QUESTIONS PRESENTED

I. Under the American with Disabilities Act, has a private hockey facility discriminated against an individual in violation of the Act, when the individual is not disabled and the facility does not perceive the individual as such?

II. Under Title III of the Americans with Disabilities Act, even if an individual meets the statutory definition of disabled, has a private hockey facility discriminated against the individual in violation of the Act, when the facility is not a public accommodation?

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2006) through grant of certiorari.

STATUTES INVOLVED

The text of the following statutes relevant to the determination of the present case are set forth in applicable part in the Appendix: 28 U.S.C. § 1254 (2006), 42 U.S.C. § 12101 (2006), 42 U.S.C. § 12102 (2006), 42 U.S.C. § 12181 (2006), and 42 U.S.C. § 12182 (2006).

STATEMENT OF THE CASE

Statement of Facts

The Respondent, the Fro-Zone Youth Hockey Rink (Fro-Zone), a private hockey facility located in the State of Manitou, is solely owned and operated by Mr. Thomas K. Musgrave. (R. at 4). Mr. Musgrave built the facility for the purpose of the enjoyment of both his son and the other children in the area. (R. at 4). As a former professional athlete, Mr. Musgrave understands the important role that exercise and athletics play in the promotion of a child's health and well-being. (R. at 4, 13). Mr. Musgrave provides the young children with the safety equipment, maintenance and space for them to enjoy a sport not normally part of the extracurricular activities offered by the local school. (R. at 13).

Mr. Musgrave built the small hockey facility adjacent to his personal property and views the rink as an extension of his home. (R. at 13). Mr. Musgrave keeps a close watch on the occupants of the building, treating the facility as the average homeowner would treat their personal backyard swimming pool. (R. at 13). However, through the wealth provided by Mr.

Musgrave's financially successful career as a professional football player, he is able to afford luxuries in excess of a mere backyard pool. (R. at 13).

Moreover, the design of the Fro-Zone reflects Mr. Musgrave's intention to use the facility for the benefit of the children and not for the purpose of a business enterprise. The facility is not designed to accommodate the public or public events. (R. at 4). Rather, the seats are designed so that children waiting for their turn to use the ice have a place to sit. (R. at 4). Public use is further hindered by the design of the outside walls, which are only one foot from the side of the ice on each side and do not provide adequate room for spectators. (R. at 4). Additionally, in an effort to focus on functionality for the children and not for public use, the restrooms are accessible only from the ice. (R. at 4). The intention for non-public use is further evidenced by the absence of concession stands, meeting rooms, and locker rooms, all amenities normally found in facilities intended to accommodate public use. (R. at 4).

Although Mr. Musgrave occasionally allows adult recreational leagues to use the facilities, in keeping with his intention to maintain the ice rink as a closely-watched private facility, Mr. Musgrave is very selective about the leagues that occupy the facility, allowing only those leagues that are specifically run by his acquaintances. (R. at 13). Further, on the rare occasion that Mr. Musgrave permits use by one of these leagues, they are only permitted to use the rink on designated nights and weekends, times when the children would not be using the facility. (R. at 13).

The matter in question occurred on July 12, 2005, when the Petitioner, Mr. Henry Baker, attended Fro-Zone to watch his son play hockey. (R. at 4). Due to his size, Mr. Baker was unable to fit into the seats, an understandable occurrence considering that the seats were primarily

designed to accommodate children waiting to use the ice. (R. at 4). Mr. Baker was informed by coaches supervising the children that there were no seats available that would not compromise Mr. Baker's safety. (R. at 4). However, despite his knowledge that Fro-Zone, a private facility, was not designed to and could not facilitate spectators, Mr. Baker approached Mr. Musgrave regarding the matter and Mr. Musgrave provided him with several alternative viewing options. (R. at 5). Instead, however, Mr. Baker chose to wait outside for his son. (R. at 5). Mr. Musgrave did not hear from Mr. Baker again until this lawsuit was filed. (R. at 5).

Procedural Background

Petitioner Henry Baker filed this instant action against Respondent Fro-Zone Youth Hockey Rink, alleging the Fro-Zone discriminated against him in violation of the Americans with Disabilities Act of 1990 (ADA), as his obesity constituted a disability as defined under the statute. (R. at 4). Further, Mr. Baker argued that the Fro-Zone was a covered structure under Title III of the ADA and was therefore required to provide accommodations for disabled individuals. (R. at 4). The trial court denied Mr. Baker's request for permanent injunction and ruled in favor of the Fro-Zone, finding: 1) the Fro-Zone was not governed by Title III or the ADA; and 2) Mr. Baker's obesity did not constitute a disability under the ADA. (R. at 4).

