No. 11-1191

IN THE

# United States Court of Appeals for the Fourth Circuit

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GILROY J. DANIELS, SR.,

Plaintiff-Appellant,

v.

ARCADE, L.P.,

Defendant-Appellee.

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On Appeal from the United States District Court
for the District of Maryland at Baltimore
No. 1:10-cv-00607-RDB

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**BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF THE BLIND IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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## Disclosure of Corporate Affiliations

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, amicus curiae the National Federation of the Blind makes the following disclosure statement:

1. Is amicus a publicly held corporation or other publicly held entity? No.

2. Does the amicus have any parent corporations? No.

3. Is 10% or more of the stock of the amicus owned by a publicly held corporation or other publicly held entity? No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? No.

5. Does this case arise out of a bankruptcy proceeding? No.

/s/ Gregory P. Care
Gregory P. Care

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## Statement of Identity, Interest, and Authority to File

Pursuant to Federal Rule of Appellate Procedure 29(a), the National Federation of the Blind ("NFB") respectfully submits this brief as amicus curiae.[1] The NFB is a national nonprofit membership organization with over 50,000 members, which is recognized by the public, Congress, executive agencies of government, and the courts as a collective and representative voice of blind Americans and their families. The NFB has over 700 local chapters in all 50 states, Washington, D.C., and Puerto Rico. The NFB promotes the general welfare of blind people by assisting them in their efforts to integrate themselves into society on terms of equality and independence, and by removing barriers and changing social attitudes, stereotypes and mistaken beliefs about blindness that result in the denial of opportunity to blind people.

The NFB has an interest in this case because the lower court's approach to standing unduly restricts the ability of blind people and other people with disabilities to enforce their civil rights under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq*. A vital aspect of independence is the ability to visit and patronize places of public accommodation across the

[1] All parties to the litigation have consented to the participation of amicus curiae NFB. Further, pursuant to Federal Rule of Appellate Procedure 29(c), amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

country, a right guaranteed by the ADA. At present, many such places are inaccessible to the NFB's blind members in violation of the ADA. Remedying these violations is necessary for the blind to fully enjoy their rights and independence and unduly restrictive tests of standing impair those enforcement efforts.

## Argument

### I. Standing in Disability Rights Cases Should Be Granted Liberally.

The Americans with Disabilities Act of 1990[2] ("ADA") is the central civil rights law protecting people with disabilities. In enacting the law, Congress found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers . . . , failure to make modifications to existing facilities and practices . . . , segregation, and relegation to lesser services, programs, activities . . . or other opportunities."[3] The ADA uses different means than other civil rights laws, but the purpose of the laws is the same: the eradication of discrimination. One professor explained the similarity:

> A single step in front of a store may not immediately call to mind images of Lester Maddox standing in the door of his restaurant to keep blacks out. But in a crucial respect they are the same, for a step can exclude a person who uses a wheelchair just as surely as a no-blacks-allowed rule can exclude a class of people.[4]

Though disability rights laws are supposed to prevent the continued isolation and segregation of people with disabilities in the same tradition as other civil rights laws, some courts appear to regard disability rights requirements – particularly those involving physical access requirements, such as ramps and handrails – as

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[2] 42 U.S.C. §§ 12101 *et seq.* (2006 & 2010 Supp.).
[3] 42 U.S.C. § 12101(a)(5) (2006 & 2010 Supp.).
[4] Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. Rev. 1, 23 (2006).

different, and less important, than other civil rights.[5] Not only is this perception of lack of importance incorrect, but it too often results in courts, including the District Court below, erecting technical barriers, such as stringent standing requirements, that prevent individuals with disabilities from enforcing their rights. Such requirements, in one sweep, bar not only enforcement of the physical access standards that some courts appear to believe are less important, but also prevent challenges to blatant and openly hostile forms of discrimination against people with disabilities.

