No. 07-16326

IN THE UNITED STATES OF COURT OF APPEALS
FOR THE NINTH CIRCUIT

BYRON CHAPMAN,

Plaintiff-Appellee

v.

PIER 1 IMPORTS (U.S.), INC.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ON REHEARING EN BANC

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INTEREST OF THE UNITED STATES

The United States submits this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a).

The Attorney General has statutory authority to enforce Title III of the Americans With Disabilities Act (ADA). 42 U.S.C. 12181, *et seq*.; 42 U.S.C. 12188(b). This case presents an issue regarding the standing of an individual with

a disability to bring a private action under Title III against a place of public accommodation. Private plaintiffs play an important role in enforcing the ADA, particularly in the area of public accommodations, which includes a large number of entities. See 42 U.S.C. 12188(a)(1). The United States could not investigate every place of public accommodation in the country to determine if it is in compliance with the ADA. Effective enforcement of Title III, therefore, depends upon a combination of suits by the United States and litigation by individuals with disabilities who are aware of and encounter violations in their local communities. The United States therefore has an interest in ensuring that the standing of private plaintiffs to sue under Title III is not unduly restricted. Pursuant to that interest, the United States filed a brief as amicus curiae in *Steger* v. *Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), addressing the standing issue presented in this case.

STATEMENT OF THE ISSUE

This Court has directed the parties to file supplemental briefs addressing:

1. The effect of *Doran* v. *7-Eleven, Inc*., 524 F.3d 1034 (9th Cir. 2008) (*Doran II*), on the panel decision, and

2. Whether *Doran II* should be overruled.

STATEMENT OF FACTS

1. Statutory Scheme

Title III of the ADA provides:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). For existing facilities, the ADA defines "discrimination" to include a defendant's "failure to remove architectural barriers," where such removal is readily achievable. 42 U.S.C. 12182(b)(2)(A)(iv). For new construction, *i.e.*, facilities designed and constructed for first occupancy after January 26, 1993, the statute defines discrimination to include a failure to design and construct the facility so that it is "readily accessible and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1).[1] The Attorney General promulgated regulations requiring new construction to comply with specific standards for accessible design. See 42 U.S.C. 12186(b) & (c); 28 C.F.R. 36.406; 28 C.F.R. Pt. 36, App. A. The ADA Standards for Accessible Design contain precise, objective

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[1] An exception is available for new construction where an entity can demonstrate that it comes within the "rare circumstance" in which it is "structurally impracticable to meet" the specific accessibility requirements set forth in the regulations implementing Title III. See 28 C.F.R. 36.401(c).

standards that must be followed in designing and constructing places of public accommodation that are subject to 42 U.S.C. 12183(a)(1).

Section 308(a)(1) of the ADA authorizes private lawsuits to enforce Title III:

> The remedies and procedures set forth in section 2000a-3(a) of this title [,the public accommodations provision of the Civil Rights Act of 1964,] are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title.

42 U.S.C. 12188(a)(1).

2. Procedural History

Plaintiff-appellee Byron Chapman, who has "a spinal cord injury that requires him to use a motorized wheelchair to travel in public," filed suit in 2004 against Pier 1 Import's Vacaville, California store (Pier 1) under Title III of the ADA. *Chapman* v. *Pier 1 Imports (U.S.), Inc.*, 571 F.3d 853, 854-855 (9th Cir. 2009). Because the Pier 1 store at issue in this case was constructed and opened for business in April 2002, it is subject to the requirements of the new construction provision of Title III. 42 U.S.C. 12183.

Chapman alleged, *inter alia*, that the store engaged in discrimination by

"designing or constructing (or both) the Store in a manner that was not readily accessible to [individuals with disabilities] when it was structurally practical [sic] to do so." Complaint For Declaratory, Injunctive, and Monetary Relief at 7 (Complaint). Pier 1 did not dispute that Chapman is a person with a disability or that Pier 1 is a place of public accommodation. *Chapman* v. *Pier 1 Imports*, No. Civ. S-04-1339, 2006 WL 1686511, at *7 (E.D. Cal. June 19, 2006).