On appeal, a three judge panel of the Fifteenth Circuit Court of Appeals, with one judge concurring, affirmed the district court's finding that Mr. Baker is not disabled under the ADA and denying his request for injunctive relief. (R. at 13). The Fifteenth Circuit held that, although the Fro-Zone was a public accommodation governed by Title III, Mr. Baker was neither disabled nor regarded as disabled under the ADA. (R. at 13). The concurring judge agreed with the

majority's decision to deny Mr. Baker's relief, but dissented from the majority's rationale on the issue, finding instead that, although Mr. Baker was disabled, the Fro-Zone was not a public accommodation governed by Title III. (R. at 13).

SUMMARY OF THE ARGUMENT

This Court should affirm the finding of the Fifteenth Circuit Court of Appeals that the Petitioner's obesity is not an impairment as defined under the Americans with Disabilities Act and that his condition does not substantially limit any major life activity. Further, this Court should affirm the Fifteenth Circuit's finding that the Fro-Zone did not regard Mr. Baker as suffering from a disability. Finally, this Court should reverse the Fifteenth Circuit's decision that the Fro-Zone Youth Hockey Rink is not an exempt facility under Title III and could be required to alter the building's structure to accommodate disabled individuals.

An individual alleging discrimination under Title III of the ADA must show both that they are disabled within the meaning of the statute and that the location of the alleged discrimination is a public accommodation. To establish that he is impaired under the statute, the Petitioner must prove either that he has a physical or mental impairment that substantially limits one or more life activities or that the discriminating facility regarded him as having such an impairment.

Mr. Baker claims that his obesity constitutes a disability within the meaning of the statute, alleging that the condition is a physical impairment that substantially limits his life activities. However, courts hold that unless obesity has a physiological cause, obesity is a physical characteristic beyond the reach of the ADA's protection. Further, to constitute a disability as defined under the ADA, the physical impairment must substantially limit a major

life activity. Mr. Baker fails to show that his obesity is physiologically-based and, further, cannot point to a specific category of activity to which he is substantially limited.

Further, in terms of the allegation that Mr. Musgrave, acting on behalf of the Fro-Zone, regarded Mr. Baker as having a disability under the ADA, there is no indication that Mr. Musgrave perceived Mr. Baker as having a disability that was either physiologically-based or substantially limiting to a major life activity. Rather, Mr. Baker was treated in the same manner as anyone to whom the facility's accommodations were not designed would be treated and the Fro-Zone provided Mr. Baker with several alternative options to meet his needs. There is no evidence that Mr. Musgrave believed either that the Petitioner's weight interfered with any of his life activities or that he suffered from an impairment covered by the ADA.

Under a discrimination claim pursuant to Title III of the ADA, a Petitioner must also establish that the alleged discrimination occurred at a place of public accommodation. A place of public accommodation is a facility operated by a private entity whose operations affect commerce. Occasional use of an exempt commercial or private facility by the general public, however, is not sufficient to convert that facility into a public accommodation under the ADA. Here, the Fro-Zone is a privately-run facility that is intended primarily for the use and enjoyment of Mr. Musgrave and his family and friends. The facility is not intended for the general public, and any occasional use by the public is restricted to acquaintances of Mr. Musgrave and is limited in time to evenings and weekends.

For all of these reasons, the Fro-Zone respectfully requests that this Court affirm both the Fifteenth Circuit's findings that obesity is not an impairment under the ADA and the holding that

the Fro-Zone did not regard Mr. Baker as suffering from a disability, and reverse the Fifteenth Circuit's decision that Fro-Zone is not an exempt facility under Title III of that statute.

ARGUMENT

Congress enacted the Americans with Disabilities Act of 1990 (ADA) to protect the disabled from discrimination by establishing "clear, strong, consistent, enforceable standards," as well as to establish the federal government as the leader in the fight against discrimination against disabled individuals. 42 U.S.C. § 12101(b) (2006). Specifically, Title III of the ADA, applicable to the case at bar, prohibits any person who "owns, leases (or leases to), or operates places of public accommodation" from discriminating against individuals on the basis of a disability. 42 U.S.C. § 12182(a) (2006).

Establishing a *prima facie* case of discrimination under Title III of the ADA requires a plaintiff to prove: (1) that he has a disability, (2) that the defendant maintains a public accommodation, and (3) that the defendant discriminated against the plaintiff by refusing to provide "full and equal" enjoyment of the accommodations or service. *Bragdon v. Abbott*, 524 U.S. 624, 629 (1998).

