No. UC-SUP 2006
IN THE SUPREME COURT
OF THE UNITED STATES

_____

HENRY BAKER,

Petitioner,

v.

FRO-ZONE YOUTH HOCKEY RINK,

Respondent.

_____

On Writ of Certiorari to the
United States Court of Appeals for the Fifteenth Circuit

_____

BRIEF OF RESPONDENT

_____

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QUESTIONS PRESENTED

I. Whether the Fro-Zone Youth Hockey Rink is a public accommodation that under Title III of the Americans with Disabilities Act must provide an additional amount of seating for usage by disabled individuals?

II. Whether Henry Baker's obesity qualifies as a disability or a perceived disability under the Americans with Disabilities Act?

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STATEMENT OF JURISDICTION

The judgment of the Fifteenth Circuit Court of Appeals in this case was entered on August 22, 2006. The petition for Writ of Certiorari was granted by this Court on September 1, 2006. The jurisdiction of this Court is found in 28 U.S.C. § 1254(1) (2005).

STATEMENT OF THE CASE

Statement of Facts

Respondent, Fro-Zone Youth Hockey Rink ("Fro-Zone") is a small ice skating facility that is owned and operated by Thomas K. Musgrave ("Musgrave") (R. at 4.) Musgrave built this rink to provide his son and other local children the opportunity to play the sport of ice hockey. *Id.* For the small fee of $500, Musgrave is able to offer the children the use of the rink for the entire school year and to provide them with hockey pads, safety gear, and personalized jerseys. *Id.* The facility was designed to seat approximately 120 people, for the main purpose of allowing children a place to sit while waiting to play. *Id.* Additionally, this seating has been used by relatives of the children in order to watch a game. *Id.* Even though Musgrave allows a few of his acquaintances to use Fro-Zone for adult games, this rink was not built for public events and it lacks such amenities as locker rooms and concessions stands that a typical public rink would have. *Id.*

Petitioner, Henry Baker ("Baker"), is 32-years-old, 5'10" tall and currently weighs 310 pounds. *Id.* at 3. In high school, Baker weighed a mere 185 pounds and was an all-state defensive back for his school football team. *Id.* Regrettably, at age 23 Baker suffered a serious knee injury during a pick-up basketball game. *Id.* Since that event, Baker has not maintained a consistent exercise program, which has resulted in his current weight. *Id.* Despite the extra pounds, Baker considers himself a fairly healthy individual. *Id.* While Baker does suffer from

sleep apnea, nothing in the record indicates that this is a result of his extra weight. Even though his parents have been diagnosed as morbidly obese, Baker does not believe their health problems have been passed onto him. *Id.* In addition, these weight problems have not been passed down to Baker's two healthy children who are very active in sports. *Id.*

In the summer of 2005, Baker's son Kirby participated in a hockey camp at Musgrave's rink. *Id.* On July 12, 2005, Baker visited the rink to watch his son play a game, but he was unable to sit comfortably in the stadium seats due to his girth. *Id.* Baker then asked the coaches if there was any other place he could sit down to watch the game. *Id.* He was then told that the only other seating in the entire rink was in the player's box, and he would need to wear proper safety gear to sit there. *Id.* The next day, Baker returned to the rink and explained his uncomfortable seating situation to Musgrave. *Id.* Musgrave suggested that Baker could stand and watch the game if the seats were too uncomfortable, but Baker found this alternative unsuitable. *Id.*

Procedural Background

Petitioner appears before this Court in Case No. UC-SUP 2006 on appeal of the decision rendered by the Fifteenth Circuit Court of Appeals on August 22, 2005, which held that the District Court incorrectly determined that Respondent was not an exempt facility under Title III of the American with Disabilities Act ("ADA"). *Id.* The Court of Appeals found that Respondent was in fact governed by Title III and thus could be required to alter the building's structure to accommodate a disabled individual. *Id.* However, the Fifteenth Circuit Court of Appeals also held that the District court correctly determined that Petitioner's obesity did not constitute a disability under the ADA because his obesity was not an impairment as defined by statute and Respondent did not regard Petitioner as suffering from a disability. *Id.* at 2.

