Case No. 09-56447

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A.J. OLIVER

Plaintiff/Appellant

v.

RALPH'S GROCERY COMPANY,
AND CYPRESS CREEK CO., LP

Defendants/Appellees.

On Appeal from the United States District Court
for the Southern District of California,
Honorable Janis L. Sammartino, District Judge, Presiding

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS LEGAL CENTER, THE IMPACT FUND, NATIONAL DISABILITY RIGHTS NETWORK, DISABILITY RIGHTS CALIFORNIA, NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL FEDERATION OF THE BLIND, PARALYZED VETERANS OF AMERICA AND LAW FOUNDATION OF SILICON VALLEY IN SUPPORT OF PETITION FOR REHEARING EN BANC

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici Curiae are organizations that represent and advocate for the rights and interests of people with disabilities. *Amici* have an interest in this case because the panel opinion would establish a heightened pleading standard for cases alleging physical barriers in violation of the Americans with Disabilities Act and thus make disability rights enforcement more difficult, in violation of clear congressional mandate. Each *Amicus* and its specific interests are described in the accompanying motion of *Amici Curiae* for leave to file the present brief in support of Appellant's petition for rehearing and rehearing en banc.

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(C)(5)

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 Curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF ISSUES MERITING EN BANC CONSIDERATION

1. Whether a plaintiff alleging discrimination under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181 – 12189, is required to identify, in the complaint itself, all barriers to access for people with disabilities that support the claim, contrary to this Court's holding in *Skaff v. Meridien North American Beverly Hills*, 506 F. 3d 832, 841, 842 (9th Cir. 2007).

2. Whether the ADA, as mandated by its statutory language, 42 U.S.C. §§ 12201(a) & 12134, incorporates the substantive standards of section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and its implementing regulations, *see, e.g.*, 28 C.F.R. pt 41.

INTRODUCTION AND STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 35(B)(1)

Pursuant to Federal Rule of Appellate Procedure 35, the Court should reconsider this case en banc because the panel decision "conflicts with a decision of . . . [this Court] and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions." The panel opinion's holding that Federal Rule of Civil Procedure 8 requires a Title III plaintiff alleging discriminatory physical barriers to identify in his complaint all actionable barriers, *Oliver v. Ralphs Grocery Co.*, 2011 WL 3607014, at *4 (9th Cir. Aug. 17, 2011) ("panel opinion"), is directly contrary to this Court's explicit holding in *Skaff v. Meridien North American Beverly Hills, LLC*, that a Title III plaintiff does not

have to identify each barrier, but rather that "concerns about specificity in a complaint are properly addressed through discovery." 506 F.3d 832, 842 (9th Cir. 2007). Notably, *Skaff* was decided after the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), clarifying the pleading standards under Rule 8.

The panel opinion also conflicts with this Court's en banc opinion in *Chapman v. Pier 1 Imports (U.S.) Inc.*, which held that "'[a]n ADA plaintiff who has Article III standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability.'" 631 F.3d 939, 951-52, 960 (9th Cir. 2011) (en banc) (citation omitted).

"Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). The *Oliver* panel was "controlled by the rule announced in [*Skaff* and had] no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court." *Id.* Because the panel opinion conflicts with prior opinion, this Court should reconsider the case en banc and, ultimately, reaffirm the holding in *Skaff*—which is consistent with the

en banc decision in *Chapman*—that a plaintiff in a Title III case alleging physical barriers is not required to list all actionable barriers in his complaint.

FACTS[1]

Plaintiff/Appellant A.J. Oliver is an individual with a disability who uses a wheelchair. On December 7, 2007, he filed suit against Defendants/Appellees alleging that a Food 4 Less grocery store contained physical barriers that discriminated against him in violation of Title III of the ADA, including but not limited to 18 specific architectural features. Mr. Oliver indicated his intent to amend the complaint to allege additional barriers, and the district court set a deadline to file amended pleadings.

Mr. Oliver did not file by the deadline, but rather attempted, two weeks later, to amend the scheduling order to permit late filing of an amended complaint. The district court denied this request for lack of good cause. Four months later, Mr. Oliver filed an expert report that listed the original 18 barriers as well as several additional barriers. The panel opinion states that, "Oliver's counsel later explained that his delays in identifying the barriers at the facility were part of his legal strategy: he purposely 'forces the defense to wait until expert disclosures (or discovery) before revealing a complete list of barriers,' because otherwise a defendant could remove all the barriers prior to trial and moot the entire case."