III. THE FRO-ZONE'S ACTIONS WERE NOT DISCRIMINATORY BECAUSE MR. BAKER'S OBESITY IS NOT A DISABILITY COVERED BY THE ADA AND WAS NOT REGARDED AS SUCH BY THE FRO-ZONE.

In support of an allegation of discrimination under the ADA, a petitioner must first establish that he is disabled as defined by the statute. The ADA offers three alternative definitions of a "disability," defining the term as:

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such an impairment; or

"(C) being regarded as having such an impairment."

42 U.S.C. § 12102(2) (2006).

The Petitioner bases his discrimination claim on prongs (A) and (C) of the disability definition, alleging that his weight is a physical impairment that substantially limits a major life activity and, further, that the Fro-Zone perceived him as having such an impairment. (R. 14).

A. Mr. Baker's obesity does not constitute a statutorily-covered disability because it is not a physical impairment that substantially limits one or more major life activities.

The United States Supreme Court has fashioned a three-step approach to reading subsection (A) of the ADA's disability definition. First, the Court considers whether the alleged condition is an impairment. *Bragdon*, 524 U.S. at 631. Second, the Court identifies that life activity that the plaintiff relies upon and determines whether it constitutes a major life activity. *Id*. Third, the Court asks whether the impairment substantially limits the major life activity. *Id*.

1. Mr. Baker's obesity is not a physical impairment because it does not have an underlying physiological cause.

The United States Supreme Court states that whether a person has a disability under the ADA is an individualized inquiry and should be reviewed on a case-by-case basis. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483 (1999)(*citing Bragdon*, 524 U.S. 641-42 ("declining to consider whether HIV infection is *per se* disability under ADA"); 29 C.F.R. pt. 1630, App. § 1630.2(j) (2006)("'The determination of whether an individual has a disability is not necessarily

based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual'"). In *Sutton*, two pilots alleged that they were denied employment because of their severe myopia, an action that they asserted constituted discriminatory conduct under the ADA. *Id*. at 475-477. Reviewing the provisions of the ADA, the Court held that the statutory definition requires that the disability be evaluated with respect to an individual. *Id.* at 483. Upholding the trial court's dismissal of the pilots' ADA claim and finding that their condition did not constitute a disability, the Court examined evidence regarding whether the pilots' particular condition, and not the general condition of myopia, was a physical impairment. *Id*. at 493-94.

The requirements necessary for a obesity to comprise a "physical impairment" under the ADA were further articulated by the Sixth Circuit Court of Appeals in *Equal Employment Opportunity Commission v. Watkins Motor Lines, Inc.*, 2006 U.S. App. LEXIS 23177 (6th Cir. Sept. 12, 2006). In *Watkins*, the Equal Employment Opportunity Commission (EEOC) argued on behalf of a truck driver who alleged that he was terminated from employment because his morbid obesity, which he alleged to be a physical impairment under the ADA, was regarded by his employer as affecting his ability to do his job. *Id*. at *3-5. The EEOC argued that an impairment may be shown either by weight problems caused by a physiological condition or morbid obesity, regardless of the cause. *Id*. at *9-10, 12. Repeating their prior holding in *Andrews*, the court clarified the EEOC's misinterpretation of the definition of an "impairment," particularly rejecting their proposition that morbid obesity constituted a *per se* impairment, stating that morbid obesity may be an impairment under the ADA only "where it has a

physiological cause." *Id*. at *13-16. *Discussing Andrews v. State of Ohio,* 104 F.3d 803, 808-09 (6th Cir.1997)("physical characteristics that are 'not the result of a physiological disorder' are not considered 'impairments' for the purposes of determining either *actual* or perceived disability")(emphasis added). Affirming summary judgment for the defendant company, the court held that the driver's claim failed without even addressing whether his condition substantially limited major life activity, as he was unable to show that his morbid obesity was caused by a physiological condition and, therefore, had not shown that he suffered from an impairment under the ADA. *See also Francis v. City of Meriden*, 129 F.3d 281, 286 (2nd Cir. 1997)(Petitioner's claim failed "because obesity, except in special cases where the obesity relates to a physiological disorder, is not a 'physical impairment' within the meaning" of the ADA).

Given the importance of proving that an individual's obese condition has an underlying physiological cause, the courts have generally held that an individual must produce evidence of such a cause to succeed on an ADA discrimination claim. In one such case, *Cook v. State of Rhode Island*, 10 F.3d 17, 20-21 (1st Cir. 1993), a morbidly obese applicant for a medical attendant position alleged that she was denied employment from a residential facility for retarded persons when the employer regarded her condition as an impairment. Although the First Circuit Court of Appeals analyzed the claim under the "regarded as" prong of the disability analysis, the court was still required to determine whether the applicant's morbid obesity comprised a physical impairment. *Id*. at 23. Because Cook had proffered expert medical testimony that her morbid obesity was caused by a physiological condition, the court held that a jury could have concluded that she had a legitimate impairment. *Id.* at 25. *See also Fredregill v. Nationwide*

Agribusiness Ins. Co., 992 F. Supp. 1082, 1090 (S.D. Iowa 1997)(denying petitioner's ADA discrimination claim for lack of evidence that obese condition was physiologically-based).