Chapman's complaint alleged that he had "encountered architectural barriers that denied him full and equal access," and attached "a true and accurate list, to the extent known by [him], * * * of the barriers that denied him access to the Store," as well as others that he had not encountered. Complaint at 4.[2] Further, in August 2005, Chapman filed a report prepared by an expert identifying not only the barriers that Chapman had encountered but also additional barriers that Chapman had not personally encountered. *Chapman*, 2006 WL 1686511, at *2.

In its motion for summary judgment, Pier 1 contended that Chapman lacked standing to challenge any of the unencountered barriers. See *Chapman*, 2006 WL

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[2] The district court stated that Chapman had visited the Pier 1 store in May and June 2004. *Chapman*, 2006 WL 1686511, at *1-2. Although neither the Complaint nor the district court's opinion so indicates, the panel opinion states that there were five encountered barriers, all relating to the restroom. *Chapman*, 571 F.3d 853, 855 (2009).

1686511, at *4. The district court construed Chapman's cross-motion as moving for summary judgment as to only eleven barriers identified in the brief supporting his motion. *Id*. at *2 n.5.

The district court stated that "nothing in the ADA requires plaintiff to have personally encountered all barriers in order to seek an injunction to remove those barriers." *Chapman*, 2006 WL 1686511, at *4. The court held, therefore, that Chapman was not precluded from raising on summary judgment allegations regarding the unencountered barriers that were identified in the expert report, of which Pier 1 had ample notice. *Id*. at *5.

The district court granted summary judgment for Pier 1 as to all of the encountered barriers either because any violations had been corrected or were only temporary, or because Chapman failed to show that the alleged barrier violated Title III. See *Chapman*, 571 F.3d at 856. The court also granted summary judgment to Pier 1 as to all but seven of the unencountered barriers. *Ibid*. As to those seven, the court either granted summary judgment to Chapman or found genuine issues of material fact that precluded summary judgment. See *Chapman*, 2006 WL 1686511, at *9-13.[3]

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[3] On June 25, 2007, the district court entered a final judgment pursuant to a stipulated agreement.

On appeal, a panel of this Court addressed solely Pier 1's argument that Chapman lacked standing to challenge the unencountered barriers. The panel articulated the standard three-part test for establishing standing under Article III of the Constitution, *i.e.*, Chapman must show that (1) he suffered an injury in fact, (2) there is a causal connection between his injury and Pier 1's conduct, and (3) it is likely, not merely speculative, that his injury will be addressed by a favorable court decision. *Chapman*, 571 F.3d at 857 (citing *Pickern* v. *Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1137 (9th Cir.), cert. denied, 537 U.S. 1030 (2002)). Finding that the second and third elements of the test were not at issue, the court addressed whether "the un-encountered barriers caused [Chapman] 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.'" *Chapman*, 571 F.3d at 857 (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

The panel decision concluded that Chapman could show an injury as to the unencountered barriers only by showing that he met the "deterrent effect" doctrine established in *Pickern*, 293 F.3d at 1137-1138, and in *Doran* v. *7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008) (*Doran II*). As described by the panel, *Chapman*, 571 F.3d at 857-858, (internal citations and footnote omitted),

> [t]he deterrent effect doctrine states that, when a disabled person encounters accessibility barriers in a facility and would return to that facility if it were accessible, he or she has been injured by the deterrent effect of the barriers actually encountered *and* additional barriers he or she might expect to encounter on future visits. Moreover, the doctrine holds that it is impractical and inefficient to expect that a person, who is deterred from entering a facility, because he or she has encountered accessibility barriers, would attempt to re-enter the facility and to experience each ADA violation related to his or her disability.

The panel decision also said that an ADA plaintiff states sufficient facts to show concrete, particularized injury by "stating that he is currently deterred from attempting to gain access to the [defendant's] store." *Chapman*, 571 F.3d at 858 (citation omitted). Therefore "because Chapman encountered alleged barriers related to his disability, he has suffered an injury in fact for the purposes of Article III if he can show that at least one of these barriers 'deterred [him] from attempting to gain access to [the Store].'" *Ibid.* (quoting *Doran II*, 524 F.3d at 1047).