SUMMARY OF THE ARGUMENT

This Court should affirm the Court of Appeals' decision holding that Petitioner's obesity did not constitute a disability under the ADA. Petitioner does not possess a physical impairment that substantially limits a major life activity and he was never regarded as disabled by Respondent. Further, this Court should reverse the Fifteenth Circuit Court of Appeals' decision that held Respondent was a facility governed by Title III of the ADA. Respondent's facility is not a place of public accommodation and even if it was, Petitioner's use of the facility does not entitle him to the relief he seeks.

Petitioner's claims should fail because Petitioner's obesity does not qualify as a disability. First, Petitioner's obesity is not a physical impairment as defined by regulation. Petitioner's large weight is simply the result of failing to exercise after an injury and is not the result of a physiological condition. Second, Petitioner's current weight has not affected any major life activity. In fact, Petitioner himself states that he is a fairly healthy individual. Third, even if a major life activity of Petitioner has been afflicted by his weight, such an effect is certainly not considerable enough to rise to the level of "substantial limitation." Finally, Petitioner's failure to prove his disabled status cannot be saved by the way he was perceived by Musgrave. Musgrave had no misconceptions about Petitioner's weight status and simply suggested that he stand if the seating was too uncomfortable.

Even if Respondent possesses a disability under the ADA, Respondent's facility is a private hockey club that is exempt from ADA compliance. Musgrave built this rink, practically in his own back yard, to allow his son and other local children to play ice hockey. Much like an owner of a backyard pool, Musgrave keeps a very close eye on those he allows to use the facility. Musgrave operates the facility as non-profit, he does not solicit or advertise for business, and he

only allows club members and the occasional family guest into the building. This rink was not created to be a public arena in which to watch exhibition hockey games and Respondent should not be forced to accommodate Petitioner's request for such a purpose.

Even assuming that Respondent's ice rink is a public accommodation, such a designation is limited to the rink itself. Therefore, Petitioner must show that the seating facility falls under the ADA on its own merits. After examining the infrequent use of the seating facility in which only relatives of the players have been given limited access, it is clear that this area is not a place of public accommodation. In addition, Petitioner is neither a client nor a customer of the ice rink itself and his use of the facility falls outside the scope of ADA compliance.

For these reasons, Respondent respectfully requests that this Court affirm the Fifteenth Circuit Court of Appeals' decision that Petitioner is not a disabled individual and reverse the Court of Appeals' decision that that Respondent is governed by Title III of the ADA.

ARGUMENT

I. PETITIONER IS NOT ENTITLED TO RELIEF UNDER THE AMERICANS WITH DISABILITIES ACT BECAUSE HIS OBESITY DOES NOT QUALIFY AS A DISABILITY, NOR WAS HE PERCEIVED AS DISABLED BY RESPONDENT.

Title III of the Americans with Disabilities Act ("ADA") states the general rule that "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) (2005) (emphasis added). The term "disability" is defined by federal statute 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)

(2005). Since there is no indication that Petitioner has "a record" of an impairment separate from the current impairment at issue in this case, Petitioner must prove that his obesity either falls within the statutory definition of § 12182(A) or § 12182(C) to maintain this action. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1120-21 (5th Cir. 1998) (stating that to make out a claim for discrimination based on having a record of an impairment, the plaintiff must show that at some time in the past, he was classified or misclassified as having a mental or physical impairment that substantially limited at least one major life activity).

A. PETITIONER'S OBESITY IS NOT A PHYSICAL OR MENTAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE OF HIS MAJOR LIFE ACTIVITIES.

In determining whether an individual has a disability under subsection (A) of § 12102(2), the Supreme Court has laid out a three-step test: (1) Does the individual suffer from a physical or mental impairment? (2) Does that impairment affect a major life activity? and (3) Does the impairment substantially limit that major life activity. *See Bartlett v. New York State Bd. of Law Examiners*, 226 F.3d 69, 79 (2d Cir. 2000) *citing Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). Applying these three steps to the case at hand, it is clear that Petitioner's obesity does not constitute a protected disability under the ADA. *See, e.g., Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995) (finding that plaintiff's obesity was not a disability under the ADA).