Therefore, to constitute a "physical impairment" under the ADA, a condition, such as obesity or "morbid obesity," is required to have an underlying physiological cause, to which an individual alleging such an impairment must verify with medical evidence. Further, Courts will evaluate alleged impairments on an individualized basis and will not extend *per se* disability status to any alleged impairment.

Despite his weight qualifying him as morbidly obese, unlike the plaintiff in *Cook*, Mr. Baker has not produced medical evidence of any genetic or physiological cause for his obesity. *See Cook*, 10 F.3d at 25. Although his parents experience health problems likely related to their obesity, Mr. Baker personally refutes any insinuation that he has genetically inherited their condition. (R. at 3). On the contrary, Mr. Baker considers himself a fairly healthy individual. (R. at 3). Therefore, without the necessary supporting medical evidence, Mr. Baker has not supported a finding that his weight is not merely a product of over-eating or his admitted lack of consistent exercise (R. at 3), both non-physiological causes of obesity.

The Petitioner will likely argue that this Court should hold that morbid obesity is a *per se* impairment under the ADA. However, the United States Supreme Court has specifically stated that the determination of whether an individual's impairment constitutes a disability is an individualized inquiry. *See Sutton*, 527 U.S. at 483. Further, courts addressing the issue of morbid obesity as a physical impairment have repeatedly denied the extension of *per se* disability status, examining instead whether the particular instance of the condition had an underlying

physiological cause. *See Watkins*, 2006 U.S. App. LEXIS 23177 at *13-15. Following this precedent, morbid obesity, as well as any other impairment, is not considered a *per se* disability and, as stated above, Mr. Baker will be required to provide evidence supporting the physiological nature of his condition. Any contrary reading of the ADA caselaw would directly contradict a well established legal precedent of the United States Supreme Court**.**

Therefore, as Mr. Baker has failed to produce evidence demonstrating that his weight is that result of a physiological condition, this Court should find that Mr. Baker is not disabled as defined by the ADA.

2. Mr. Baker's obesity does not substantially limit one or more major life activities.

In addition to requiring that an individual alleging discrimination establish a physiologically-based physical impairment, the Supreme Court's three-step approach for analyzing a claim under section (A) of the ADA's disability definition, requires that a disability also be substantially limiting to a major life activity. *Bragdon*, 524 U.S. at 631. The ADA defines neither, "major life activity" or "substantially limited" in their definition of a covered disability. However, the EEOC has interpreted the term "substantially limited" as meaning:

i. unable to perform a major life activity that the average person in the general population can perform; or

ii. significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1)(i)(ii) (2006).

Building on the EEOC's definition, the term "substantially limited" has been further refined by the various courts analyzing impairments under ADA claims. In *Nedder v. Rivier College*, 908 F. Supp. 66, 73 (D. N.H. 1995), a terminated employee sought a preliminary injunction for the reinstatement of her job under an ADA discrimination claim, alleging that her morbid obesity substantially limited her ability to walk, a major life activity. Interpreting the term "substantially limiting," the court stated that "'whether a impairment substantially limits a major life activity is determined in light of (1) the nature and severity of the impairment, (2) its duration or expected duration, and (3) its permanent or expected permanent or long-term impact.'" *Id*. at 75 (*quoting Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995)). Denying the employee's motion for preliminary injunction, the court noted that "'not every impairment that affected an individual's major life activities is a substantially limiting impairment.'" *Id*. (*quoting Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995)). The court held that the terminated employee's limitations were not substantial in either the character or degree required to invoke the protection afforded by the ADA, as the disability only prevented her from walking briskly in certain situations. *Id*. at 77. *See also Stone v. Entergy Services, Inc.*, 1995 U.S. Dist. LEXIS 8834 (E.D. La. June 19, 1995)(summary judgment granted for employer, as, although terminated employee could not walk briskly and had some trouble climbing stairs, his ability to walk was not substantially limited).