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[1] This section is summarized from the panel opinion. *See* 2011 WL 3607014, at *1-2.

2011 WL 3607014, at *2 n.7.

The district court refused to consider the barriers raised for the first time in Mr. Oliver's expert report. It granted summary judgment in the defendants' favor on various grounds with respect to the 18 barriers listed in the complaint.

The panel affirmed. It held that Mr. Oliver "did not give the defendants fair notice that the barriers listed for the first time in the expert report were grounds for his claim of discrimination," *Oliver*, 2011 WL 3607014, at *4, and stated, more broadly, that "[i]n general, only disclosures of barriers in a properly pleaded complaint can provide such notice; a disclosure made during discovery, including in an expert report, would rarely be an adequate substitute," *id.* The panel opinion's concluding paragraph goes even farther still: "[F]or purposes of Rule 8, a plaintiff must identify the barriers that constitute the grounds for a claim of discrimination under the ADA in the complaint itself; a defendant is not deemed to have fair notice of barriers identified elsewhere." *Id.* at *5.

ARGUMENT

I. Under Governing Ninth Circuit Precedent, a Plaintiff Alleging Discrimination Under Title III of the ADA Is Not Required to List all Actionable Barriers in his Complaint.

The panel opinion in *Oliver* conflicts with Circuit precedent holding that a plaintiff challenging discriminatory physical barriers does not have to list each such barrier in his complaint.

Title III of the ADA prohibits discrimination on the basis of disability by places of public accommodation. 42 U.S.C. § 12182(a). Newly constructed facilities and alterations to existing facilities are required to be "readily accessible to and usable by individuals with disabilities," *id.* § 12183(a)(1) & (2); barriers are required to be removed from unaltered existing facilities where "readily achievable" to do so, *id.* § 12182(b)(2)(A)(iv). This Court has held that, in a Title III claim, the various barriers in a facility do not give rise to discrete injuries; rather "the injury . . . is the 'discrimination' under the ADA that results from an accommodation's 'failure to remove architectural barriers.'" *Chapman*, 631 F.3d at 951-52 (citation omitted).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (citation omitted).

In *Skaff*, this Court addressed the level of specificity required in a complaint alleging discrimination in the form of physical barriers that violate the ADA, and concluded that the plaintiff was not required to list each actionable barrier in his complaint. The plaintiff in *Skaff* sued a hotel alleging that he "encountered numerous . . . barriers to disabled access, including 'path of travel,' guestroom,

bathroom, telephone, elevator, and signage barriers to access, all in violation of federal and state law and regulation[.]" 506 F.3d at 840. The defendant challenged the complaint on the grounds that the plaintiff "did not allege the existence of specific accessibility barriers with sufficient detail." *Id.* at 841.

Skaff rejected that argument, holding that the complaint had provided sufficient notice and that "concerns about specificity in a complaint are properly addressed through discovery . . .." *Id.* at 842. The Court noted that the defendant's argument "ignore[d] the purpose of a complaint under Rule 8—to give the defendant fair notice," and quoted the Supreme Court's holding that "'[s]pecific facts are not necessary'" to satisfy Rule 8. *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). This Court also instructed that "Rule 8's concluding admonishment that '[a]ll pleadings shall be so construed as to do substantial justice' confirms the liberality with which we should judge whether a complaint gives the defendant sufficient notice of the court's jurisdiction." *Id.* at 839 (quoting Fed. R. Civ. P. 8(f)).

Skaff thus established the law of the Circuit that a Title III plaintiff alleging physical barriers is not required to list each actionable barrier in his complaint in order to provide sufficient notice of his discrimination claim.

II. *Skaff* Controls the Outcome in this Case.

Under the law of the circuit, the *Oliver* panel should have followed *Skaff*

because that decision was issued before *Oliver* and "[o]nly the en banc court can overturn a prior panel precedent." *United States v. Parker*, --- F.3d ---, 2011 WL 3659313, at *2 (9th Cir. Aug. 22, 2011).

