

Case No. 21-55183

UNITED STATES COURT OF APPEALS

for the

NINTH CIRCUIT

Chris Langer,
Plaintiff and Appellant,

vs.

Milan Kiser, Diana Kiser,
Defendants and Appellees.

On Appeal from the United States District Court,
Southern District of California
Case No.: 3:18-CV-00195-BEN-AHG
Hon. Roger T. Benitez

**BRIEF OF CIVIL RIGHTS EDUCATION AND ENFORCEMENT
CENTER, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND,
KATHERINE CORBETT, ANN CUPOLO-FREEMAN,
RUTHEE GOLDKORN, AND JULIE REISKIN AS *AMICI CURIAE*
IN OPPOSITION TO THE PETITION FOR REHEARING *EN BANC***

Amy Farr Robertson, CO Bar No. 25890
Fox & Robertson, PC
1 Broadway, Suite B205
Denver, CO 80203
303-917-1870
arob@foxrob.com

Maria Michelle Uzeta, SBN 164402
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
510-644-2555
muzeta@dredf.org

TABLE OF CONTENTS

CONSENT OF THE PARTIES TO THE FILING 1

CORPORATE DISCLOSURE STATEMENT 1

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)..... 1

IDENTITY AND INTERESTS OF *AMICI CURIAE* 2

INTRODUCTION..... 5

ARGUMENT 5

 I. Private Enforcement is Expressly Authorized by the ADA and is Crucial to the Statute’s Goal of Accessibility and Nondiscrimination. 5

 II. Petitioners and Supporting Amici are Complaining About Being Held to Account for Inaccessible Premises 9

 III. Tester Standing Has Been Recognized In a Wide Variety of Contexts 11

 IV. Title III Standing Does Not Required an Intent to Buy Goods or Services or Complete a Transaction..... 14

CONCLUSION 18

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE RULE 32(g)(1) 18

CERTIFICATE OF SERVICE..... 19

TABLE OF AUTHORITIES

Cases

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| <i>Antoninetti v. Chipotle Mexican Grill, Inc.</i> , 643 F.3d 1165 (9th Cir. 2010) | 11 |
| <i>Arroyo v. Golbahar</i> , No. 22-55182, 2023 WL 2064588 (9th Cir. Feb. 17, 2023) | 15 |
| <i>Arroyo v. Rosas</i> , 19 F.4th 1202 (9th Cir. 2021) | 15 |
| <i>Baughman v. Walt Disney World Co.</i> , 685 F.3d 1131 (9th Cir. 2012) | 16 |
| <i>Chapman v. Pier 1 Imports (U.S.) Inc.</i> , 631 F.3d 939 (9th Cir. 2011). | 12 |
| <i>Civil Rights Education and Enforcement Center v. Hospitality Properties Trust</i> , 867 F.3d 1093 (9th Cir. 2017) | 3, 10, 13, 14 |
| <i>Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.</i> , 765 F.3d 1205 (10th Cir. 2014) | 13 |
| <i>Colorado Cross Disability Coal. v. Hermanson Fam. Ltd. P’ship I</i> , No. CIV. 96-WY-2491-AJ, 1997 WL 33471623 (D. Colo. Aug. 5, 1997). | 15 |
| <i>D’Lil v. Best Western Encina Lodge & Suites</i> , 538 F.3d 1031 (9th Cir. 2008) | 7, 11 |
| <i>Doran v. 7-Eleven, Inc.</i> , 524 F.3d 1034 (9th Cir. 2008) | 5 |
| <i>Dudley v. Hannaford Bros. Co.</i> , 333 F.3d 299 (1st Cir. 2003). | 7 |
| <i>Evers v. Dwyer</i> , 358 U.S. 202 (1958). | 12, 13 |