Much as it assists in establishing that an impairment is physiologically-based, medical evidence and testimony plays a significant role in establishing the character and degree by which a disability limits a major life activity. In *Harding v. Cianbro Corp.*, 436 F. Supp.2d 153, 167-68

(Dist. Me. 2006), a terminated employee sued his former employer claiming that he was terminated in violation of the ADA after his fibromyalgia, which limited various life activities including his ability to sit, stand, walk and sleep, affected his work performance. Addressing the difficulties associated with determining the extent of limitations related to a condition, such as fibromyalgia, that affects individuals in varying manners, the court noted that the Supreme Court holds, "'[a]n individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person.'" *Id*. at 175. (*quoting Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 199 (2002)). The court stated that "[i]n general, unsupported self-serving statements by the plaintiff regarding the severity of a disability are insufficient to preclude summary judgment in the ADA case." *Id*. Denying the employer's motion for summary judgment on the ADA claim, the court held that the evidence raised a general issue of material fact as the former employee's personal assertions were corroborated by medical records and testimony of the employee's doctor that the employee's fibromyalgia substantially limited the major life activities of sleeping and lifting. *Id.* at 177-78. *See also Bragdon*, 524 U.S. at 631-35 (Court reviewed evidence of insurmountable effects of human immunodeficiency virus in determining that it substantially limited the major life activity of reproduction).

Therefore, to support a disability claim pursuant to section (A) of the ADA's disability definition, an individual must produce evidence that an impairment substantially limits a specific life activity and not merely limits the individual under certain circumstances.

During deposition, Mr. Baker claimed that he is substantially limited in a "variety of major life activities," but could not specify any particular category of activity. (R. at 9). Even if Mr. Baker had identified a major life activity, he lives a fairly normal life and shows no signs that his weight has limited him in any substantial manner. Mr. Baker has a healthy family and, despite a lack of a post-secondary education, Mr. Baker has been able to successfully secure a position as a financial consultant with a national financial institution. (R. at 9). Further, Mr. Baker has stated that, despite few minor health difficulties, he considers himself to be a fairly healthy individual. (R. at 3). Thus, Mr. Baker's ADA claim fails, as he is unable to point to any specific major life activities affected by his weight.

Although he has not previously cited any specific major life activities to which he is substantially limited, based on the events leading to this claim, Mr. Baker may allege that he is limited in his ability to sit. However, unlike the terminated employee in *Harding*, Mr. Baker has not produced any evidence indicating the character or degree to which his weight limits his ability to sit. *See* 436 F. Supp. 2d at 177-78. Such an evidential showing is imperative when the allegedly limiting condition is one that varies widely in the extent to which it affects inflicted individuals, as is the case with obesity. *See Id.* at 175. Without evidence supporting the extent of his limitations, Mr. Baker's claims are more like those in *Nedder*, where the terminated employee's ADA claim failed as she was only able to establish a limited number of circumstances under which her ability to walk was limited. *See* 908 F. Supp. at 73 Similarly, the event that transpired at the Fro-Zone, only establishes that Mr. Baker's ability to sit is affected when he attempts to sit in seats designed to facilitate children. *See Id.*; (R. at 4). Other than this limited circumstance, Mr. Baker offers no other situations under which his ability to sit is

hindered. Such a limited showing fails to establish that Mr. Baker is substantially limited in his ability to sit.

Mr. Baker may also allege that his sleep, which is affected by his sleep apnea, is a major life activity that his weight substantially limits. However, Mr. Baker has failed to produce any evidence supporting a causal connection that establishes that his sleep apnea is the result of his weight. The Mayo Clinic's Foundation for Medical Education and Research lists an array of potential causes for sleep apnea, including: being male, being older, high blood pressure, neck circumference, a narrowed airway, weight, a family history of sleep apnea, use of alcohol, sedatives, or tranquilizers, smoking, heart disorders, stroke or brain tumor, neuromuscular disorders, or high altitude. *See* The Mayo Foundation for Medical Education and Research, http://www.mayoclinic.com/health/sleep-apnea/DS00148/DSECTION=4 (last visited Oct. 7, 2006). Further, Mr. Baker has received treatment from both a sleep clinic and a family doctor for his disorder. (R. at 3). Based on this treatment, it can be assumed that if Mr. Baker's sleep apnea was caused by his weight, he would easily have been able to produce medical testimony supporting the causal link. Without such evidence, any claim that Mr. Baker's weight affects the major life activity of sleeping must fail, as one can not be any more certain that Mr. Baker's inability to sleep is caused by his weight than any of the numerous other potential causes.

Therefore, as Mr. Baker is unable to establish that his weight substantially limits a major life activity, this Court should find that Mr. Baker's condition does not constitute a disability afforded protection under the ADA. Moreover, as Mr. Baker has additionally failed to establish a physiological cause for his obesity, this Court should affirm the Fifteenth Circuit's holding that Mr. Baker's obesity is not an impairment as defined by the ADA and, as such, Mr. Baker cannot

be afforded the requested relief because the Fro-Zone is not subject to the requirements set forth in the ADA and Title III of that statute.

