 Standards because the revised public entrance provisions must be read as reaching the same outcome as the 1991 public entrance provisions. In addition, because the porches, themselves, are part of the store space, they are, themselves, required to be accessible and to be on an accessible route. For all the foregoing reasons, Defendants are in violation of title III of the ADA.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

EVE L. HILL
Senior Counselor to the Assistant Attorney General

GREGORY B. FRIEL, Acting Chief
KEVIN J. KIJEWski, Deputy Chief
SHEILA M. FORAN, Special Legal Counsel

¹⁰ Defendants' raised porches are similarly in violation of the analogous provisions of the 1991 Standards regarding accessible routes to public and common use areas. *See* 1991 Standards, §§ 4.1.3 (requiring an accessible route connect accessible entrances with all accessible spaces within a facility), 4.3.2 (requiring at least one accessible route from public streets to the accessible building entrance they serve, which "shall, to the maximum extent feasible, coincide with the route for the general public."), 4.3.3 (width), 4.3.6 (surface textures), 4.3.7 (slope), 4.3.8 (changes in level), etc.

/s/ Nabina J. Sinha

NABINA J. SINHA, Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 616-2730
Facsimile: (202) 305-9775
nabina.sinha@usdoj.gov

Dated: June 26, 2012

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2012, a copy of foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Nabina J. Sinha
NABINA J. SINHA
Trial Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 616-2730
Facsimile: (202) 305-9775
nabina.sinha@usdoj.gov

Counsel for United States