Federal Election Comm’n. v. Cruz,
 142 S. Ct. 1638 (2022).....13

Harty v. Simon Prop. Grp., L.P.,
 428 F. App’x 69 (2d Cir. 2011.)13

Havens Realty Corp. v. Coleman,
 455 U.S. 363, 374 (1982).....12, 13

Houston v. Marod Supermarkets, Inc.,
 733 F.3d 1323 (11th Cir. 2013)13

Karczewski v. DCH Mission Valley LLC,
 862 F.3d 1006 (9th Cir. 2017)16

Kyles v. J.K. Guardian Sec. Servs., Inc.,
 222 F.3d 289 (7th Cir. 2000)13

Langer v. Kiser,
 57 F.4th 1085 (9th Cir. 2023)11, 14

Molski v. Evergreen Dynasty Corp.,
 500 F.3d 1047 (9th Cir. 2007).11

Mosley v. Kohl’s Dep’t Stores, Inc.,
 942 F.3d 752 (6th Cir. 2019)13

Nanni v. Aberdeen Marketplace, Inc.,
 878 F.3d 447 (4th Cir. 2017)13

Newman v. Piggie Park Enterprises, Inc.,
 390 U.S. 400, 402 (1968).....6, 7

Pierson v. Ray,
 386 U.S. 547 (1967).....12

Smith v. Pacific Properties and Development Corp.,
 358 F.3d 1097 (9th Cir. 2004).13

Spector v. Norwegian Cruise Line Ltd.,
 545 U.S. 119 (2005).....16

Suárez-Torres v. Panaderia Y Reposteria España, Inc.,
988 F.3d 542 (1st Cir. 2021).....13

Tandy v. City of Wichita,
380 F.3d 1277 (10th Cir. 2004)13

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972).....5

Statutes

Americans with Disabilities Act of 1990

42 U.S.C. § 121017, 10, 11

42 U.S.C. § 12181.*passim*

Pub. L. No. 101–336.....9

Civil Rights Act of 1964, tit. II, 42 U.S.C. § 2000a6, 7

Fair Housing Act of 1968, as amended, 42 U.S.C. § 360412, 13

42 U.S.C. § 198312

Other Authorities

Amy F. Robertson, *ADA Defense Abuse: A Case Study*,
CREECblog (Feb 27, 2018),
<https://creeclaw.org/2018/02/27/ada-defense-abuse-a-case-study/>7

*Implementation of the Americans with Disabilities Act: Challenges,
Best Practices and New Opportunities for Success*,
Nat’l Council on Disability, (July 26, 2007),
<https://permanent.fdlp.gov/lps91121/implementation-07-26-07.pdf>.....8

Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From
Law on the Books to Organizational Rights Practices*,
40 Law & Soc’y Rev. 493 (2006).....5

Michael Waterstone, *A New Vision of Public Enforcement*,
92 Minn. L. Rev. 434 (2007).6

Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*,
58 Vand. L. Rev. 1807 (2005)8

National Disability Policy: A Progress Report, Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 2),
Nat’l Council on Disability (Oct. 31, 2019),
https://ncd.gov/sites/default/files/NCD_Progress%20Report_508.pdf6

Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*,
54 UCLA L. Rev. 1 (2006).5, 6

Rules

Ninth Circuit Rule 29-2 18

Ninth Circuit Rule 32-1 18

Fed. R. App. P. 29 1

Fed. R. App. P. 32 18

Fed. R. App. P. 35 16

CONSENT OF THE PARTIES TO THE FILING
FEDERAL RULE OF APPELLATE PROCEDURE 29(b)(2)

This motion is filed with the consent of Dennis Price, on behalf of counsel for Plaintiff-Appellant, and Phillip Stillman, on behalf of counsel for Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* certify that no *Amicus* has a parent corporation and that no publicly held corporation owns 10 percent or more of any *Amicus*'s respective stock.