B. Mr. Baker's obesity does not constitute a statutorily-covered disability because the Fro-Zone did not regard the impairment as physiologically-based or substantially limiting to a major life activity.

An individual may also establish discrimination under the ADA by showing that they have been "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C). The EEOC has interpreted the phrase "regarded as having such an impairment" to mean that an individual:

> "(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> "(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> "(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment."

29 C.F.R. § 1630.2(l).

Interpreting the "regarded as" definition, the Court in *Sutton* established two ways in which an individual may fall within the statutory definition: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) when a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more life activities." 527 U.S. at 489. The Court noted that '[i]n both cases it is necessary that a covered entity entertains misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." Id. The Court noted that, standing alone, the allegation that a respondent recognizes

a disability does not establish a claim that the respondent regards the petitioner as substantially limited in a major life activity. *Id.* at 490.

Simplifying the discrimination analysis under the "regarded as" definition, the court in *Fredregill v. Nationwide Agribusiness Ins. Co.*, 992 F. Supp. 1082, 1085-86 (S.D. Iowa 1997), fashioned a two-part inquiry for determining if an individual has been regarded as having an impairment. In *Fredregill*, an employee claimed that his employer discriminated against him because of his weight, resulting in his failure to receive a promised job and subsequent demotion. *Id.* at 1084. The court held that it was not enough that the company perceived the employee as obese or took the employment action because he was obese. *Id.* at 1088. Rather, the employee was required to establish both that the company "regarded him as having (1) a physical impairment within the meaning of the ADA, which (2) substantially limited him in [a major life activity]." *Id.* at 1088-89. Addressing the first prong of this analysis, the court reiterated that the term physical impairment as defined by the ADA requires an obese individual to establish a physiological cause for their condition. *Id.* at 1089. The employee's discrimination claim failed, as he was unable to produce any evidence that, although his employer regarded him as overweight, the employer had regarded his weight as physiologically based or as substantially limiting his ability to work. *Id.* at 1091.

As an individual's perception is difficult to prove, direct evidence that the individual alleging discrimination was perceived as having a physiologically based and substantially limiting impairment is essential to the "regarded as" analysis. For example, supporting evidence allowed the First Circuit in *Cook*, 10 F.3d at 19-21, to address a case factually similar to *Fredregill* and reach the opposite result, holding that the an employer's actions indicated that the

applicant was regarded as having a substantially limiting impairment. The applicant in *Cook* was able to produce evidence that the employer had perceived her obesity as a physical impairment that would substantially limit her ability to work. *Id*. at 23. The record revealed that, despite the employer's knowledge that a physical examination of the applicant revealed that her physiologically-based morbid obesity would not impair her ability to successfully perform her duties, the employer clearly stated that the decision not to offer employment was based solely on the perception that the applicant's weight would impede her abilities. *Id*.

Thus, it is not enough that a petitioner merely establishes that he was viewed by the respondent as overweight. Rather, by contrasting the opposite results reached by the courts in *Cook* and *Fredregill,* it is apparent that direct evidence that the respondent regarded the petitioner's obesity as physiologically-based and substantially limiting to a major life activity is essential to successfully proving discrimination under the ADA's "regarded as" prong. *Id.*; 992 F. Supp. at 1091. Without evidence that Mr. Musgrave, acting on behalf of the Fro-Zone, perceived Mr. Baker as suffering from a physiologically-based impairment that substantially limited a major life activity, Mr. Baker's discrimination claim must fail under the "regarded as" analysis.

Here, like the petitioner in *Fredregill*, Mr. Baker has produced no evidence that Mr. Musgrave either perceived his weight as physiologically-based or substantially limiting to a major life activity. *See* 992 F. Supp. at 1091. This Court must bear in mind that the purpose of the Fro-Zone is to provide an activity for the children of Manitou and the seats, in accordance with this objective, are designed to accommodate children waiting to take the ice. With this design in mind, it is highly conceivable that adults would have difficulty perching comfortably in

the Fro-Zone's seats. Mr. Baker was treated in the same manner and given the same options as any of the other adults that found the facility's amenities uncomfortable or inconvenient.

Therefore, as Mr. Baker has failed to establish that the Fro-Zone perceived his weight as a physiologically-based impairment that substantially limited his ability to perform major life activities, this Court should affirm the Fifteenth Circuit's holding that Mr. Baker's obesity is not an impairment as defined by the ADA and, as such, Mr. Baker cannot be afforded the requested relief because the Fro-Zone is not subject to the requirements set forth in the ADA and Title III of that statute.