Courts, such as the District Court below, also appear to assume that ADA cases are abusive or unnecessary drains on courts. While courts may be rightly concerned with managing their dockets and avoiding abusive or wasteful litigation, ADA cases must not be assumed to fall into this category. Private enforcement is central to accomplishment of the ADA's rightful purposes and, as has been demonstrated repeatedly, compliance does not happen without the credible threat of private enforcement.[6]

### A. The Americans with Disabilities Act Confers Broad Standing.

Title III of the ADA[7] is a civil rights statute enforced primarily by private citizens and, as such, courts should accord standing in ADA cases on a liberal

[5] *Id.* at 24.
[6] *Id.* at 9.
[7] 42 U.S.C. §§ 12181 *et seq.* (2006 & 2010 Supp.).

basis.[8] The Ninth Circuit put it this way: "[t]he Supreme Court has instructed us to take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act.'"[9] Thus, in ADA cases, standing should be conferred even "to the outermost limits of Article III."[10]

### B. The *Judy v. Pingue* Standing Factors Are Bad Law and Policy.

The policy of broad standing in ADA cases notwithstanding, the District Court below applied a strict five-part test for standing in ADA claims derived from an unpublished Southern District of Ohio opinion in *Judy v. Pingue*.[11] The lower court applied five factors that needed to be satisfied: proximity, past patronage, definitiveness of plans to return, frequency of travel near the defendant, and

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[8] *Fiedler v. Ocean Props., Ltd.*, 683 F. Supp. 2d 57, 65 (D. Me. 2010); *Betancourt v. Federated Dep't Stores*, 732 F. Supp. 2d 693, 705 (W.D. Tex. 2010); *see also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 952 (9th Cir. 2011).

[9] *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

[10] *Kyles v. J.K. Guardian Sec. Servs.*, 222 F.3d 289, 294 (7th Cir. 2000) (citing *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975)); *Oti Kaga, Inc. v. Hous. Dev. Auth.*, 342 F.3d 871, 880 (8th Cir. 2003). The Supreme Court has delineated the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring (1) "an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) "a causal connection between the injury and the conduct complained of-the injury [that is] fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court," and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (internal citations and quotation marks omitted).

[11] Mem. Op. at 5 (citing No. 08-859, 2009 WL 4261389 (Nov. 25, 2009)).

number of lawsuits filed. This cramped approach to standing limits Title III enforcement to locations frequented at predictable intervals by persons with disabilities. Such a test should not be the law of this or any other circuit because it ignores the realities that not all public accommodations are patronized in this way and that persons with disabilities may not wish, and are not required, to patronize an accommodation as long as it discriminates against them. Instead, this Court should apply a test simply asking: (1) whether the plaintiff has a disability, (2) whether the access barrier remains, and (3) whether the plaintiff would be willing to return to the public accommodation if the barrier were removed.[12]

### 1. The "Proximity" Factor Interferes with the Rights of Persons with Disabilities.

The "proximity" test used by the court below unnecessarily constrains the rights of individuals with disabilities, such as the constitutional right to travel.[13] A law implicates the right to travel when "it uses any classification which serves to penalize the exercise of that right."[14] Such penalties are subject to "intensified equal protection scrutiny" requiring a "compelling justification."[15]

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[12] *Federated Dep't Stores*, 732 F. Supp. 2d at 709.
[13] *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 901-03 (1986).
[14] *Id.* at 903 (internal quotation marks omitted); *see also Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("Constitutional rights would be of little value if they could be . . . indirectly denied, or manipulated out of existence.") (internal quotation marks and citations omitted).
[15] *Soto-Lopez*, 476 U.S. at 904.

Because the "proximity" factor conditions a plaintiff's standing on how closely he lives to the discriminating business,[16] it is a classification that penalizes the plaintiff's right to travel. If a person with a disability, while traveling, encountered a barrier at a public accommodation and wished to challenge the barrier, the "proximity" factor would effectively preclude any remedy the traveler might otherwise enjoy had he been a local resident. This scenario is analogous to the line of Supreme Court cases invalidating classifications of residents that "resulted in the unequal distribution of rights and benefits among otherwise qualified bona fide residents."[17]

The present situation also shares similarities with another civil rights struggle, that is: African-Americans' pursuit of equality and integration. In *Heart of Atlanta Motel, Inc. v. United States*,[18] the Supreme Court ruled that the Civil Rights Act of 1964 was necessary to combat discrimination and protect the right of African-Americans to travel and patronize accommodations while doing so.[19]

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[16] Mem. Op. at 5 ("As the distance between a plaintiff's residence and the public accommodation increases, the likelihood of future harm decreases.").
[17] *Soto-Lopez*, 476 U.S. at 903.
[18] 379 U.S. 241 (1964).
[19] *Id.* at 251, 252-53. It is notable that both the Civil Rights Act and the ADA were enacted pursuant to Congress's authority to regulate interstate commerce, which includes travel. *Id.* at 249; 42 U.S.C. § 12101(b)(4) (2006 & 2010 Supp.).