STATEMENT PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

The undersigned certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or any other person other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

IDENTITY AND INTERESTS OF AMICI CURIAE

Katherine Corbett (who writes under the name Corbett O’Toole) has been a national leader on disability rights for over 40 years, created the first national project on women and disability, organized the Disabled Women’s Symposium in Beijing, China in 1995, and has published two books as well as numerous articles in both peer-reviewed and popular publications. She has post-polio syndrome and uses a power wheelchair for mobility.

Ann Cupolo-Freeman has been involved in the disability rights movement for over 40 years. She has served on various nonprofit boards of directors including the Disability Rights Education and Defense Fund, the Center for Independent Living, and Jobs for the Homeless. She worked with Katherine Corbett on a grant that created a book entitled “No More Stares,” a role-model book for young women with disabilities. She has Diastrophic Dysplasia and uses a power wheelchair for mobility.

Ruthee Goldkorn has been a disability rights advocate for almost 30 years. She has been a member and served in executive positions of Californians for Disability Rights, is a member of the California Attorney General’s Disability Rights Working Group and a former member of the Los Angeles World Airports Disability Accessibility Accommodation Advisory Committee. She has multiple sclerosis and uses a power wheelchair for mobility.

Julie Reiskin, LCSW, is the Co-Executive Director of the Colorado Cross-Disability Coalition, a member of the Board of Directors of the Legal Services Corporation, Chair of the Board of the ACLU of Colorado, and an adjunct faculty member at the University of Denver Graduate School of Social Work. She has multiple sclerosis and uses a power wheelchair for mobility.

Ms. Corbett, Ms. Cupolo-Freeman, Ms. Goldkorn, and Ms. Reiskin – the “Individual *Amici*” – are all busy professional women who use wheelchairs. All relate, in emails to and conversations with the undersigned, recent and repeated encounters with architectural barriers throughout their daily lives at businesses constructed before and after the effective date of the Americans with Disabilities Act (“ADA”), including: stores and restaurants with a single step at the entrance; new restaurants with inaccessible tables; businesses with inaccessible restrooms; inaccessible hotel transportation; inaccessible theaters; inaccessible medical equipment; and inaccessible parking lots. While these barriers present significant difficulties for their professional and personal lives, they cannot possibly take time to file a federal lawsuit challenging every barrier they encounter each day. They did take the time to serve as testers and plaintiffs in the case of *Civil Rights Education and Enforcement Center v. Hospitality Properties Trust*, 867 F.3d 1093 (9th Cir. 2017) (“*CREEC*”), working to ensure that they and other disabled travelers could fully and equally enjoy the defendant’s hotels.

The Civil Rights Education and Enforcement Center (“CREEC”) is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC’s efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to places of public accommodation and that Title III of the ADA, 42 U.S.C. § 12181 *et seq.*, (“Title III”) can be effectively enforced to ensure equal access and independence.

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom it advocates. DREDF pursues its mission through education, advocacy and law reform efforts.

INTRODUCTION

Amici demonstrate below that the panel’s decision in this case is solidly in the mainstream of decisions of the Supreme Court, this Circuit, and other circuits over the past 65 years, and that thus neither rehearing nor the invective of Petitioners and their supporting *amici* is justified.

ARGUMENT

I. Private Enforcement is Expressly Authorized by the ADA and is Crucial to the Statute’s Goal of Accessibility and Nondiscrimination.

Congress chose to make private enforcement “the primary method of obtaining compliance with the [ADA].” *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039-40 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)); indeed, the remedies provision of Title III provides a private right of action for injunctive relief against places of public accommodation that violate its requirements. 42 U.S.C. § 12188(a). Understandably so, as “the ADA regulates more than 600,000 businesses, [and] 5 million places of public accommodation.”¹ The pace of government litigation cannot keep up with this broad reach.²

¹ Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 *Law & Soc’y Rev.* 493, 499-500 (2006).

² See Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 *UCLA L. Rev.* 1, 9-10 (2006).