IV. EVEN IF MR. BAKER IS DISABLED, THE FRO-ZONE HAS NOT DISCRIMINATED AGAINST HIM IN VIOLATION OF THE ADA, AS THE FACILITY IS NOT A PUBLIC ACCOMMODATION COVERED BY TITLE III.

Title III of the ADA expressly prohibits discrimination against disabled individuals in a private entity that is held to be a public accommodation. Specifically, 42 U.S.C. § 12182(a), provides in pertinent part:

> No individual shall be discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations by any person who owns, leases (or leases to) or operates a place of public accommodation.

Further, 42 U.S.C. § 12181(7) (2006), includes an exhaustive, not merely exemplary or illustrative, list of private entities which are considered "public accommodations," including at issue here "a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. § 12181(7)(L). If a facility does not fall within one of the categories, it is not considered a public accommodation. 28 C.F.R. § 36.104 (2006). Additionally, a place of public accommodation must be used for non-residential purposes and its operations must affect commerce. *Id.*

The issue of whether a facility was a "public accommodation" pursuant to Title III was explored in *Jankey v. Twentieth Cent. Fox Film Corp.*, 14 F.Supp.2d 1174 (C.D. Cal. 1998). In that case, the plaintiff alleged that the denial of access to the commissary, the studio store, and an ATM machine on the defendant film studio's private lot constituted a violation of Title III of the ADA, as such facilities were public accommodations a defined by the statute. *Id*. at 1179. Granting the film studio's motion for summary judgment, the court held that all three facilities were not public accommodations, stating that, "[t]he determination of whether a facility is a 'public accommodation' for purposes of coverage by the ADA...turns on whether the facility is open 'indiscriminately to other members of the general public.'" *Id*. at 1178 (*interpreting* 42 U.S.C. § 12181). According to the court, "occasional use of an exempt commercial or private facility by the general public is not sufficient to covert that facility into a public accommodation under the ADA." (*citing Kelsey v. Univ. Swim Club of Orlando*, 845 F. Supp. 1526, 1529 (M.D. Fla. 1994). The court determined that the facilities were not public accommodations because the facilities were located on a private lot that was not open to the general public, the primary purpose of the facilities was to benefit particular individuals, the studio only occasionally rented the commissary and studio store to the public outside of business hours and such use was discriminatorily reviewed, and the facilities were not a profitable venture. *Id*. at 1181-84.

Additionally, even if a facility is a public accommodation as defined by Title III, the failure to make reasonable modifications to ensure the inclusion of disabled persons does not always constitute discriminatory conduct. In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 667-69 (2001), a golfer alleged discrimination under Title III of the ADA after the PGA refused to allow him to use a golf cart to facilitate a degenerative circulatory disorder that significantly impaired

his ability to walk for the distance or duration required in a golf tournament. Addressing the PGA's claim that permitting a golfer to use a cart would give that golfer a stamina advantage that would fundamentally alter the golf tournament, the Court reviewed the provisions of Title III, noting that determining whether a requested modification is "reasonable" requires an inquiry as to whether it would "fundamentally alter the nature" of the goods, services, facilities, privileges, advantages, or accommodations. *Id.* at 682-83. (*interpreting* 42 U.S.C. § 12182(b)(2)(A)(ii)). The Court noted that a finding that the fundamental nature of the entity would be altered would exempt that entity from the obligation to make requested modifications. *Id.* Affirming the Ninth Circuit's entry of a permanent injunction permitting the golfer to use a cart, the Court held that in this situation the cart offered no stamina advantage because the golfer was still required to walk in excess of a mile, a distance that, considering the rigors associated with his disability, placed a comparable strain on the participant's body. *Id.* at 688, 690. As such, the modification did not fundamentally alter the nature of the tournament. *Id.* at 690

Therefore, to constitute a public accommodation as defined by Title III, a facility must be open indiscriminately, not merely occasionally, to the general public. However, even if a facility is deemed to be a public accommodation, it is exempt from Title III coverage if a requested modification would fundamentally alter the nature of that entity.

Applying the *Jankey* court's public accommodation analysis, it is clear that the Fro-Zone hockey facility is a private entity and not a public accommodation subject to the regulation of Title III. Similar to the commissary, studio store and the ATM machine, the hockey facility was not open indiscriminately to the general public. Rather, the primary purpose of the hockey facility is to provide a benefit to particular individuals. *See Id.* at 1181. Mr. Musgrave designed

and built the Fro-Zone with the purpose of providing his son, an avid hockey fan, with a place to enjoy the sport and to provide the children of the surrounding area with an opportunity to enjoy a sport not otherwise offered by the local school system. (R. at 13). The facility was built with this explicit purpose in mind and not to benefit the general public. This purpose is evidenced by the fact that the design of the facility was built to accommodate the children and not the public. The seats are designed so that children waiting to play have a place to sit. (R. at 4). Additionally, the restrooms are not available to the general public, but are rather are situated under the stadium seats and are accessible only from the ice. *Id*. Moreover, there are no locker rooms, concession stands, meeting rooms or other accommodations that are standard amenities at facilities that are intended for public use. *Id*.