The panel of this Court stated that, although Chapman alleged in his complaint that the barriers he claims to have encountered deterred him from reentering the Pier 1 store, he testified in his depositions "that the encountered alleged barriers did not deter him from visiting the Store or using the restroom; that he intended to return to the Store in the future; and that he may already have

done so." *Chapman*, 571 F.3d at 858. The panel held that Chapman's admission demonstrated that he did not suffer an injury in fact for purposes of "the Ninth Circuit's prudential standing doctrine," which required that he be deterred from attempting to gain access to the store. *Id.* at 859.

The panel decision found that the admissions in Chapman's deposition were "much different from the facts in" *Pickern*, because in *Pickern*, "the plaintiff 'state[d] that he prefers to shop at Holiday markets and that he would shop at [Holiday Foods'] Paradise market if it were accessible' to him." *Chapman*, 571 F.3d at 859 (quoting *Pickern*, 293 F.3d at 1138). The panel stated further that in *Pickern*, "[t]he Paradise market's lack of accessibility *prevented the plaintiff from using the facility that he preferred to use*, and, but for a lack of accessibility, he would visit the facility." *Ibid*. (emphasis added).

This Court granted Chapman's petition for rehearing en banc on January 26, 2010.

SUMMARY OF ARGUMENT

This Court correctly held in *Doran* v. *7-Eleven, Inc*., 524 F.3d 1034, 1047 (2008) (*Doran II*), that "[a]n ADA [Title III] 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." An individual with a disability who alleges that a facility covered by Title III violates the ADA in a manner that is likely to affect his use of it, and that he is likely to use the facility in the near future, has established an injury sufficient to confer standing because his statutory right not to be "discriminated against on the basis of disability in the full and equal enjoyment" of that place of public accommodation has been violated. 42 U.S.C. 12182(a). A plaintiff who plans to use a public accommodation that contains barriers to access experiences unlawful "discrimination," within the meaning of the ADA, if a place of public accommodation was built as new construction and fails to meet the regulatory requirements of the ADA Standards for Accessible Design. See 42 U.S.C. 12183(a)(1).

The panel decision in this case held that Chapman did not have standing to challenge any barrier he had not personally encountered on his prior visits to the Pier 1 store because he testified that he was not completely deterred from visiting the store and may, in fact, have visited there since filing his complaint. That decision is in error because those facts do not extinguish plaintiff's standing to vindicate his ADA Title III rights.

In order to seek injunctive relief under Title III, a plaintiff need only show either (1) that the barriers to accessibility are continuing to cause him harm or (2)

that there is a "real or immediate threat" of future harm if injunctive relief is not awarded. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102, 111 (1983). Even if the plaintiff is not completely deterred from accessing a place of public accommodation, both the previously encountered and unencountered barriers deny him "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of the place of public accommodation in violation of Title III. 42 U.S.C. 12182(a). So long as the plaintiff alleges that he intends to use the facility in the future, the Article III injury requirement is met.

In our view, this Court need not overrule *Doran II* in order to reverse the panel decision in this case. The panel's error was in interpreting the holding in *Doran II* to require that a plaintiff refrain from visiting the public accommodation at issue, following the filing of his complaint, in order to demonstrate that he has suffered injury in fact for purposes of standing. We believe that *Doran II* can be read as recognizing that deterrence from patronizing a facility because of barriers to access that an individual has encountered, or of which he is aware, is one way to satisfy Article III standing requirements, but it is not the only way. An individual who chooses to patronize a newly constructed place of public accommodation where barriers deny him a full and equal enjoyment, but do not entirely bar his access, should not be precluded from seeking an injunction requiring the facility to

meet the accessibility standards in the ADA Standards for Accessible Design. 28 C.F.R. Pt. 36, App. A. If, however, this Court disagrees with our interpretation of *Doran II*, then we believe it should be overruled in pertinent part.

