IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	C.A. No. 94-10494
	)	
Plaintiff-Appellant,	)	
	)	D.C. No. CRS 94-162-WBS
v.	)	(E.D. Calif., Sacramento)
	)	
JEREMY BAIRD, et al.,	)	APPELLANT'S REPLY BRIEF
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the Eastern District of California

APPELLANT'S REPLY BRIEF

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Plaintiff, United States of America, hereby respectfully submits this reply brief in support of its contention on appeal that a convenience store offering electronic video games for use by members of the public is a "place of entertainment" and thus a "public accommodation."

Suggesting that the government is attempting to rewrite the statute, defendants contend that any rule of application adopted by this Court must be "grounded in the statute." Appellees' Brief at 14-16. The government agrees entirely; indeed, the government's position is that the plain language of the statute compels the conclusion that a convenience store offering video games for use by the public is a "place of entertainment." By its

terms and without limitation or exception, the statute covers any place of entertainment. Given that it is beyond dispute that video games cause people to entertain themselves on the premises, defendants' core contention is that the statute excludes businesses "where any entertainment offered is a peripheral adjunct to the basic non-entertainment nature of the business establishment." Appellees' Brief at 15. This contention, of course, is a restatement of the district court's "basic function and purpose" test. E.R. 17; Order at 11.

As discussed in the government's opening brief (page 15), a basic or principal function requirement is irreconcilable with the plain language of the Civil Rights Act. Subsection (b)(2), regarding food establishments, contains an express principal function requirement. Subsection (b)(3), regarding places of entertainment, conspicuously lacks any such limiting language. Consistent with this omission, the entertainment need not be a "certain quantum of the establishment's business." DeRosier, 473 F.2d at 752. Thus, defendants are asking this Court (as they did the district court) to engraft a basic function requirement to a statutory provision which plainly lacks one and sits in a context in which it is clear that Congress knew full well how to include such a limitation. Defendants' request is properly addressed to Congress.

Applying the plain language of subsection (b)(3), the convenience store in this case is unquestionably at least in part a place of entertainment, especially in light of the Supreme

Court's broad definition of "entertainment" in Daniel v. Paul. The electronic video games had no purpose other than to entertain users on the store's premises. The machines were in the store to attract individuals inclined to enter the store to purchase that form of entertainment. As defendants acknowledge, the proceeds from the machines were split by the operator of the store and the lessor of the machines. Appellees' Brief at 6. Until the operator of the store removed the machines, the store was a place of entertainment under the Act.[1]

Contrary to defendants' suggestion, the fact that the statute does not contain a "principal purpose" requirement does not mean that every establishment that has on its premises a device providing some form of entertainment qualifies as a place of entertainment (Appellees' Brief at 14), and the government has never suggested otherwise. An establishment is only a "place of entertainment" by virtue of the presence of entertainment devices if the devices are present for the purpose of causing people to enter the premises to entertain themselves or to be entertained.

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[1] The dispositive facts are not in dispute. Although defendants assert that the government has set forth only irrelevant facts, Appellees' Brief at 2, the government's brief clearly states the facts that it contends are dispositive -- that the 7-11 store was ostensibly open to the public and contained electronic video games for use by members of the public, and that components of these games were manufactured outside the state of California. Appellant's Brief at 6. Moreover, the background facts set forth by the government refute defendants' contention, which was adopted by the district court, that the government is simply attempting "to federalize a state assault." Appellees' Brief at 17; E.R. 7; Order at 13. A gang beating pursuant to a concerted effort by white supremacists to drive blacks out of a neighborhood is a classic federal civil rights case.

People do not ride elevators in order to be entertained by "piped-in Muzak" or enter barber shops to watch television. Television and radio in those places simply make more comfortable an environment in which a person is present for other reasons. These establishments are not open to the public in whole or in part for entertainment purposes. On the other hand, the convenience store in this case contained electronic video games in order to entertain people on the premises without regard to whatever other activities they may be undertaking. The store was open to the public in part for entertainment purposes. In short, the government's plain language approach yields only results which are consistent with the statutory language and Congress's intent of attacking discrimination at places which people frequent for entertainment purposes.