Persons with disabilities seek nothing more and deserve nothing less than this, but the "proximity" test denies them the full extent of their right to live in the world.[20]

The "proximity" test also has overtones of the "outside agitators" argument made against integration efforts during the African-American civil rights movement.[21] Because the "proximity" test impairs efforts to remedy access violations, it helps perpetuate the shameful history of persons with disabilities being wrongfully denied the "right to fully participate in all aspects of society" and continues "society['s] . . . isolat[ion] and segregat[ion of] individuals with disabilities."[22] Whether a violation is near or far is of no moment; because it deters and prevents people with disabilities from fully participating in society, those who encounter such violations should be free to seek their elimination on behalf of themselves and other affected individuals with disabilities.

What is worse, the "proximity" factor is an entirely arbitrary one. The District Court noted its approval of a general rule that "a distance of more than 100

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[20] Thirty-four years before the passage of the ADA, Jacobus tenBroek authored a law review article that advocated for acceptance of this basic notion – not as a right of constitutional vintage – but as a guiding principle for viewing the place of people with disabilities in law and society. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 Cal. L. Rev. 841 (1966). In his article Dr. tenBroek noted a strikingly simple passage from Dean Prosser's treatise on torts: "The man who is blind, or deaf, or lame, or is otherwise physically disabled, is entitled to live in the world . . . ." *Id.* (quoting Prosser, Torts § 32, at 155 (3d ed. 1964)).

[21] *See* Bagenstos, *supra* note 4, at 25-30.

[22] 42 U.S.C. § 12101(a)(1)-(2) (2006 & Supp. 2010).

miles between a defendant's business and a plaintiff's residence weighs against finding a reasonable likelihood of future harm."[23] It is unclear how or why 100 miles was deemed the appropriate boundary separating standing from none, and the cases cited by the Court below provide no explanation.[24] The cities of Baltimore, MD and Philadelphia, PA are approximately 100 miles apart, which amounts to little more than a two-hour trip by car or a one-hour trip by train.[25] A plaintiff traveling such relatively minor distances (for some, a commute) should not be prevented from seeking enforcement of the ADA.

The "proximity" rule also threatens to undermine the core purpose of the ADA as a means of increasing accessibility for individuals with diverse disabilities. Title III of the ADA is not just about removing the many barriers to physical access for wheelchair users and other people with mobility disabilities. The ADA is also about challenging discriminatory policies and practices that exclude people with all kinds of disabilities. Stringent standing requirements such

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[23] Mem. Op. at 5.
[24] Mem. Op. at 5-6.
[25] Amicus curiae respectfully requests, pursuant to Federal Rule of Evidence 201(b), that the Court take judicial notice of the driving distance provided by the Internet mapping service, Google Maps at http://maps.google.com, *Rindfleisch v. Gentiva Health Sys., Inc.*, 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) (cataloging cases granting similar requests), and the train schedules provided online at http://www.amtrak.com by Amtrak, a nationally chartered passenger train service. Rail Passenger Service Act of 1970 § 101, 45 U.S.C. § 501 *et seq*. (2006). The travel information referenced can be readily and accurately determined by resort to these sources, the accuracy of which cannot reasonably be questioned.

as the "proximity" test would restrict challenges to both physical and policy barriers equally.

Several examples adapted from actual situations illustrate the unacceptable impact of the "proximity" rule on the rights of people with disabilities. Although these examples are from actual situations, some of which resulted in litigation, standing was not an issue in the cases. Nonetheless, these situations illustrate the broad potential of the lower court's "proximity" test to penalize travel by people with disabilities and to inhibit challenges to exactly the kinds of conduct Congress intended to prohibit in the ADA.

In a recent case, a man receiving cancer treatment several hours from his home took his family, including his HIV-positive child, to stay at an RV park close to the cancer treatment facility. One day, the parents took their child to enjoy the playground and swimming pool in the park. When the manager of the park learned of the child's HIV status, he denied the child access to common areas like the swimming pool and showers on the basis of his disability – a violation of the child's right to enjoy the public accommodations offered to others without disabilities.[26] Because the park was not near the family's home, the lower court's

[26] *United States v. Wales West, LLC*, No. 09-cv-29-CG-B, Dkt. #38 (S.D. Ala. 2010) (consent decree), *available at*: http://www.ada.gov/wales_west.htm; U.S. Dep't of Justice, Justice Department Settles Lawsuit Alleging HIV Discrimination by RV Resort in Alabama, http://www.justice.gov/opa/pr/2010/January/10-crt-051.html (last visited May 4, 2011).