The *Oliver* panel opinion neither cited nor distinguished *Skaff*. Rather, it relied on *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963 (9th Cir. 2006), *Oliver*, 2011 WL 3607014, at *4, but misstated the holding of that case. In *Pickern*, the plaintiff had filed a complaint under Title III of the ADA listing "possible architectural barriers," but "did not actually allege that any of these specific barriers existed." 457 F.3d at 965. Four months after the deadline for expert reports and after the close of discovery, the plaintiff filed an expert declaration alleging specific barriers. *Id.* at 966. This Court held that the list of "hypothetical possible barriers" in the complaint did not provide adequate notice and that "because the expert's report was not filed and served until after the discovery deadline, that report cannot be construed as notice that would prompt the Appellees to seek discovery regarding the new allegations." *Id.* at 969.

In other words, *Pickern* viewed an expert report as a legitimate potential source of notice, but rejected it in that case because it was not timely filed.

The *Oliver* panel opinion cited *Pickern* for the statement that "in order for the complaint to provide fair notice to the defendant, each such feature must be alleged in the complaint." *Oliver*, 2011 WL 3607014, at *4. As is clear from the

above, however, *Pickern* made no such holding. Rather, *Pickern* is consistent with *Skaff* in recognizing discovery as a legitimate source of notice, if timely. *See Skaff*, 506 F.3d at 841-42 ("concerns about specificity in a complaint are properly addressed through discovery").

III. The Panel Opinion Improperly Creates a Heightened Pleading Standard That Will Undermine Enforcement of Title III.

A. The Panel Opinion Improperly Creates a Heightened Pleading Standard.

The panel opinion's requirement that an ADA plaintiff list all actionable barriers in his complaint will subject individuals with physical disabilities—those most likely to face discrimination from such barriers—to a heightened pleading standard. *Skaff*, 506 F.3d at 842.

In *Swierkiewicz v. Sorema N.A.*, the Supreme Court held that it was inappropriate to impose a heightened pleading standard for complaints alleging discrimination in employment. 534 U.S. 506, 515 (2002). Although the Supreme Court clarified the pleading standards under Rule 8 five years later in *Twombly*, that Court cited *Swierkiewicz* in reaffirming that the standard it articulated did not "apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished '"by the process of amending the Federal Rules, and not by judicial interpretation."'" *Twombly*, 550 U.S. at 569 n.14 (quoting *Swierkiewicz*, 534 U.S. at 515, and

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

It is for this reason that *Skaff*—after *Twombly*—rejected the heightened pleading standard adopted by the panel here. 506 F.3d at 841 ("[T]he Supreme Court has repeatedly instructed us not to impose such heightened standards in the absence of an explicit requirement in a statute or federal rule." (citing *Swierkiewicz*, 534 U.S. at 515)). Contrary to this clear Ninth Circuit and Supreme Court authority, the panel opinion has improperly established a heightened pleading standard for disabled plaintiffs alleging physical barriers in violation of Title III.

B. The Heightened Pleading Standard in the Panel Opinion Will Undermine Enforcement of Title III

"'[U]nder the ADA, private enforcement suits "are the primary method of obtaining compliance with the Act."'" *Chapman*, 631 F.3d at 946 (quoting *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008), and *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)). "[T]he enforcement scheme of Title III of the ADA would be severely undermined if we were to adopt [a] piecemeal approach." *Doran*, 524 F.3d 1034, 1043. The panel opinion's heightened pleading standard is not only improper, *see Twombly*, 550 U.S. at 569 n.14; *Swierkiewicz*, 534 U.S. at 512-13; *Skaff*, 506 F.3d at 841, it will also undermine the private enforcement that this Court—en banc—has held to be crucial.

The panel opinion's heightened pleading standard will prejudice plaintiffs with disabilities and unnecessarily burden the courts. Plaintiffs will be forced to fully and officially survey facilities prior to litigation, often contrary to the will of the owner/operator of the premises, or gamble on courts' willingness to allow unfettered amendments to pleadings to specifically address each and every barrier discovered after an initial lawsuit is filed. If a court does not permit unfettered amendments, the plaintiff will be forced to file multiple complaints against the same facility to obtain meaningful injunctive relief. Ultimately, the panel opinion will discourage and undermine enforcement. *See Chapman*, 631 F.3d at 952 (outlining consequences of a heightened pleading standard).