Defendants' statutory interpretation analysis is flawed at the outset because it misstates the applicable construction principles. Defendants lay the foundation for their restrictive application of the Act by quoting the district court's statement that "section 2000a(b) is very explicit in limiting the types of establishments that may qualify as a place of public accommodation under the statute." (Appellees' Brief at 9.) The district court, however, erroneously relied on Cuevas v. Sdrales for this "explicit limitations" approach. E.R. 11; Order at 5. Cuevas was decided four years before the Supreme Court in Daniel v. Paul rejected an explicit enumerations argument that only the type of businesses set forth in the statute, i.e., establishments where

patrons are entertained as spectators or listeners, qualify as places of entertainment. The Court thus held that the statute contains an illustrative rather than exhaustive list of covered establishments. The Court found that no legislative history supported the narrow interpretation advanced by the establishment in that case (and urged by defendants here). 395 U.S. at 306.

Consistent with this unsupported narrow interpretation of the Civil Rights Act, the defendants dispute the government's contention that the statutory language must be given "a liberal and broad construction." Appellees' Brief at 9. It is settled law, however, that this principle of statutory construction applies in this context. Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968) (en banc) ("That Title II of the Civil Rights Act is to be liberally construed and broadly read we find to be well established."); Daniel v. Paul 395 U.S. at 306-308 (rejecting express limitations contention in favor of approach that would "call for broader coverage").

Defendants contend that the district court "faithfully followed the approach to statutory construction mandated by the Supreme Court in Daniel v. Paul." Appellees' Brief at 11. Defendants misread Daniel. The question before the Court was whether active participation in an activity qualifies as "entertainment" even though the statute enumerates only places of spectator or listener forms of entertainment. The Court analyzed this question by focusing on the definition of the word "entertainment," and expressly adopted Webster's definition.

Based on this definition, the Court rejected the restrictive contention that the statute only covers places involving spectator entertainment. The Court stated: "Under any accepted definition of 'entertainment,' [the establishment] would surely qualify as a 'place of entertainment.'" 395 U.S. at 306. Contrary to defendants' suggestion (page 11), the Court did not hold that a business establishment qualifies as a "place of entertainment" only if it is "generally accepted" that the establishment "in some realistic sense" is a "place of entertainment." The Court simply defined "entertainment" such that it includes all forms of amusement, whether active or passive. Clearly, this definition includes electronic video games.

Further, as appellees note, the district court's ruling was based on the premise that the nature of the establishments covered is demonstrated by the examples set forth in the statute. E.R. 18; Order at 13. The Court in Daniel, however, rejected that express enumerations approach. The district court's analysis was therefore not consistent with Daniel v. Paul.

As discussed in the government's opening brief (pp. 10-14), the few relevant cases decided since Daniel support the government's interpretation of the Act. Defendants contend, however, that this Court should not follow the Fifth Circuit's opinion in DeRosier because the dissent in that case presents a "more compelling analysis." Appellees' Brief at 12. Defendants offer no analytical support for this assertion and do not even attempt to refute DeRosier's central point that "[c]ertainly an

establishment which provides mechanical devices for the use and enjoyment of its patrons and customers is a 'place of entertainment.'" 473 F.2d at 752.

Defendants also reiterate the district court's attempt to distinguish DeRosier. Appellees' Brief at 12. They assert that a bar is already a place of entertainment and that the presence of a jukebox, shuffleboard, and a pool table "brings a bar back within the generally accepted meaning of a 'place of entertainment.'" Appellees' Brief at 13. As discussed in the government's opening brief (page 13), this distinction cannot be reconciled with the settled proposition that, like retail stores per se, bars per se are not covered by the Act. Thus, the socializing nature of a bar does not qualify a bar as a covered place of entertainment. As the court in DeRosier made clear, the only reason the bar in that case qualified as a place of entertainment was because it contained "mechanical amusement devices." 473 F.2d at 752. Consistent with Congress's exclusion of bars from the coverage of the Act, the court did not rely on the "inherent nature of the establishment" (as suggested by defendants). There is therefore no basis for treating a convenience store any differently from a bar for purposes of determining if it is a place of entertainment.

Presumably in order to suggest that the government's literal interpretation will open the door to some parade of horribles, defendants note that video games "are becoming more and more widespread and are present in a wide variety of business establishments," and thousands of diverse businesses would be

covered by the Act. Appellees' Brief at 13. The government agrees that places of entertainment in the 1990's may look different than they did in the 1960's, which is a reason to read the statute broadly. Further, an increase in the number of establishments covered by the Civil Rights Act is neither surprising nor alarming. Thousands of fast food establishments are now covered by the Act. Thousands of convenience stores, like 7-11's, have added gas pumps and, by this addition, have become covered by the Act. An increase in the number of covered establishments or a change in the nature of many covered establishments is not in the least bit inconsistent with either the language of the statute or Congressional intent.