1. Petitioner's obesity is not a physical or mental impairment.

According to Federal regulations, the phrase "physical or mental impairment" is defined as:

> [A]ny *physiological disorder or condition*, cosmetic disfigurement, or anatomical loss *affecting one or more of the following body systems*: (1) neurological; (2) musculoskeletal; (3) special sense organs; (4) respiratory, including speech organs; (4) cardiovascular; (5) reproductive; (6) digestive; (7) genitourinary; (8) hemic and lymphatic; (9) skin; and (10) endocrine;
> 28 C.F.R. § 36.104 (1991) (emphasis and numbering added).

In addition, the same federal regulation also provides that:

> [T]he phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.
> *Id.*

In determining whether a certain condition is in fact a physical or mental impairment, it is important to distinguish between physical, psychological, environmental, cultural and economic characteristics that are not impairments. *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997), 29 C.F.R. app. § 1630.2(h) (1992). A physical characteristic that is not the result of a physiological disorder is not considered an "impairment" and hence is not a disability. *Id.* Therefore, conditions affecting "height, *weight*, or muscle tone" cannot be defined as a disability unless they are the result of a physiological disorder. *Cassista v. Community Foods, Inc.*, 5 Cal. App. 4th 1050, 1064 (Cal. 1993) *citing* 29 C.F.R. app. § 1630.2(h), *see also*, S. REP. NO. 101-116, pt. 2, at 22-23 (stating that other physical characteristics which would not be covered include hair or eye color, height and muscle tone).

Further, the legislative history of the ADA indicates that this act does not cover physical characteristics such as weight. *See* Andrea M. Brucoli, Comment, *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals: Morbid Obesity as Protected Disability or an Unprotected Voluntary Condition*, 28 GA. L. REV. 771, 804 (1994), *see also* 29 C.F.R. app. § 1630.2(j) (1992) (stating that "except in rare circumstances, obesity is not considered a disabling impairment"). In *Francis v. City of Meriden*, 129 F.3d 281 (2d Cir. 1997) the Second Circuit held that "obesity, *except in special cases where the obesity relates to a physiological disorder*, is not a 'physical impairment' within the meaning of the statutes." *Id.* at 286 (emphasis added). Additionally, the Sixth Circuit has declined to extend ADA protection to

all "abnormal" physical characteristics, such as abnormal weight, because doing so would frustrate the central purpose of the statutes. *E.E.O.C. v. Watkins Motor Lines, Inc.*, 2006 WL 2597344, *5 (6th Cir. 2006) (stating that any other interpretation would wrongfully suggest that any physical abnormality, such as being extremely tall or short would be ADA impairment).

In the case at hand, Petitioner's alleged disability of obesity is not the result of physiological condition. First, none of Petitioner's "body systems" has been affected by his weight pursuant to 28 C.F.R. § 36.104. Petitioner's additional weight is far from being in the same vein as a neurological, reproductive, or endocrine disorder. Second, it should be noted that "obesity" is not included among the suggested list of physiological conditions in § 36.104. Third, at issue in this case is the plaintiff's weight, a physical characteristic that is heavily influenced by non-physiological factors.

While it cannot be completely ascertained from the record, Petitioner's large weight is most reasonably explained as a combination of his environment and his own conduct. Petitioner was not overweight until after he injured his knee. Since that injury, Petitioner acknowledges that he has not maintained a regular exercise regime and his weight has slowly increased over time. Without proper diet and exercise, almost anyone could reach the weight of Petitioner, regardless of their physiology. As the case law holds, just because Petitioner's weight is "abnormally" high, does not give him a disabled status under the ADA.

Finally, even if this court assumes that Petitioner's morbidly obese parents have a physiological condition, Petitioner himself states that these health concerns have not been passed down to him genetically. This condition is clearly not an immutable one because Petitioner, a previously healthy high school athlete, has not always struggled with weight issues and it stands to reason that with the proper diet and exercise, Petitioner could have full control over this

matter. He even states that he considers himself "a fairly healthy individual" and acknowledges that both of his children have not exhibited any problems that could be considered a physiological condition.