Although Mr. Musgrave permits extremely limited use of the facility by adult recreational leagues, the use is similar to the occasional public use of the film studio facilities in *Jankey*, which did not disqualify that facility from Title III exemption. *See* 14 F. Supp.2d at 1181-83. The court in *Jankey* ruled that the occasional renting of the commissary and studio store to the general public did not convert the facilities to public accommodations as such use was only occasional, outside of business hours, and was discriminatorily reviewed by the studio owner. *See Id.* Similar to the commissary and the studio store, the use of the Fro-Zone by adult leagues is described in the record as "occasional." (R. at 13). Further, the circumstances under which the hockey facility was rented are analogous to those under which the film studio's facilities were made available to the public. *See Id*. The Fro-Zone was also made available only outside of operating hours, as it was rented during nights and weekends, times that the children

did not use the facility, and such use was discriminatorily reviewed by Mr. Musgrave, as he allowed only his friends and acquaintances to utilize the facility. (R. at 4).

Further, even if the Fro-Zone is deemed to be a public accommodation as defined by Title III, it is exempt from making the modification requested by Mr. Baker because such a modification would fundamentally alter the nature of the Fro-Zone. The modification requested by Mr. Baker is dissimilar to the request made in *PGA Tour, Inc.*, where the modifications did nothing to alter the nature of the golf tournament. *See* 532 U.S. 690. Requiring the Fro-Zone to alter its seating would fundamentally change the nature of the services and accommodations provided by the by the hockey facility. As previously stated, the purpose of the Fro-Zone is to provide Mr. Musgrave's son and the other local children with a place to play hockey. The facility has been designed with this purpose in mind. (R. at 4). Treating the Fro-Zone as a public facility would drastically change the rink's explicit, singular fundamental purpose. Seats designed for children would have to be replaced with seating for larger adults. (R. at 4). Additionally, as the restrooms are accessible only from the ice, a design implemented for the benefit of the children using the ice, it can be implied that this amenity will also have to be altered to service the public. (R. at 4). As such, requiring the Fro-Zone to make the requested changes will fundamentally alter a facility designed to accommodate children, as the convenience that helped to serve this specific purpose will be destroyed.

The sole purpose of the Fro-Zone is to benefit the children of Manitou by providing them with a facility that they can enjoy an activity not provided by the local school system; its operations are not open indiscriminately to the general public at large and, therefore, it is not a public accommodation. Further, the Fro-Zone is exempt from making the modifications

requested by Mr. Baker, as they will fundamentally alter the facility's ability to serve the aforementioned purpose. As such, this Court should reverse the Fifteenth Circuit's holding that the Fro-Zone is a public accommodation subject to the guidelines of Tile III and should find that it is not required to make the requested modifications.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm both the Fifteenth Circuit's findings that obesity is not an impairment under the ADA and the holding that the Fro-Zone did not regard the Petitioner as suffering from a disability, and reverse the Fifteenth Circuit's decision that Fro-Zone is not a facility exempt from the requirements of Title III.

Respectfully submitted,

Applicant ID. #21 - Group 2
Counsel of Record
Clifton Avenue and Calhoun Street
Cincinnati, OH 45221

DATED:_____ _____

Applicant #21

CERTIFICATE OF SERVICE

The foregoing brief was served upon Attorney for the Petitioner on the 9th day of October, 2006, at the following address:

Petitioner's Attorney, Esq.
Clifton Avenue and Calhoun Street
Cincinnati, OH 45221

DATED:_____ _____
Applicant #21

APPENDIX

STATUTORY PROVISIONS:

28 U.S.C. § 1254

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

42 U.S.C. § 12101(b):

"Congressional findings and purposes

(b) Purpose. It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."

42 U.S.C. § 12102(2)

"As used in this Act:

(2) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment."

42 U.S.C. § 12181(7)

"As used in this title [42 USCS §§ 12181 et seq.]:

(7) Public accommodation. The following private entities are considered public accommodations for purposes of this title [42 USCS §§ 12181 et seq.], if the operations of such entities affect commerce—

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation."

42 U.S.C. § 12182(a)

"Prohibition of discrimination by public accommodations

(a) General rule. 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."