Government enforcement suffers from factors including a lack of staff and resources, and the fact that the political environment at any given time often dictates the amount of effort the Department of Justice (“DOJ”) invests in civil rights enforcement.³ These factors have had a negative impact on the DOJ’s ability to enforce federal disability rights laws. At best, the DOJ’s enforcement efforts have been “inconsistent,” and can “result in a relapse of gains achieved or a failure to appropriately react to emerging issues.”⁴

Reliance on private enforcement has its roots in Title II of the Civil Rights Act of 1964 (“CRA”), 42 U.S.C. § 2000a *et seq.* – prohibiting race discrimination in public accommodations – and has been explicitly endorsed by the Supreme Court. In *Newman v. Piggie Park Enterprises, Inc.*, the Court held that when a private plaintiff sues to enforce Title II of the CRA, he “does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.” 390 U.S. 400, 402 (1968). Indeed, it held, private litigation was essential to “securing broad compliance with the law.” *Id.* at

³ *Id.* at 9; Michael Waterstone, *A New Vision of Public Enforcement*, 92 Minn. L. Rev. 434, 436, 450-451 (2007). *See also National Disability Policy: A Progress Report, Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 2)*, Nat’l Council on Disability, at 89 tbl. A, 90 tbl. B (Oct. 31, 2019), https://ncd.gov/sites/default/files/NCD_Progress%20Report_508.pdf (reporting consistently declining budget levels and a 24% drop in staffing for the DOJ’s Civil Rights Division between 2010 and 2018).

⁴ *Id.* at 42.

401. The remedies provision of Title III of the ADA incorporates by reference that of Title II of the CRA, 42 U.S.C. § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a)), and “[i]t is fair to assume that Congress had the same understanding [as expressed in *Newman*] when it enacted Title III of the ADA.” *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003). Thus, it is not a stretch to conclude that without private litigants, the ADA’s promise of equality and inclusion would be nothing more than a lofty dream.

Yet, despite Congressional intent to facilitate private enforcement and create “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” 42 U.S.C. § 12101(b)(1)-(2), ADA access cases are becoming riskier and more difficult for the private bar to bring. This Court has already recognized that the fact that Title III provides only injunctive relief “removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit . . .” *D’Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (internal citations omitted). Further, litigating an ADA case – especially against the not-uncommon headwind of defense motions practice – often takes many years and extensive resources.⁵ As

⁵ See, e.g., Amy F. Robertson, *ADA Defense Abuse: A Case Study*, CREECblog (Feb 27, 2018), <https://creeclaw.org/2018/02/27/ada-defense-abuse-a-case-study/> (detailing the two-and-a-half-year course of a Title III case resulting in an agreement to survey and remedy inaccessible parking).

a result of these risks and hurdles, many individuals with disabilities are unwilling or unable to undertake the arduous litigation process,⁶ and the ADA remains a chronically *under-enforced* statute.⁷

This case is an excellent example of the arduous path to basic barrier removal. It was filed in January 2018 simply asking that Petitioners make their parking lot accessible. Rather than complying with the applicable accessibility standards, Petitioners have contentiously fought jurisdiction and liability for more than five years. If individuals with the fortitude to take on the burden of enforcement as testers are stripped of standing moving forward, the result will inevitably be less private enforcement of the ADA, frustration of statutory goals, and the continued exclusion of people with disabilities from community life.

⁶ *Implementation of the Americans with Disabilities Act: Challenges, Best Practices and New Opportunities for Success* at 169, Nat'l Council on Disability, (July 26, 2007), <https://permanent.fdlp.gov/lps91121/implementation-07-26-07.pdf> (“Few civil rights plaintiffs, no matter how self-motivated and justified by circumstances, have sufficient resources of time, money, and specialized training to successfully bring and maintain a federal lawsuit by themselves.”)

⁷ See Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 Vand. L. Rev. 1807, 1854 (2005) (arguing that “[c]ombined with survey data and other social science research showing that people with disabilities are still at the margins of society in areas covered by Titles II and III, these low numbers demonstrate under-enforcement of these Titles ... [and] demonstrated noncompliance.”).