For these reasons, Petitioner's obesity does not meet the required definition of a "physical or mental impairment" and is therefore not a disability under the ADA.

2. Petitioner's obesity does not affect a major life activity.

Even assuming *arguendo* that Petitioner's extra weight is a physical impairment, he must also show that that this impairment affects a "major life activity" to fall within the ADA's protection. *See* 42 U.S.C. § 12182(a). Federal regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 36.104. Although this is not an exhaustive list of major life activities, it is highly illustrative. *Bragdon v. Abbott*, 524 U.S. 624, 638-639 (1998). This court has stated that "major life activities" refers to those activities that are of central importance to daily life. *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 197 (2002). In defining these activities, Congress did not intend everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled. *Id.* (stating that the figure of 43 million people with disabilities mentioned in 42 U.S.C. § 12101(a)(1) (2005) would have been much higher if such was the case). Simply put, "major life activities" are the fundamental functions central to the life process itself. *See Land v. Baptist Medical Center*, 164 F.3d 423, 424 (8th Cir. 1999).

In the current case, Petitioner has failed to prove that his weight affected any major life activity. He has no problem caring for himself and can perform all the functions central to the life process such as walking, seeing, and hearing. Petitioner may argue that sleeping is a major

life activity and that his sleep apnea has affected that activity. While sleeping may fall within the definition of a major life activity, this is irrelevant because nothing in the record indicates that Petitioner's sleep apnea is a result of his increased weight.

This is not a case where Petitioner is unable to walk properly or care for himself due to his large size. He simply has an additional medical condition that strikes people of all shapes and sizes. Petitioner must not be allowed to supercede the ADA requirement of possessing a disability that affects a major life activity. The effect of his obesity, and not a collateral condition, must be the focus of this case

Petitioner may also argue that "sitting" is a major life activity that has been impaired by his weight. This argument is flawed because Petitioner does not have a problem with the activity of "sitting" in general; he simply has a problem fitting into one particular seat. If Petitioner could not sit down at all or often had a hard time doing so, this would be a different matter. However, nothing in the record indicates that Petitioner's ability to sit in general has been affected by his weight in any way.

Since Petitioner's obesity itself has not affected any major life activity, he does not fall within the ADA's protection as a disabled individual.

3. Petitioner's obesity does not substantially limit any major life activity.

Finally, even if Petitioner's condition is a physiological one that affects a major life activity, that effect must rise to the level of substantially limitation. *See* 42 U.S.C. § 12102(2). Federal regulation has defined the term "substantially limits" as:

> [U]nable to perform a major life activity that the average person in the general population can perform; . . . or 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.

In addition, the factors that should be considered in determining whether or not there is a substantial limitation are "(1) The nature and severity of the impairment, (2) the duration or expected duration of the impairment and (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id., Toyota,* 534 U.S. at 196.

This Court has stated that to rise to the level of substantial limitation, the effect must be "considerable" or "to a large degree" and that impairments which interfere in only a minor way or result in a "mere difference" from normal activity are precluded from the protection of the ADA. *See Id.* at 196-197. The impairment's impact must also be permanent or long term. *See Id.* at 198, *citing* 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii) (2001). Finally, the ADA requires that Petitioner prove that the extent of the limitation is substantial in terms of his own experience. *See Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555, 567 (1999) (holding that monocular vision is not invariably a disability, but must be analyzed on an individual basis, taking into account the individual's ability to compensate for the impairment).

In the case at hand, Petitioner's alleged physiological condition has not substantially affected any major life activity. Even assuming *arguendo* that Plaintiff's obesity is a physiological condition, that this condition resulted in Petitioner's sleep apnea, and that sleeping is considered a major life activity, nothing in the record indicates that Petitioner's sleep schedule has had a considerable, major impact on his life. After applying the factors that define "substantial limitation" it is clear that Petitioner's condition does not rise to the required level.