In addition to being inconsistent with the plain language of the statute and the Fifth Circuit cases, defendants' interpretation of the statute yields an unworkable legal standard. Nowhere do the defendants suggest how a court or a jury would proceed to determine whether a particular establishment is "generally accepted" as a "place of entertainment." Although not stated in these terms, the defendants' approach is basically a "know it when we see it" approach. But whose understanding of the phrase "place of entertainment" controls? How much entertainment is required? What principles guide the judge's or jury's determination?[2]

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[2] This defect in defendants' approach is demonstrated by the fact that the district court, as urged by defendants, cited as a reason for its conclusion that the corporate owner of the 7-11 declared that the store was not intended to be a place of entertainment. E.R. 17a; Order at 12. As noted in the government's opening brief (pages 15-16), this "evidence" should not even be relevant. In any event, defendants have never explained how this

Moreover, defendants' approach would seem to exclude from coverage a large number of mixed use establishments which people frequent for entertainment. Is a highway souvenir and gift shop with an arcade of electronic gambling devices covered? A warehouse used for a commercial boxing tournament? A parcel of land used for a carnival? A convenience store with a video arcade attached by a doorway to the food section? An empty commercial facility leased to show satellite telecasts of sporting events on a single big-screen television? Under the plain language approach urged by the government and adopted by the Fifth Circuit, these establishments are covered because they are places where people go for entertainment. Under the defendants' approach, these places may not be covered, although that is not entirely clear given the vague nature of their approach.

Turning the vagueness problem on its head, defendants contend, for the first time, that if this Court were to interpret the statutory language as urged by the government, the statute would be unconstitutionally vague because defendants would not be on notice that their conduct is a violation of the law. Appellees' Brief at 9-11. Defendants' "constitutionally-based" contention is unsupported and unsupportable. No court has ever held that in a criminal civil rights case a defendant cannot be convicted unless he had notice that his conduct was prohibited by

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evidence supports their proffered application of the statute. The government submits that it does not.

a federal law.[3] The cases that have addressed vagueness challenges to the criminal civil rights laws have consistently rejected such challenges on the ground that the specific intent element of the offense ensures that a defendant can be convicted only if he acted with a level of guilty knowledge that satisfies constitutional standards. See United States v. Screws, 325 U.S. 91, 102-104 (1945) (noting that specific intent requirement ensures that "the accused cannot be said to suffer from lack of warning or knowledge that the act that he does is a violation of law"); United States v. Reese, 2 F.2d 870, 880-886 (9th Cir. 1993) (noting that specific intent element eliminates "charge of unconstitutionality on the grounds of vagueness" and that knowledge by the defendants that "they acted outside the boundaries of state law" is irrelevant). Moreover, the government's interpretation of the statute is not in the least bit vague; it is a literal interpretation based exclusively on the words of the statute, viewed in the context of the Act as a whole. It is difficult therefore to imagine an interpretation of the statute that is less vague. On the other hand, defendants' common understanding approach is so vague that it defies restatement in the form of a legal standard or a jury instruction. If there is a constitutional vagueness problem, it is in defendants' interpretation of the statute.

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[3] Defendants could not seriously maintain that they did not have notice that a racially-motivated beating is unlawful. The constitutional concern over the prosecution of individuals who believe they are acting lawfully is simply not implicated in this case.

In conclusion, the Act covers any place of entertainment without regard to whether the entertainment is a principal or basic function of the establishment. The 7-11 store in this case indisputably contained electronic video machines for use by members of the public. These machines had no purpose other than to entertain people and to generate profits for the store's proprietor. The district court's contrary ruling is inconsistent with the plain language of the statute, existing precedent, and the desirability of a workable legal standard. The dismissal of counts one and two of the superseding indictment should therefore be reversed.

DATED: March 1, 1995

Respectfully submitted,

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on March 1, 1995 she served a copy of APPELLANT'S REPLY BRIEF by placing said copy in a postpaid enveloped addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Sacramento, California.

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