II. Petitioners and Supporting *Amici* are Complaining About Being Held to Account for Inaccessible Premises.

The panel’s decision here does not present an issue of exceptional importance; it demonstrates Title III being enforced as intended, albeit long after the deadline for compliance.

Missing in the hyperbole of the Petition and supporting *amicus* briefs is any assertion that now, over 30 years after it was required, Petitioners’ facilities or those challenged in the other cases cited in those briefs are actually accessible to people with disabilities.

The ADA was signed into law on July 26, 1990, and became effective on January 26, 1992.⁸ Title III of the statute required all facilities constructed after that date to be accessible, *see* 42 U.S.C. § 12183(a); it required existing facilities to remove barriers where readily achievable to do so by January 26, 1993, at the latest, *id.* § 12182(b)(2)(A)(iv).⁹

Thirty years ago.

Given these requirements and deadlines, people like the Individual *Amici* and Plaintiff/Appellant Chris Langer should be able to go about their daily lives accessing new buildings – and older buildings in which barrier removal was

⁸ Americans with Disabilities Act of 1990, Pub. L. No. 101–336, § 310(a).

⁹ For certain smaller businesses, lawsuits could not be brought to challenge failure to remove barriers until up to one year after the effective date, or January 26, 1993. *Id.* § 310(b).

readily achievable – and generally “full[y] and equal[ly] enjoy[ing] ... the goods, services, facilities, privileges, advantages, [and] accommodations of ... place[s] of public accommodations.” 42 U.S.C. § 12182(a).

This hasn’t happened. Instead, ongoing and widespread noncompliance with Title III has resulted in people with disabilities being excluded, relegated to inferior services and facilities, disadvantaged socially and economically¹⁰ – and deeply frustrated that their efforts toward full and equal enjoyment are not only obstructed but villainized by noncompliant businesses.

It is the experience of the Individual *Amici* that illegal barriers are a routine impediment to their professional and personal lives. By the time a wheelchair-user arrives at a public accommodation, hoping to enjoy its goods, services, facilities, privileges, advantages, and accommodations, it’s too late for a lawsuit to be much use. You roll up to a place that should have been made accessible some time in the past 30 years only to discover that you can’t park, or you can’t get in the door, or you can’t use the restroom, or – in the case of the Individual *Amici* in the *CREEC* case – you can’t get from the airport to your hotel because the hotel’s van is inaccessible. The fact that you just achieved an injury-in-fact and an admit-one

¹⁰ The social and economic disadvantage that results from the exclusion and relegation of people with disabilities to inferior services and facilities is a primary reason the ADA was enacted. 42 U.S.C. § 12101(a)(5) and (6). The ADA’s purpose is profoundly frustrated by continued noncompliance with accessibility standards.

ticket to federal court does not let you park, or get in the door, or use the restroom, or get to your hotel.

Testers help solve this problem. Wheelchair-users who are intentional about investigating and challenging barriers can help move our society toward a time when they and others can go about their daily lives expecting *and finding* access to a wide range of facilities and thus achieving the ADA’s goal of “equality of opportunity, full participation, independent living, and economic self-sufficiency.” 42 U.S.C. § 12101(a)(7). As this Court has stated, “[f]or the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA.” *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007).¹¹

III. Tester Standing Has Been Recognized In a Wide Variety of Contexts.

Mr. Langer, the Individual *Amici*, and other ADA testers are participating in a long and honored history of civil rights enforcement. In order to bring this enforcement to federal court, they must of course show an “inten[t] to return to the facility” or deterrence from returning. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631

¹¹ Quoted in *Langer v. Kiser*, 57 F.4th 1085, 1095 (9th Cir. 2023); *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1175 (9th Cir. 2010); *D’Lil*, 538 F.3d at 1040.

F.3d 939, 953 (9th Cir. 2011). Tester standing does not change this; it simply eliminates motive from the equation.