While Petitioner's sleep may often be affected by his condition, there is no indication that the effect is severe enough to prevent him from getting adequate sleep nor is there an indication that his condition is permanent or that it will result in any long-term impacts. If in fact

Petitioner's sleep apnea is tied to his weight, it stands to reason that if Petitioner resumed his previous work-out regime and lowered his weight, his sleep apnea could disappear altogether. While it is unfortunate that Petitioner suffers from such a condition, he admirably deals with it and lives a relatively normal life.

Likewise, if Petitioner's ability to sit is assumed to be an affected major life activity, the fact that Petitioner cannot fit in a single chair does not rise to the required level for ADA protection because there are no other instances in the record of Petitioner being unable to sit properly. The fact that a single chair is uncomfortable to Petitioner can hardly be said to constitute a substantial limitation on his ability to sit.

Plaintiff has therefore failed to prove that in his particular case, his condition has affected him in such a way as to rise to the level of "substantial limitation."

B. PETITIONER WAS NEVER PERCEIVED AS DISABLED BY RESPONDENT.

In *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) this court explained that in order to be perceived as disabled, it is necessary that a covered entity entertain misperceptions about the individual, either believing that the person has a substantially limiting impairment that when there is none or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. *Id.* at 489. Congress included the "perceived disabilities" concept of § 12102(2)(C) in order to protect individuals, not possessing a disability, from being treated as if they had an impairment that substantially limited a major life activity. *See Cook v. State of R.I., Dept. of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 25 (1st Cir. 1993). More particularly, this concept was included to protect individuals who are denied employment based on misperceptions about their ability. Brucoli, *supra*, at 778, *see also E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Hawaii 1980) (suggesting that Congress added the perceived

disability protection because a discriminated individual could gain little consolation from the fact that the employer was wrong about his ability).

The Equal Employment Opportunity Commission has promulgated federal regulations that state in order to be perceived as disabled, an individual must either: (A) have an impairment that does not substantially limit a major life activity but that is treated by as such, (B) have an impairment that substantially limits a major life activity, but only as a result of other's attitudes toward the impairment, or (C) have no impairment but is nonetheless treated by as having an impairment. 45 C.F.R. § 84.3(j)(2)(iv) (1990). For example, in *Cook v. State*, the First Circuit addressed a case in which the plaintiff, who had passed an employer's pre-hire physical examination, was not hired solely on the ground that her weight put her at greater risk of developing serious ailments such as heart disease. 10 F.3d at 21. The court in that case found that plaintiff had been wrongfully discriminated against because she was treaded as if she had a disability when she did not and she was otherwise qualified for the job. *Id.* at 27, *see also Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987) (holding that those accused of possessing a contagious disease, without a determination of whether they were otherwise qualified to perform a job, would be vulnerable to discrimination on the basis of mythology and that was precisely the type of injury Congress sought to prevent).

Petitioner's reliance in this case on a theory of perceived disability is greatly misplaced. First, it is clear that this theory was intended to apply to prevent people from being discriminated against based on untrue misconceptions. In the case at hand Musgrave possessed no misconceptions about Petitioner's weight. Musgrave did not, for example, tell Respondent that he could not sit in the chair because he appeared too big for it. Second, the concept of perceived disability has almost exclusively been limited to employment discrimination and is therefore

irrelevant to the situation at hand. Musgrave simply stated to Petitioner that if the seating was too uncomfortable for him, he could stand and watch the game instead. There was no evaluation of Petitioner's ability to sit and certainly no offer of employment to be a game spectator. Musgrave simply offered an alternative to Petitioner, just as he would have if a person of normal weight approached him and complained that the seats did not have enough cushioning or were too uncomfortable.

For these reasons, it is clear that Petitioner was never regarded as being disabled by Respondent and therefore is not subject to ADA protection.

II. RESPONDENT'S FACILITY IS NOT A PLACE OF PUBLIC ACCOMMODATION THAT MUST PROVIDE SEATING FOR DISABLED INDIVIDUALS UNDER TITLE III OF THE AMERICANS WITH DISABILITIES ACT.