"proximity" factor, if applied, would have prevented the child from suing over the park's discriminatory policy, even though that policy would affect others.

The ADA legislative history refers to the following example of the discrimination the law was intended to stop. A group of children with Down Syndrome and their families decided to take a trip to visit a zoo. When they arrived, however, the zookeeper denied them entrance to the Monkey House, claiming that the children would frighten the chimpanzees.[27] Under the lower court's "proximity" test, whether these children could challenge such blatant discrimination would depend on whether they lived within 100 miles of the zoo.

Another example arises from a traveling fair and is capable of repetition in countless other theme parks and tourist destinations. A man in a wheelchair visits the California Fair while it is in his area and finds that he is unable to access many of the ticket booths, concessions, and rides because of physical barriers. Although these issues present violations of Title III,[28] the man's standing to sue would be compromised by the "proximity" rule because the fair will soon move on to a location far from his home.

A deaf football fan decides to attend a football game at FedEx Field in Landover, Maryland between the New England Patriots and the Washington

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[27] H.R. Rep. No. 101-485, pt. 2 at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 312.

[28] *See McIver v. Cal. Exposition & Fair*, CV-S-01-1967 GEB KJM, 2005 WL 1541087 (E.D. Cal. June 28, 2005).

Redskins. While watching the game, he discovers that the aural content played on the stadium's speakers, such as referee announcements and music played during breaks in the action, is not captioned. The stadium's failure to caption the aural content broadcast to other fans violates the public accommodation's duty to provide effective communication.[29] Under the District Court's "proximity" rule, the deaf fan's standing would depend on whether he was a Redskins Fan from Maryland or a New England Patriots fan from Massachusetts, even though other deaf fans are likely to encounter the same problems.

A blind man who uses a guide dog went with his friends to visit a brewery and take a tour offered to the public. When he entered the facility, the management noticed the dog and told him that he could not take the tour with the dog in light of a "no animals" policy. The brewery's refusal to grant a reasonable modification of the "no animals" policy violates the ADA,[30] but application of the "proximity" factor would preclude a suit to rectify the violation because the man lived too far away from the brewery to have standing.[31]

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[29] *Feldman v. Pro Football, Inc.*, 09-1021, 2011 WL 1097549, *9 (4th Cir. 2011).

[30] *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1056 (5th Cir. 1997).

[31] In the real-life case on which this scenario is based, the court recognized that the policy banning service dogs on the brewery tour affected more than the plaintiff before it and, accordingly, upheld an injunction requiring the brewery to ensure that all "disabled persons with guide dogs or other service animals have the broadest feasible access to the public tour." *Id.*

The "proximity" test also has the practical consequence of creating an entire class of public accommodations that, by their nature, would evade enforcement. For example, because hotels overwhelmingly serve those who live far away from their homes (and thus need lodging) and do so on a largely irregular basis, it is nonsensical to impose a requirement that a plaintiff live in close proximity to a hotel and have fixed plans to revisit it. Other similar examples include convention centers and amusement parks, which primarily benefit out-of-town professionals and tourists, respectively, on an irregular basis.

### 2. Past and Future Patronage and Frequency of Travel Factors Are Inapposite in this Context.

In the context of the ADA, it makes little sense to demand that a person with a disability be prepared to repeatedly subject himself to continued discrimination after having suffered it once. Exclusion on the basis of disability, even if caused by a step rather than a "no-blacks-allowed" sign, is more than inconvenient. It is humiliating, emotionally damaging, and sometimes physically dangerous.[32]

Having received extensive information about disability discrimination, Congress included in the ADA a futility provision that acknowledged the reality that a single episode of discrimination should be actionable when the offending

[32] *E.g.*, *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938 (C.D. Cal. 2005) (describing a situation where a man in a wheelchair had his hand crushed by inaccessible door); *Boemio v. Love's Rest.*, 954 F. Supp. 204 (S.D. Cal. 1997) (describing a situation where a man was forced to urinate in the parking lot due to inaccessible bathroom).

entity does not intend to comply with the law.[33] This logic should guide any court in determining whether, as a requisite of standing, a Title III plaintiff needs to show a pervasive history of patronage and an intent to return to the defendant's establishment and suffer further discrimination. Indeed, the Ninth Circuit accepted this guidance in *Pickern v. Holiday Quality Foods, Inc.*, and held that "under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury."[34] The Eighth Circuit took a similar approach in *Steger v. Franco*.[35]