As early as 1958, the Supreme Court recognized that motive did not factor into the standing analysis, holding that a Black plaintiff who rode a segregated bus for the purpose of instituting litigation had standing. *Evers v. Dwyer*, 358 U.S. 202, 204 (1958). In 1967, the Court held that Black ministers who had used a whites-only waiting room in Jackson, Mississippi with the expectation of being arrested had standing to seek damages under 42 U.S.C. § 1983. *Pierson v. Ray*, 386 U.S. 547, 558 (1967).

The Court relied on those two cases when, in *Havens Realty Corp. v. Coleman*, it recognized the standing of a Black tester who had received inaccurate information about the availability of housing, in violation of the Fair Housing Act, 42 U.S.C. § 3604(d). 455 U.S. 363, 374 (1982).¹² The Court defined “testers” as “individuals who, *without an intent to rent or purchase* a home or apartment, *pose as renters or purchasers* for the purpose of *collecting evidence* of unlawful steering practices.” *Id.* at 373 (emphasis added). This Circuit relied on that definition to recognize fair housing testing beyond just the receipt of inaccurate

¹² Petitioners and several of their supporting *amici* strive to differentiate Title III testing from the specific type of testing at issue in *Havens*. *See, e.g.*, Petition at 13 (“The FHA prohibited misrepresentations”). This ignores the long and varied history of testing as a tool of civil rights enforcement in fair housing and other contexts.

information prohibited by § 3604(d). In *Smith v. Pacific Properties and Development Corp.*, it held that a disabled tester who observed architectural barriers in a housing development in violation of 42 U.S.C. § 3604(f)(2) had standing to sue. 358 F.3d 1097, 1102, 1104 (9th Cir. 2004). It later quoted the *Havens* definition in recognizing Title III tester standing in *CREEC*. 867 F.3d at 1101. Other circuits have recognized testing as a tool for challenging discrimination in employment,¹³ transportation,¹⁴ and of course – as here – architectural barriers.¹⁵

Just last year, the Supreme Court held that Sen. Ted Cruz had standing to challenge provisions of federal election law despite the fact that his injury-in-fact was self-inflicted: he had “knowingly triggered” the applicable statute. *Federal Election Comm’n. v. Cruz*, 142 S. Ct. 1638, 1647 (2022) (citing *Evers* and *Havens*).

¹³ *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 298 (7th Cir. 2000) (holding that Black testers who applied for a job had standing to challenge discriminatory treatment in the hiring process).

¹⁴ *Tandy v. City of Wichita*, 380 F.3d 1277, 1285, 1287 (10th Cir. 2004) (disabled bus passenger had standing to where his motive to ride the bus was not “for personal transportation” but to test the system several times per year).

¹⁵ *Suárez-Torres v. Panaderia Y Reposteria España, Inc.*, 988 F.3d 542, 551 (1st Cir. 2021); *Mosley v. Kohl’s Dep’t Stores, Inc.*, 942 F.3d 752, 758 (6th Cir. 2019); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 457 (4th Cir. 2017); *Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211 (10th Cir. 2014); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332 (11th Cir. 2013); *Harty v. Simon Prop. Grp., L.P.*, 428 F. App’x 69, 71 (2d Cir. 2011.)

Again, far from presenting a deviation from precedent or an issue of exceptional importance, the panel’s decision here is in line with cases over the past 65 years across many circuits – including this one, *CREEC*, 867 F.3d at 1103 – and the Supreme Court as well as widely-accepted civil rights enforcement practices.