ARGUMENT

I

THIS COURT CORRECTLY HELD IN *DORAN II* THAT AN ADA TITLE III PLAINTIFF MAY CHALLENGE IN ONE LAWSUIT ALL BARRIERS RELATED TO HIS SPECIFIC DISABILITY

A. An ADA Title III Plaintiff Has Standing To Seek Injunctive Relief If He Establishes That A Covered Facility Is Inaccessible In A Manner That Is Likely To Affect His Use Of The Facility And He Is Likely To Use The Facility In The Near Future

In order to establish standing to seek injunctive relief, a plaintiff must show "that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual or imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The injury that entitles him to an injunction is the threat of future harm, not any past harm that he may have suffered. *Lujan*, 504 U.S. at 564 ("Past exposure to illegal conduct does not in

itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.") (citation omitted). The plaintiff must allege either that defendant's current conduct is continuing to harm him, or that there is a "real or immediate threat" of future harm if injunctive relief is not awarded. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102, 105, 111 (1983) ("Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers."); *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974).

An "injury" occurs for purposes of standing whenever the defendant invades a "legally cognizable interest." See *Lujan*, 504 U.S. at 560. The "injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id*. at 578 (citation and internal quotation marks omitted); accord *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 449 (1989) (plaintiffs who are denied information sought under the Freedom of Information Act have standing to challenge denial; they are not required to show any harm other than the denial of information itself).

The legal interest at issue in this case is that of persons with disabilities to enjoy accessible public accommodations. In cases under Title III of the ADA, a plaintiff establishes the requisite continuing harm or likelihood of future injury if

he alleges (1) that the facility in question violates the ADA in a manner that is likely to affect his use of it; and (2) that he is likely to use the facility in the near future (or would use the facility in the near future but for the ADA violation). If the defendant has failed to design and construct facilities for first occupancy after January 26, 1993, that comply with the ADA Standards for Accessible Design, 28 C.F.R. Pt. 36, App. A, the facilities violate Title III of the ADA. See 42 U.S.C. 12183(a)(1). The regulatory standards are specific and objective. For example, Standard 4.13.5 requires that doorways have a minimum clear opening of 32 inches. 28 C.F.R. Pt. 36, App. A, § 4.13.5. If a doorway measures less than 32 inches, it violates 42 U.S.C. 12183(a)(1). See *Long* v. *Coast Resorts, Inc.*, 267 F.3d 918, 922 (9th Cir. 2001). All that remains to be shown to satisfy standing requirements is that the plaintiff is likely to use the facility in the near future.

B. This Court's Decision In Doran II Is Correct To The Extent That It Held That A Plaintiff Has Standing To Challenge Barriers Specific To His Disability That He Has Encountered, As Well As Those That He Has Not

The decision in *Doran II* correctly recognized that "each separate architectural barrier inhibiting * * * access [by a person with a disability] to a public accommodation [is not] a separate injury that must satisfy the requirements of Article III." 524 F.3d 1034, 1042 (9th Cir. 2008). Thus, a plaintiff who suffered discrimination and "a legally cognizable injury for purposes of Article III

standing," *id*. at 1043, when he encountered barriers to access may "conduct discovery to determine what, if any, other barriers affecting his or her disability existed at the time he or she brought the claim. This list of barriers would then in total constitute the factual underpinnings of a single legal injury." *Id*. at 1044.

Moreover, it is not essential for a plaintiff to demonstrate that he will necessarily use all aspects or features of a public accommodation in order to seek injunctive relief concerning other barriers in the facility that are likely to affect his use of the facility in the future. What the statute guarantees is "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations," 42 U.S.C. 12182(a), which requires that an individual with a disability have the same access to all aspects of the public accommodation as do those without disabilities –even though, just like an individual without a disability, he may choose not to use all of them. Following this principle, courts have held that plaintiffs who establish that they are likely to use a public accommodation have standing to seek relief throughout the facility, not merely in those portions where they establish that they have gone in the past, or are certain to go in the future. See *Steger* v. *Franco, Inc.*, 228 F.3d 889, 893-894 (8th Cir. 2000) (plaintiff "need not encounter all of these barriers to obtain effective relief."); *Disabled Americans for Equal Access, Inc.* v. *Ferries del Caribe, Inc*., 405 F.3d

60, 64-65 (1st Cir. 2005) (plaintiff need not have traveled aboard Ferries' vessel in order to challenge barriers to his accessibility).