Nonetheless, the District Court applied a rule that "past patronage weighs in favor of finding a reasonable likelihood [of] return," and that Title III plaintiffs must demonstrate a "concrete and specific intent to return" to the discriminating establishment.[36] Again, context and real-life considerations show that this demand is unreasonable. Past patronage is only relevant to the factor of whether a legal injury has occurred and should not be required to demonstrate a future willingness to return. In addition to the mandate of the futility provision, common sense counsels against past and future patronage as a measure of standing. As the dissenting judge in *Access for America v. Associated Out-Door* noted:

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[33] 42 U.S.C. § 12188(a)(1) (2006 & 2010 Supp.).
[34] 293 F.3d 1133, 1136-37 (2002).
[35] 228 F.3d 889, 892 (8th Cir. 2000).
[36] Mem. Op. at 6, 7.

> Especially in the disability context, a "specific-date/set-plans" standard would produce patently absurd results, and would almost certainly place plaintiffs in a Catch-22 so far as their credibility is concerned. To have standing under the ADA, is a wheelchair-bound individual who consistently but unpredictably frequents a particular Burger King required to predict the very day on which he will next crave a Whopper?[37]

Jurists have also roundly criticized the standing requirement that plaintiffs have a concrete plan to return to a discriminatory establishment.[38] Professor Adam Milani has pointed out that private ADA enforcement will suffer under narrow standing tests and further noted that "[b]y their very nature, [Title III] violations are ongoing and not isolated occurrences."[39] Accordingly, plaintiffs with disabilities need not establish imminent future injuries because "they have an actual and present injury – they are currently deterred from visiting a building."[40] Another author agreed, stating that a Title III "suit is in court because the

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[37] 188 F. App'x 818, 820 (11th Cir. 2006) (Barkett, J., dissenting).

[38] *E.g.*, Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 Berkeley J. Emp. & Lab. L. 377, 397 (2000) (noting that Title III cases "do not involve extreme situations in which only a plaintiff's criminal conduct could cause future discrimination to occur," but instead "these are cases in which plaintiffs represent a class of litigants who repeatedly face instances of discrimination as a result of their own voluntary and lawful conduct."); Elizabeth Keadle Markey, *The ADA's Last Stand?: Standing and the Americans With Disabilities Act*, 71 Fordham L. Rev. 185 (October 2002); Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 Wake Forest L. Rev. 69 (Spring 2004); Kelly Johnson, Note, *Testers Standing Up for Title III of the ADA*, 59 Case W. Res. L. Rev. 683 (2009).

[39] Milani, *supra* note 38, at 113.

[40] *Id.* at 117-18.

defendant refuses to make the necessary changes, so there is little doubt a plaintiff would be subjected to the harm if he or she were to return."[41]

The requirement that a plaintiff make concrete plans to revisit a place she knows will discriminate against her (through either policies or other barriers) is unreasonable. Instead, Title III plaintiffs should only be required to credibly allege their willingness to return if the discriminatory policy or barrier is removed.

### C. The "Litigation History" Factor Undermines ADA Enforcement.

The District Court below relied, in part, on the Plaintiffs' "litigation history" and found that the number of claims they brought weighed against a finding of standing.[42] In the context of the ADA, however, any reliance on the litigation history of a plaintiff as a negative factor in a standing analysis undermines the enforcement of the ADA. Indeed, the phenomenon of frequent litigators is a logical consequence of both legal rules and practical considerations regarding remediation of persistent ADA access violations.

First, the structure of the ADA makes it clear that Congress intended for private litigants to shoulder much of the responsibility for enforcing the law. "[I]n civil rights cases . . . as under the ADA, private enforcement suits 'are the primary method of obtaining compliance with the Act.'"[43] Further, the Supreme Court has

[41] Johnson, *supra* note 38, at 712.
[42] Mem. Op. at 8-9.
[43] *Doran*, 524 F.3d at 1039 (quoting *Trafficante*, 409 U.S. at 209).

acknowledged that civil rights laws like the ADA are structured so that prevailing individual plaintiffs vindicate the law's objectives for the benefit of all similarly situated individuals.[44] The ADA encourages individuals to enforce its mandates by providing a private right of action and allowing prevailing plaintiffs to recover their attorneys' fees.[45] Thus, when a blind individual sues to enforce the right to bring a service animal into a public accommodation[46] or a deaf person successfully litigates for the provision of a sign language interpreter at a hospital,[47] those places are made accessible, not just for those litigants, but for all persons with those disabilities.