IV. Title III Standing Does Not Required an Intent to Buy Goods or Services or Complete a Transaction.

Petitioners attempt to heighten the standard for Title III standing in ways contrary to the plain language of the statute. They assert – without citation – that it is a “bare minimum requirement” that a Title III plaintiff “desire to buy a good or service.” Petition at 9; *see also id.* at 1 (“complete a transaction”); 8 (“Title III’s goal [is] to make goods and services available to disabled patrons who seek to purchase them.”); 12 (“the commercial aspect of Title 3”).¹⁶

Title III is far broader than Petitioners’ new standard suggests, requiring – as noted above – “full and equal enjoyment of the goods, services, facilities, privileges, advantages, [and] accommodations” of a place of public accommodation. 42 U.S.C. § 12182(a). Petitioners essentially ask this Court to delete the words “full and equal” from this statutory provision and pretend that it stops after the words “goods” and “services.”

¹⁶ This is a theoretical point on Petitioners’ part, as Mr. Langer testified to an intent to patronize Petitioners’ business. *Langer*, 57 F.4th at 1098-99.

As one early Title III testing case put it,

[s]hopping is one of the great American pastimes. People browse in shops and shopping areas, see what is available and make purchases if something catches their fancy. There simply is no requirement in the ADA that a person desiring entrance into a place of public accommodation have a specific desire to make a purchase at that particular business.

Colorado Cross Disability Coal. v. Hermanson Fam. Ltd. P'ship I, No. CIV. 96-WY-2491-AJ, 1997 WL 33471623, at *4 (D. Colo. Aug. 5, 1997). This Court has clearly distinguished between California state law, which requires a plaintiff to demonstrate an intent to use a business's services, and Title III of the ADA, which requires only an intent to visit the store. *Arroyo v. Rosas*, 19 F.4th 1202, 1215 (9th Cir. 2021).¹⁷

This is underscored by the list of exemplar public accommodations in Title III's definition of that term, which includes many where one would not necessarily "buy a good or service:" homeless shelters and other social service establishments; lecture halls and other places of public gathering; galleries and other places of display or collection; and parks and other places of recreation. *See generally* 42 U.S.C. § 12181(7). Hotels and car dealerships – to take examples from among the *amici* supporting Petitioners – are places that people commonly visit without the

¹⁷ *See also* *Arroyo v. Golbahar*, No. 22-55182, 2023 WL 2064588, at *1-3 (9th Cir. Feb. 17, 2023) (memorandum disposition filed *after* the panel opinion here, finding similarly and citing *Arroyo v. Rosas*).

intent or result of making a purchase: hotels to attend events hosted by others; and car dealerships to test drive cars before deciding to buy one, *cf. Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1009 (9th Cir. 2017) (reversing dismissal of plaintiff’s claim that Title III required car dealership to provide hand controls to test drive its vehicles).

People who do not use wheelchairs are able to go in and out of places of public accommodation without demonstrating a “desire to buy a good or service.” In order for enjoyment to be full and equal, as required by Title III, wheelchair-users must be able to use public accommodations in the same way. “Public accommodations must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience.” *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (citing *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 128-29 (2005)).

Petitioners’ crabbed version of Title III standing would do precisely the opposite of “secur[ing] or maintain[ing] uniformity of the court’s decisions,” Fed. R. App. P. 35(a), but instead would take Title III jurisprudence in new direction destructive of the rights protected by that statute.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the petition for rehearing *en banc* be denied.

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta

Michelle Uzeta

Attorney for Amici Curiae

Dated: March 9, 2023

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE RULE 32(g)(1)**

I certify that the foregoing brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6). The brief contains approximately 3,695 words, excluding the items exempted by Fed. R. App. P. 32(f), as counted using Microsoft Word, Version 2208, and uses a proportionally spaced typeface and 14-point font. This brief is accompanied by Form 8, in compliance with Circuit Rule 32-1(e).

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: March 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2023, I electronically filed the foregoing Brief of Civil Rights Education and Enforcement Center, Disability Rights Education and Defense Fund, Katherine Corbett, Ann Cupolo-Freeman, Ruthee Goldkorn, and Julie Reiskin as *Amici Curiae* in Opposition to the Petition for *en Banc* Review with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all the participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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