As previously stated, Title III of the ADA states the general rule that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation. . . ." 42 U.S.C. § 12182(a). However, the ADA does not apply to private establishments or clubs. *See* 42 U.S.C. § 12187 (2005). In addition, "mixed use" facilities can exist in which only a portion of the facility is considered a "public accommodation" subject to the ADA. *Jankey v. Twentieth Century Fox Film Corp.*, 14 F.Supp.2d 1174, 1178 (C.D. Cal. 1998). It is also clear that a disabled individual should be a client or customer of the covered public accommodation in order to force compliance with the ADA. 42 U.S.C. § 12182(a), *c.f. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 662 (2001) ("Martin II") (discussing whether competing golfers are members of the class protected by Title III).

A. **RESPONDENT'S FACILITY IS A PRIVATE CLUB AND IS THEREFORE EXEMPT FROM COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT.**

In determining whether a facility is a private club or a public accommodation, one must first define the nature of the entity. *Martin v. PGA Tour, Inc.*, 984 F.Supp. 1320, 1324 (D. Or. 1998) ("Martin I"). Under the ADA, there are twelve categories in which a private facility could be considered a public accommodation, including "an auditorium, convention center, lecture hall, or other *place of public gathering*" and "a gymnasium, health spa, bowling alley, golf course, or other *place of exercise or recreation*." 42 U.S.C. § 12181(7) (emphasis added). If a private entity does not fall within one of those categories, it is not subjected to ADA requirements. *See Stoutenborough v. Nat'l Football League,* 59 F.3d 580, (6th Cir. 1995), cert den (US), 116 S.Ct. 674.

Further, if an entity is considered a private club or establishment, it is exempt from ADA compliance. 42 U.S.C. § 12187, *see also* 42 U.S.C. § 2000a(e) (2005) (stating that "The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public. . ."). In defining what a "club" means, the Fifth circuit has stated that:

> [O]ne rarely abandons the path of logic and commonsense when Webster is consulted for the precise meaning of a term. . . Webster's Third International Dictionary of the English Language offers the following definition at pg 430: *Club* - an association of persons for social and recreational purposes or for the promotion of some common object. . .
> *Quijano v. Univ. Federal Credit Union,* 617 F.2d 129, 131 (5th Cir. 1980).

Specifically, federal law has held there are seven factors that should be used in determining whether an organization is a bona fide private club, including: (1) The selectivity of the group in admitting members, (2) memberships control, (3) the history of the organization, (4) the use of the facilities by nonmembers, (5) the purpose of the club, (6) whether the club advertises for members, and (7) whether the club is nonprofit. *United States v. Lansdowne Swim Club*, 713

F.Supp. 785, 796 (E.D. Pa. 1989). In construing the private club exception of Title III, courts have properly placed great weight on the first factor, that of selectivity. *See, e.g., Tillman v. Wheaton-Haven Rec. Ass'n,* 410 U.S. 431 (1973).

For example, in *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993), the plaintiff brought an action to be admitted into the Boy Scouts of America despite his refusal to affirm his belief in God. *Id.* at 1286. The court found that the Boy Scouts, with a membership of over five million, was indeed a private club because "admission to membership was not without the exercise of sound discretion and judgment." *Id.* at 1267. The court also focused on the purpose of the organization, its history, and its non profit status. *Id.* at 1277. Finding that four of the seven *Lansdowne Swim Club* factors were satisfied, the court concluded that the organization was entitled to exception." *Id., c.f. Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, (6th Cir. 1995) (holding that an athletic association was not a public accommodation and that the critical inquiry should be into the nature of the place to which the disabled individual alleges unequal access), *Martin I* (applying the *Lansdowne* seven factor test).