Finally, facility owners and operators, such as Appellees here, have had notice for over twenty years concerning the precise conditions that constitute barriers in violation of the ADA. The Department of Justice adopted the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") as the standard for new construction and alterations on July 26, 1991. 56 Fed. Reg. 35544, 35602 (28 C.F.R. § 36.406(a)). The ADAAG provide detailed, inch-by-inch, standards with which building owners and operators are required to comply. *See generally* 28 C.F.R. pt. 36, app. A (1991). As this Court has recognized, "[t]hose responsible for new construction are on notice that if they comply with the ADAAG's objectively measurable requirements, they will be free from suit by a

person who has a particular disability related to that requirement." *Chapman*, 631 F.3d at 948 n.5. Twenty years after initial publication of the ADAAG, businesses cannot credibly claim they have no notice of how to build, alter, or maintain a compliant facility.

IV. The Panel Opinion Improperly Used Rule 8 to Address a Discovery and Case Management Issue.

As this Court explained in *Skaff*—addressing the level of detail in a Title III claim for physical barriers—"concerns about specificity in a complaint are properly addressed through discovery devices under Rules 26, 27, 33, and 36, and, if applicable, the pre-trial order entered pursuant to Rule 16." 506 F.3d at 842; *see also Swierkiewicz*, 534 U.S. at 512-13 (holding that Rule 8(a)(2)'s "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

The panel opinion—and the district court—should have addressed any concern about the specificity of Mr. Oliver's complaint through an analysis of the state of discovery, for example, whether the plaintiff had responded to interrogatories, document requests, and depositions and whether—if unsatisfied—the defendant had filed a motion to compel. *See Skaff*, 506 F.3d at 842 (noting that the defendant could have propounded more specific discovery and that it had not moved to compel).

To the extent footnote seven of the panel opinion suggests a concern about the plaintiff's conduct of the litigation, district courts have a number of case management tools at their disposal—in addition to the discovery listed in *Skaff*—to ensure that the defendant has notice of the barriers being challenged in a Title III claim. For example, the Chief Judge of the Northern District of California has issued General Order 56,[2] which stays most discovery in Title III cases while requiring the parties to jointly inspect the premises and then to meet and confer to discuss specific violations and solutions. Even in districts without a similar general order, Rule 16 gives district courts the power to set deadlines and otherwise manage Title III cases to ensure that all parties have sufficient notice. Finally, of course, the sanctions provisions of Rules 11, 16(f), 26(g)(3), and 37(b)(2) of the Federal Rules of Civil Procedure, among others, give district courts ample tools to address discovery abuse, failure to comply with deadlines, and other litigation misbehavior.

V. The Panel Opinion Conflicts with this Court's En Banc Decision in *Chapman*.

In both *Chapman* and *Doran*, the Court held that "each separate architectural barrier inhibiting a disabled person's access to a public accommodation" is not a separate injury, but rather "the injury suffered by disabled plaintiffs is the

[2] http://www.cand.uscourts.gov/filelibrary/142/GO%2056.pdf.

'discrimination' under the ADA that results from an accommodation's 'failure to remove architectural barriers.'" *Chapman*, 631 F.3d at 951-52 (quoting *Doran*, 524 F.3d at 1042-43; 42 U.S.C. § 12182(b)(2)(A)(iv)). Thus, "[a]n ADA plaintiff who has Article III standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability." *Doran*, 524 F.3d at 1047 (quoted with approval in *Chapman*, 631 F.3d at 950-51, 960).

Chapman and *Doran* explicitly address standing, but they are ultimately about *pleading* standards, because they address what a plaintiff must allege to get into the courthouse. *See Warth v. Seldin*, 422 U.S. 490, 500-01 (1975) (explaining that standing question may depend on the nature of the "injury" under the statute). Rule 8 addresses those same concerns, and is therefore indistinguishable in this context. If an ADA plaintiff has standing to seek a remedy for barriers beyond those personally experienced, he cannot be expected to plead the extent of those barriers at the beginning of the case, when he is, by definition, unaware of them. Although the plaintiff could theoretically file a series of amended complaints to address later-discovered barriers, as noted above, turning discovery responses into amended complaints in this way is a waste of the court's and the parties' time. The scope of the violations is, as explained earlier, the proper province of discovery. Rule 8 requires only a short and plain statement of jurisdiction, the plaintiff's

claim, and relief requested. Fed. R. Civ. P. 8(a). *Chapman* and *Doran* explain that the ADA injury is not barrier-specific, thus plaintiffs need not plead all barrier-specific injuries to state a claim.