Indeed, this Court in *Long* v. *Coast Resorts, Inc.*, 267 F.3d at 922-923, awarded a plaintiff with a mobility impairment an injunction that required a hotel to bring the width of the bathroom doors in each of over 800 hotel rooms into compliance with ADA Standards for Accessible Design, even though the plaintiff had neither encountered the barrier to accessibility in each of those rooms nor was likely ever to do so. See also, *e.g.*, *Independent Living Res.* v. *Oregon Arena Corp*., 982 F. Supp. 698, 762 (D. Or. 1997) (permitting plaintiff to seek relief for unencountered barriers in one action even though it "is unlikely that any individual plaintiff will ever sit in each of the seats in the arena, or use each of the restrooms, or attempt to reach each of the ketchup dispensers in the arena"); *Parr* v. *L & L Drive-Inn Restaurant*, 96 F. Supp. 2d 1065, 1081 (D. Haw. 2000) ("Plaintiff should not be required to encounter every barrier seriatim * * * to obtain effective relief."). Accordingly, this Court should not accept Pier 1's argument that *Doran II* should be overruled.

II

AN INDIVIDUAL WITH A DISABILITY NEED NOT REFRAIN ENTIRELY FROM PATRONIZING A PLACE OF PUBLIC ACCOMMODATION IN ORDER TO CHALLENGE ALL BARRIERS TO ACCESSIBILITY THAT ARE LIKELY TO AFFECT HIS USE AND ENJOYMENT OF IT

As we have argued above, the relevant inquiry in determining whether a plaintiff who has encountered a barrier has standing to seek an injunction is whether he is likely to encounter barriers to access at the relevant facility in the future. Whether he has been deterred from visiting the store by the barriers he encountered in the past is not a necessary element of that inquiry.

The concept that a plaintiff may establish standing by showing that he was deterred from patronizing a facility because of barriers he has encountered was first introduced in this circuit in *Pickern* v. *Holiday Quality Foods, Inc.*, 293 F.3d 1133 (9th Cir.), cert. denied, 537 U.S. 1030 (2002). In *Pickern*, the district court had entered summary judgment in favor of the defendant grocery store because the plaintiff, who had encountered barriers to access in the parking lot that barred him from entering the store, had not attempted to enter the store again within the one-year period of the statute of limitations. On appeal, this Court held that when an individual with a disability

has actual knowledge of illegal barriers at a public accommodation to

> which he or she desires access, that plaintiff need not engage in the 'futile gesture' of attempting to gain access in order to show actual injury during the limitations period. When such a plaintiff seeks injunctive relief against an ongoing violation, he or she is not barred from seeking relief either by the statute of limitations or by lack of standing.

Pickern, 293 F.3d at 1135.[4]

As further explained in its opinion, this Court's holding appeared to encompass two distinct circumstances. First, "a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.'" *Pickern*, 293 F.3d at 1138. In the following sentence, the Court stated, "[s]imilarly, a plaintiff who is threatened with harm in the future because of an existing or imminently threatened non-compliance with the ADA suffers 'imminent injury.'" *Ibid.* Taken together, the Court's statements suggest that (1) deterrence from even attempting to visit the store again because of the certainty that plaintiff could not gain access at all, or

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[4] On the other hand, the clause in Section 308(a) that permits a suit by a person who is "about to be subjected to discrimination," is designed to clarify that plaintiffs may challenge plans for buildings for which the design or construction is not yet complete. See 28 C.F.R. Pt. 36, App. B, subpart E, § 36.501. In such a case, the violation arguably has not yet occurred. It is only "about to" occur. By contrast, if, as here, the defendant has already constructed a facility that is not readily accessible to and usable by individuals with disabilities, the discrimination is already taking place. See 42 U.S.C. 12183(a)(1). Contrary to dictum in *Pickern*, 293 F.3d at 1136, therefore, there is no need for a plaintiff to rely on the "about to be subjected to discrimination" clause in order to maintain this action.

might suffer humiliation, burden, or danger in attempting to do so, is one way to show injury, and, (2) a plaintiff who might be able to obtain limited access to the facility, although he may not be able to take advantage of all of its services or accommodations, has still suffered an injury sufficient to satisfy constitutional Article III concerns because of the imminent threat of future injury from the continuing Title III violations.