In addition, the occasional use of an exempt private facility by the general public is not sufficient to convert that facility into a public accommodation under the ADA. *Jankey*, 14 F.Supp.2d at 1178. For example, a private club with a "limited guest policy," in which guests are not permitted "unfettered use of facilities," is not a public accommodation for purposes of the ADA. *Kelsey v. Univ. Club of Orlando,* 845 F.Supp. 1526, 1530 (M.D. Fla. 1994). The court in *Jankey* stated that repeated tours of a commercial facility that was not otherwise a place of public accommodation did not make that facility a place of public accommodation. *See Id.* at 1179 (stating that "If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place

of public accommodation and the tour is not subject to the requirements for public accommodations").

In the case at hand, Fro-Zone is a private, recreational club as was found in *Welsh*. Just as the court stated in *Martin I*, one must look to the true nature and purpose of the rink to decide if it is a public accommodation. It is undisputed that Musgrave built this facility in order to give his son and other local school children the means to share their common interest in the sport of ice hockey. This rink was not built for spectators; it was built to allow children the opportunity to play the sport they loved.

Applying the factors of *Lansdowne* to the case at hand further supports the proposition that Fro-Zone is simply a private hockey club for local school children. First, Musgrave is genuinely selective about the people he allows to play on the ice. He only allows local children and people he knows and trusts to use the facility, and the public at large is not given access. Second, the organization has a consistent history of serving the youth of the community and was not created for the purpose of avoiding ADA. Third, the facility is not open to non-members and even though relatives of certain members have been allowed to occasionally visit, they have never been allowed full access to the ice. Fourth, it is the clear purpose of this organization to provide local children the ability to play hockey and not to serve as public sports arena. Fifth, this club does not advertise or solicit membership. It is simply available for those children who seek to use the facilities who obtain Musgrave's consent. Finally, this organization is non-profit, as Musgrave only collects enough money to pay for equipment and maintain the rink. He also does not charge an admission price or sell tickets to these games.

After weighing all these facts it is clear that this youth hockey league is simply a private club that is exempt from ADA compliance.

B. EVEN IF RESPONDENT'S FACILITY PROVIDES A PUBLIC ACCOMMODATION OF HOCKEY GAMES, SPECTATORS ARE NOT PART OF THAT ACCOMMODATION AND ARE NOT ENTITLED TO ADDITIONAL SEATING UNDER THE ADA.

It is important to note that even if a facility consists of a specific public accommodation, that portion, and only that portion is subjected to the ADA. *Jankey* 14 F.Supp.2d at 1178. It is therefore critical in such a mixed use case to determine whether the areas "behind the ropes" are public accommodations as well and whether the disabled individuals are clients or customers of the original accommodation.

As previously stated, the court *Jankey* held that plaintiff's repeated tours of a commercial facility that was not otherwise a place of public accommodation did not make that facility a place of public accommodation. *Id.* at 1179. However, the court did suggest that such a facility could be considered a "mixed use" in which some areas were subject to the ADA and others were not. *Id.* at 1178. In fact, a public accommodation may contain within itself a portion which is an "exempt area." *Independent Living Res. v. Oregon Arena Corp.*, 982 F.Supp. 698, 758-760 (D. Or. 1997). Therefore, in order to be receive ADA protection, Petitioner must show that the seating was in fact a place of public accommodation irrespective of the rink itself.

In addition, 42 U.S. § 12182(b)(1)(A)(iv) defines the term "individual or class of individuals" as "the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." *Id.* Even though that clause might not literally be applicable to Title III's general rule prohibiting discrimination against disabled individuals, this court has left unanswered the question of whether clause (iv)'s restriction to the clients or customers of public accommodations fairly describes the scope of Title III's protection as a whole. *Martin II*, at 679, *see also Id.* at 679-680 (holding that even if such a construction was correct, Petitioner's argument faltered on its own terms).

In the case at hand, it is important to differentiate the ice rink's function as "a gymnasium, health spa, bowling alley, golf course, or other place of exercise" from "an auditorium, convention center, lecture hall, or other place of public gathering. *See* 42 U.S.C. § 12181(7). This court must distinguish the rink's use as youth hockey league, from its alleged use as spectator's arena, the only category of the twelve that could be applicable. Assuming *arguendo* that the ice rink is itself a public accommodation as a place of recreation, that would at most mean that the rink should accommodate disabled youth players on the ice. Such accommodations should not be extended to incidental visitors who briefly use the rink's seating for another purpose.