The panel opinion directly contradicts this controlling rule of law. In attempting to solve a case management issue with a new pleading standard, the panel opinion not only conflicts with existing law, it burdens individuals and businesses with an unwieldy and unworkable rule.

VI. The Panel's Dicta Concerning 42 U.S.C. § 12201(a) Conflicts with Prior Circuit and Supreme Court Precedent.

Dicta in footnote 11 of the panel opinion make a sweeping, important, and demonstrably incorrect statement. Having decided the parties' dispute concerning California Manual on Uniform Traffic Control Devices ("MUTCD") on other grounds, *see Oliver*, 2011 WL 3607014, at *6, the panel opinion states: "[O]ur case law interpreting [42 U.S.C.] § 12201(a) does not support Oliver's argument that the ADA incorporates the substantive standards contained in the Rehabilitation Act and its regulations." *Id.*, at *6 n.11.

The ADA's statutory language and Circuit and Supreme Court precedent make it very clear that the ADA incorporates the standards and regulations implementing section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The plain language of Section 12201(a) states:

Except as otherwise provided in this Chapter, nothing in this Chapter shall

> be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a). This language—in and of itself—constitutes an explicit congressional mandate that the ADA effectively adopts the substantive and remedial provisions of Section 504 and its implementing regulations. The ADA's statutory language also mandates that the Department of Justice promulgate regulations that are consistent with regulations implementing section 504. *See* 42 U.S.C. § 12134(b).

These ADA provisions were enacted against a backdrop of explicit congressional endorsement of Section 504 regulations. *See, e.g.*, *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 632, 635 (1984) (holding that Section 504 regulations were "endorsed" and "codified" by Congress).[3] Accordingly, both Supreme Court and Circuit precedent explicitly recognize the incorporation of Section 504 into the ADA. For example, the en banc decision in *Chapman* relies on the Rehabilitation Act case of *Alexander v. Choate*, 469 U.S. 287 (1985), to

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[3] In the almost three decades since 1984, Congress has repeatedly acted to reauthorize and amend Section 504. In none of those actions has it objected to the Supreme Court's characterization in *Darrone* of a congressional "endorsement" of Section 504 regulations. *E.g.*, Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (July 26, 1990); ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (Sept. 25, 2008); Civil Rights & Remedies Equalization Act of 1986, Pub. L. 99-506, 100 Stat. 1807 (Oct 21, 1986); Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (Mar. 22, 1988); and Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (Oct. 29, 1992).

interpret Title III of the ADA and explains, "'[t]he legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.'" 631 F.3d at 944-45 & n.2 (quoting *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n. 3 (9th Cir. 1995)); *accord Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999) (same); *see also Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (Section 12201(a) "requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"); *Pierce v. County of Orange*, 526 F.3d 1190, 1216 n.27 (9th Cir. 2008) (Title II of the ADA was modeled after section 504; "'[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act'" (quoting *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999))); *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) (noting that "Congress has directed that the ADA and RA be construed consistently" (citing 42 U.S.C. § 12134(b))).

Although the challenged sentence in footnote 11 is not necessary to the panel's ultimate decision, it is in direct conflict with Circuit and Supreme Court precedent and *Amici* respectfully request that it be corrected in or deleted from any opinion on rehearing or rehearing en banc.

CONCLUSION

For all of the reasons stated above, *Amici* respectfully request that this Court vacate the panel opinion, reconsider the case en banc and, ultimately, reaffirm the holding in *Skaff* that a plaintiff in a Title III case alleging physical barriers is not required to list all actionable barriers in his complaint.

Dated: October 5, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rule of Appellate Procedure 29(d) and Ninth Circuit Rules 29-2(c) and 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,089 words.

Dated: October 5, 2011

FOX & ROBERTSON, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 5, 2011.

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