The Court correctly recognized in *Pickern* that the plaintiff's reluctance to return to the Holiday grocery store while the barriers to his accessibility remained – which the Court termed "deterrence" – did not negate his standing to seek injunctive relief against those barriers, and any others that he was unable to discover because he could not gain access. *Pickern*, 293 F.3d at 1138.

Subsequently, in *Doran II*, the Court applied the concept of deterrence in the context of a statute of limitations challenge by the defendant. The Court permitted the plaintiff to challenge ADA violations that he did not know about when he filed his complaint, because he was deterred by the violations he did know about "from conducting further first-hand investigation of the store's accessibility." 524 F.3d 1034, 1042 (9th Cir. 2008). The Court acknowledged that Doran had visited the 7-Eleven once after filing suit, that he encountered the same access barriers on that occasion, and that he testified that those barriers

"caused him 'a lot of frustration.'" *Id.* at 1040-1041. Although Doran further testified that he planned to return to the store *after* those barriers were fixed, *ibid.*, his statement that the barriers continued to frustrate his ability to take full advantage of the store's facility on his subsequent visit was itself sufficient to demonstrate that he would suffer harm were he to decide to continue to patronize the store, and therefore, established his standing to seek an injunction.

In a footnote in this Court's opinion in *Doran II* responding to the dissent's contention that the majority opinion "conferr[ed] standing [on ADA plaintiffs] . . . for things that did not injure" them, 524 F.3d at 1024 n.5, the Court stated:

> Once a disabled individual has encountered or become aware of alleged ADA violations that deter his patronage of *or otherwise interfere with his access to a place of public accommodation*, he has already suffered an injury in fact traceable to the defendant's conduct and capable of being redressed by the courts, and so he possesses standing under Article III to bring his claim for injunctive relief forward. *See Lujan*, 504 U.S. at 560-61.

Ibid. (emphasis added).

That formulation recognizes that both deterrence from future visits *and* continued "interfere[nce] with" access during subsequent visits are proper bases for demonstrating that a plaintiff has standing to seek injunctive relief for a

violation of Title III of the ADA.[5]

A plaintiff who is threatened with harm in the future because of existing or imminently threatened noncompliance with the ADA suffers "imminent harm." So long as a plaintiff can show both that he intends to use a covered facility in the future and that the facility is inaccessible in a manner that is likely to affect his use of it, he has established a "sufficient likelihood" of future injury to meet Article III's standing requirements. *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009).

The panel opinion in this case read this Court's decision in *Doran II* incorrectly, in our view, as converting deterrence from a sufficient showing for standing into a necessary element for obtaining standing. As so applied, the requirement that a Title III ADA plaintiff allege and prove that he has been completely deterred from visiting the place of public accommodation, and has not visited since filing his complaint, unnecessarily denies an individual with a disability the right to take advantage of the goods and services of a place of public

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[5] Pier 1's advocacy of the view expressed by the dissenting judge in *Doran II* is similarly mistaken. See Pier 1 Imports (U.S.), Inc.'s Supplemental Brief Addressing *Doran* v. *7-Eleven*, at 11-14. The prudential principle that places limitations on a litigant's ability to raise another person's legal rights is not implicated here because Chapman is seeking relief to vindicate his own right to full and equal enjoyment of Pier 1's facilities without discrimination based on his mobility impairments.

accommodation, to the extent he can do so, even while barriers to full accessibility remain. If a plaintiff is likely to visit a covered facility in the future, he should have standing to seek relief to remove any barriers that may reasonably impede his access throughout the store, even if he is willing to accept less than full access while the case is working its way through the judicial system.

CONCLUSION

For the foregoing reasons, the en banc Court should (1) reaffirm the holding in *Doran II* that an individual who establishes standing because of the inaccessibility of a covered facility, and his intention to use the facility in the near future, may challenge all barriers to inaccessibility specific to his disability, and (2) reverse the panel's decision to the extent that it held that Chapman did not have standing to challenge any unencountered barriers because he was not deterred completely from patronizing the store. If this Court disagrees with our interpretation of *Doran II*, we believe that case should be overturned.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect X4 software, the brief contains 5,071 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

s/ Marie K. McElderry
MARIE K. McELDERRY
Attorney

DATED: March 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ON REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by Federal Express, overnight delivery, to the following non-CM/ECF participants:

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