Petitioner may argue that such seats could be considered a place of public gathering for watching the games, but this is not the rink's true purpose. The only people outside of this organization who have been allowed to use the seating have been blood relatives of the players. Such guest selectivity fails to create "a public gathering" and correctly distinguishes Fro-Zone, lacking even the most basic of arena amenities, from a professional hockey rink. Again, these guests have not been allowed unfettered use of the facility and have only been allowed in occasionally as a common courtesy. In addition, there is no sales office, ticket counter, or admission price for these guests as there would be in a typical stadium or arena. Simply put, Petitioner has failed to meet its burden of showing that the seating falls within the definition of 42 U.S.C. § 12181 (2005) and therefore ADA compliance is not required. *See Stoutenborough*, 59 F.3d at 583 (holding that defendants did not fall under the scope of the ADA because their activity was not defined within the twelve "public accommodation" categories identified by the statute).

It is also worth noting that Petitioner is not the client or customer of Respondent's facility. It is clear from the record that Petitioner's son, and not Petitioner himself, is in fact that client. While this court has reserved judgment as to the effect of this matter thus far, it now must draw the line and prevent the ADA from proceeding beyond its intended bounds. Allowing third parties to demand ADA compliance when they are not in fact participants in the public accommodation itself would be a manifest absurdity. For example, if a day care center, covered under the ADA by 42 U.S.C. § 12181(7)(k) (2005), has a small playground slide, it must obviously be accessible to any handicapped child who may want to use it. However, should a father, who comes to pick up his child, be afforded the same handicap accessibility to the children's slide? The obvious answer is no. He is simply an outside party that that the ADA was not created to protect. The situation at hand is no different, as Petitioner is attempting to gain equal access to something that was clearly designed and intended for his child.

Therefore, Petitioner is not entitled to additional seating for disabled individuals even if the rink itself is considered a place of public accommodation.

CONCLUSION

The eastern District of Virginia said it best when they stated: "The case law and the regulations both point *unrelentingly* to the conclusion that *a claim based on obesity is not likely to succeed under the ADA.*" *Smaw v. Com. of Va. Dept. of State Police,* 862 F.Supp. 1469, 1475 (E.D. Va. 1994) (emphasis added). Petitioner is simply not a disabled individual that the ADA was designed to protect. He is a "fairly healthy individual" who does not possess a physiological impairment, whose major life activities have been not significantly affected by his weight, and who was never perceived by Musgrave as having a disability. Even if Petitioner's sleep apnea can be shown to be a result of his weight, it would make absolutely no sense under the ADA to

allow him different seating because he fails to get adequate sleep at night. It also would make little sense to classify Petitioner as disabled because he cannot sit comfortably in one particular seat.

Further, this rink is not a public accommodation and was not meant for Petitioner's enjoyment. Fro-Zone was created and operated as a private club in order to allow Musgrave's son and other local children to play ice hockey. While Musgrave's friends may occasionally use the facility, this is no different than Musgrave allowing his neighbors access to his private backyard pool. This court should not punish Musgrave for his generosity in allowing parents to watch their kids play hockey and cannot allow Petitioner to commandeer this facility by forcing it to change from a private children's hockey club into a public spectator's arena. Doing so would be equivalent to transforming a backyard pool into a public swimming facility just because the owner generously invited over some guests.

For the reason stated above, Respondent, Fro-Zone Youth Hockey Rink, respectfully requests that this Court affirm the Fifteenth Circuit Court of Appeals' decision that Petitioner is not a disabled individual and reverse the Court of Appeals' decision that that Respondent is a public accommodation governed by Title III of the ADA.

Respectfully Submitted,

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_____
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CERTIFICATE OF SERVICE

The foregoing brief was served upon attorney for Petitioner at the following address, on this 10th day of October, 2006:

Respondent's Attorney, Esq.
1000 Main Street, Suite 300
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DATED: _____ _____
Applicant ID # 155