Second, practical considerations make frequent private litigants an integral part of enforcing Title III. While it is true that the Department of Justice (DOJ) has the authority to engage in litigation to enforce Title III, that authority is limited to cases in which there is a "pattern or practice of discrimination" or the "discrimination raises an issue of general public importance."[48] Even among those

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[44] *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 600 (1983) (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 401-02 (1968)); *see also Walker v. Carnival Cruise Lines*, 107 F. Supp. 2d 1135, 1143 (N.D. Cal. 2000) (describing how Title III relief "redound[s] not only to the plaintiffs themselves, but to similarly situated disabled persons, and the entire society at large.").

[45] 42 U.S.C. §§ 12188(a), 12205 (2006 & 2010 Supp.).

[46] *E.g.*, *Johnson*, 116 F.3d 1052.

[47] *E.g.*, *DeVinney v. Maine Med. Ctr.*, Civ. 97-276-P-C, 1998 WL 271495 (D. Me. May 18, 1998).

[48] 42 U.S.C. § 12188(b)(1)(B) (2006 & 2010 Supp.); *see also* Nat'l Council on Disability, Promises to Keep: A Decade of Federal Enforcement of the Americans

cases, the Civil Rights Division of the DOJ has emphasized in its own budgetary statements that it faces challenges in carrying out its duties with respect to the ADA.[49] One review showed that the Department of Justice reached 107 public accommodation settlements in 10 years of enforcing the ADA – "less than one settlement a month by an agency charged with nationwide enforcement."[50] The DOJ has also noted that it "will not necessarily make a determination on each complaint about whether or not there is an ADA violation. . . . Any . . . action would be taken on behalf of the Unites [sic] States. We do not act as an attorney for, or representative of, the complainant."[51] Thus, even in the relatively few cases where the DOJ gets involved in a case, the victim of discrimination must still prosecute the underlying action without direct assistance from the DOJ.

In addition to statutory limits, there are budgetary and logistical constraints that, as a practical matter, result in a vast number of public accommodations – particularly small businesses – that are not policed by any governmental entity.

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with Disabilities Act 53 (2000) (hereinafter "Promises"), *available at*: http://www.ncd.gov/newsroom/publications/2000/pdf/promises.pdf.

[49] *See* U.S. Dep't of Justice, Civil Rights Div., FY 2012 Performance Budget 4-5 (2011), *available at*: http://www.justice.gov/jmd/2012justification/pdf/fy12-crt-justification.pdf.

[50] Ruth Colker, The Disability Pendulum: The First Decade of the Americans with Disabilities Act 192 (2005).

[51] U.S. Dep't of Justice, How to File a Title III Complaint, *available at*: http://www.ada.gov/t3compfm.htm.

The National Council on Disability, an independent federal agency,[52] recently reported that effective enforcement of the ADA is hampered by "insufficient government enforcement of compliance obligations among small businesses in particular . . . ."[53] Because small businesses make up the vast majority of all U.S. businesses, the enforcement gap for Title III is very substantial.[54] Thus, it falls to individual litigants to fill that void.

Unfortunately, even now – more than 20 years after passage of the ADA – persons with disabilities still face ubiquitous and gratuitous barriers to access throughout the country. The National Council on Disability recently noted that "there is general acknowledgement that many public accommodations are not in compliance with Title III and are not, in fact, accessible."[55] A recent law review article reported an estimate that "less than 2 percent of public buildings in the

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[52] 29 U.S.C. § 780a (2006).

[53] Nat'l Council on Disability, Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success 166, 167-68 (2007) (hereinafter "Implementation") ("When the [DOJ's] limited human and financial resources are added into the mix, it is not surprising that the DOJ's enforcement record focuses on large, high-profile commercial defendants."), *available at*: http://www.ncd.gov/newsroom/publications/2007/pdf/implementation_07-26-07.pdf.

[54] The U.S. Census has calculated that there are over 6.6 million business establishments employing fewer than 20 employees, which represents 86% of all U.S. business establishments. U.S. Census Bureau, Statistical Abstract of the United States: 2011 at 500 tbl. 757, *available at*: http://www.census.gov/compendia/statab/2011/tables/11s0757.pdf.

[55] Nat'l Council on Disability, Implementation at 169.

United States fully comply with Title III."[56] Even those who advocate in favor of restrictions on ADA litigation acknowledge that "no one disputes that ADA access violations exist."[57] The simple, undisputed fact is that Title III is underenforced.[58]

A variety of studies show that the overwhelming majority of offending businesses refuse to voluntarily rectify their ADA access barriers – even when offered assistance to do so – making lawsuits (sometimes by "serial" litigators) the only recourse to enforce the law. Several years ago the Public Entity Risk Institute (PERI) issued a report on a collaborative approach to reduce ADA access lawsuits against San Francisco businesses which concluded that litigation achieved greater compliance with the law than the non-litigious approach.[59] In that case members of both the disability rights and small business communities formed the San Francisco Collaborative and designed a proactive approach to remedying the access barriers in San Francisco businesses without litigation. Over 18 months, the

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[56] Johnson, *supra* note 38, at 707. Between 1992 and 1997, the DOJ received just 2,953 charges for violations of Title III, which pales in comparison to the number of public accommodations that exist in the nation. Nat'l Council on Disability, Promises at 63.

[57] *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 16 (2000) (statement of Rep. Mark Foley), *available at*: http://commdocs.house.gov/committees/judiciary/hju66728.000/hju66728_0f.htm; *see also* Bagenstos, *supra* note 4, at 23.

[58] *E.g.*, Nat'l Council on Disability, Implementation at 189; Bagenstos, *supra* note 4, at 4.

[59] PERI, Access to San Francisco Small Businesses A Problem for Customers with Disabilities 1 (2008), *available at*: https://www.riskinstitute.org/peri/index2.php?option=com_bookmarks&do_pdf=1&id=316

Collaborative conducted extensive outreach to the business community on accessibility and made available a $25,000 technical assistance fund accompanied by a list of qualified, experienced accessibility surveyors from which to choose.[60] At the end of the outreach period, less than 3% of the 2,200 businesses contacted responded to ask for more information and less than 0.2% of the 2,200 businesses requested grants for accessibility surveys or modification planning.[61] PERI concluded from these results that most businesses believe the odds are that they will not be sued, so they will not spend money on accessibility until they are compelled to do so by litigation.[62]

The Disability Law Center (DLC), the designated protection and advocacy center in Massachusetts,[63] experienced similar results in its own mediation program for access barrier matters. Because very few attorneys would take referrals for such cases, DLC launched a mediation program free to all participants that was aimed at finding a collaborative solution.[64] In most cases the complainant was willing to participate in mediation because their only objective was securing

[60] *Id.* at 2-5.
[61] *Id.* at 1; *see also* Nat'l Council on Disability, Implementation at 172-74.
[62] PERI, Access to San Francisco Small Businesses A Problem for Customers with Disabilities at 5.
[63] 42 U.S.C. § 10805 (2006); Disability Law Center of Massachusetts, http://www.dlc-ma.org/.
[64] Nat'l Council on Disability, Implementation at 170.

access, but most business owners declined to participate.[65] The then-Executive Director of the DLC, Christine Griffin, described the businesses' approach: "They prefer to hedge their bet and wait to see if someone files the lawsuit."[66]

In a study conducted by the University of Illinois at Chicago, researchers visited 38 businesses in two Chicago neighborhoods and gave them a baseline assessment of whether the business's entrance and goods and services were fully accessible, moderately accessible, or inaccessible, along with suggestions on how to achieve greater accessibility inexpensively.[67] Four months later the researchers conducted follow-up assessments and only three businesses had improved from "inaccessible" to "moderately accessible" and none had become fully accessible.[68] The researchers also found that "many establishments believed that the lack of customers with disabilities justified not making accessibility improvements," demonstrating a lack of awareness that their inaccessible entrances prevented customers with disabilities from entering.[69]

Despite the prevalence of ADA access violations and the general refusal on the part of businesses to correct them, private litigants suing to remedy these violations still face great risk and little promise of reward. Plaintiffs bringing Title

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[65] *Id.*
[66] *Id.*
[67] *Id.* at 174.
[68] *Id.* at 175.
[69] *Id.*

III claims are unable to recover monetary damages, so their sole legal remedy is injunctive relief,[70] the pursuit of which is fraught with threshold challenges like narrow tests for standing. Because of the Supreme Court's strict construction of fee shifting provisions,[71] only the few plaintiffs who ultimately prevail in obtaining a judicially-sanctioned victory (less than 30% in Title III cases)[72] are permitted to recover their attorneys' fees. The result is that many individuals who routinely face barriers and wish to remedy them are dissuaded from bringing suit because of the great risks involved even when it is clear that the business at issue is violating the law.

This situation precipitated the development of a specialized bar and a class of ideologically motivated plaintiffs who understand the law and can effectively manage the risk of ADA enforcement.[73] As the National Council on Disability has noted:

> Title III enforcement requires the availability of a private bar that has the incentive to acquire ADA expertise and is willing to take on Title III compliance cases. Unfortunately, Title III's remedial limitations and the *Buckhannon* case have created the exact opposite status quo. Individuals with disabilities who encounter barriers under Title III are forced to rely purely on a public accommodation's good will in

[70] Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 Vand. L. Rev. 1807, 1825 & n.95 (2005) (citing 42 U.S.C. § 12188(a) (2002) (permitting only injunctive relief)).
[71] *E.g., Buckhannon Bd. & Care Home, Inc. v. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).
[72] Waterstone, *supra* note 70, at 1829.
[73] Bagenstos, *supra* note 4, at 12-14.

> responding to informal complaints or are left to seek out those few attorneys who have found ways to manage their risk when bringing Title III actions.[74]

Again, these plaintiffs act not only for themselves but also on behalf of all similarly situated individuals. This is particularly true for potential patrons of a public accommodation that is known to be inaccessible and is thus avoided because attempts to use it would be both futile and embarrassing.

In view of these realities, tests on standing that consider the litigation history of a plaintiff create a gratuitous barrier to enforcement of the ADA and remediation of access violations affecting many persons with disabilities.[75] Indeed, without "serial litigators" there would be very little enforcement of Title III at all. Putting aside the Title III claims brought by "a small group of nine individuals and advocate organizations [in Florida] . . . , there would have been *six* Title III cases filed for the entire state in 2005."[76] As the National Council on Disability put it: "it strains credulity to suggest that only six establishments in Florida were inaccessible to people with disabilities in 2005."[77] Similar results were seen in the Northern District of California, which contains San Francisco's

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[74] Nat'l Council on Disability, Implementation at 169; *see also id.* at 168, 177.
[75] *Id.* at 192 ("The central problem is that any attempt to curtail the actions of serial litigants by limiting Title III's private right of action will inevitably lead to limiting implementation of the ADA by further restricting a private right of enforcement that is already severely limited.").
[76] *Id.* at 189.
[77] *Id.*

109,000 private businesses, yet had just six Title III access claims filed in the first half of 2005.[78] The dearth of Title III enforcement actions is a direct result of jurisprudential barriers.

In sum, the frequency with which a plaintiff litigates should not be a factor in determining standing in view of the reality that there are rampant Title III violations that are expected to be remedied by private litigants at such great risk. Whether an ADA case is abusive or frivolous should be considered on the merits, and appropriate action taken. Stringent standing requirements, such as those applied by the District Court, assume, without evidence, that most ADA cases are frivolous. While the Judiciary cannot change the statutory circumstances contributing to this analysis, it is entirely free to – and should – apply its own standing principles to restore the promise that the ADA would bestow broad standing on those who are brave enough to enforce its mandates.

## Conclusion

Withholding standing from plaintiffs because of their distance from an offending facility or so-called "serial litigant" status signals to public accommodations across the country that they can avoid liability under the ADA if they do not discriminate against the same person twice.[79] This Court should refuse

[78] *Id.*

[79] *Pickern*, 293 F.3d at 1138 (quoting *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1080-81 (D. Haw. 2000) ("This court is reluctant to embrace a rule of

to communicate that message and instead adopt a more reasonable approach to standing in Title III cases that is consonant with the approach taken in other civil rights contexts, that is: asking if the plaintiff has a disability, the access barrier remains, and the plaintiff would be willing to return to the accommodation if the barrier were removed.

Respectfully submitted,

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standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice . . . .")).

## Certificate of Compliance

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c) that the foregoing brief is in 14-point, proportionately spaced Times New Roman font. According to the word processing software used to prepare this brief (Microsoft Word 2010), the word count of the brief is exactly 6363 words, excluding the cover, corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Gregory P. Care
Gregory P. Care

## Certificate of Service

I certify that on May 10, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record. In addition, pursuant to Local Rule 31(d), eight bound copies of the foregoing brief were mailed to the Clerk of the Court.

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