No. 99-2294

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHELLE L. STEGER, et al.,

Plaintiff-Appellant

v.

FRANCO, INC.,

Defendant-Appellee

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States submits this brief pursuant to Fed. R. App. P. 29(a). The United States submits that the district court applied the wrong legal analysis in concluding that plaintiffs lacked standing to maintain this action. Plaintiffs are persons with disabilities who allege that defendant's retail and office building has failed to remove architectural barriers to accessibility, as required by the Americans With Disabilities Act (ADA), 42 U.S.C. 12182(b)(2)(A)(iv). The Attorney General has statutory authority to enforce the ADA's public accommodations provisions. 42 U.S.C. 12188(b). Private plaintiffs play an important role in enforcing the ADA. See 42 U.S.C. 12188(a) (stating that person who is subject to discrimination in violation of ADA may bring private action). This is particularly true in the area of public accommodations, given the very large

number of such entities. The United States, therefore, has an interest in ensuring that the standing of private plaintiffs to sue under Title III is not unduly restricted.

STATEMENT OF THE ISSUE

Did the district court apply the correct legal analysis in determining that plaintiffs did not have standing to maintain an action for injunctive relief pursuant to Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 et seq.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989)

City of Los Angeles v. Lyons, 461 U.S. 95 (1983)

Duffy v. Riveland, 98 F.3d 447 (9th Cir. 1996)

STATEMENT OF THE CASE

1. Title III of the Americans With Disabilities Act ("ADA") provides that "[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 any 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). The ADA defines "discrimination" to include, inter alia, "the failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities * * * where such removal is readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv). Barrier removal is considered "readily

achievable" if it is "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9). The ADA regulations give 21 examples of steps facilities can take to remove barriers, including, inter alia, installing ramps, adding raised markings on elevator control buttons, installing offset hinges to widen doorways, installing accessible door hardware, installing grab bars in bathrooms, and rearranging furniture. 28 C.F.R. 36.304(b). Plaintiffs who have been discriminated against in violation of Title III of the ADA may file suit and obtain injunctive relief to correct ADA violations in the public accommodation at issue.[1/] See 42 U.S.C. 12188(a)(1); 42 U.S.C. 2000a-3(a).

2. At all times relevant to this litigation, defendant Franco, Inc. has owned the Clayton Central Building ("CCB") in Clayton, Missouri, a suburb near St. Louis (JA 23).[2/] The CCB provides office and retail store space for health care providers and other retail and service establishments (JA 23). The parties stipulated that the CCB is a public accommodation within the meaning of the ADA, 42 U.S.C. 12181(7)(E)-(F) (JA 23). Because the CCB was constructed prior to the effective date of the ADA (JA 23), the new construction requirements of Section 303 of the

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[1/] Plaintiffs may not recover monetary damages in private actions however. Ibid.

[2/] "JA __" refers to the joint appendix. "Tr. __" refers to the trial transcript dated June 15-16, 1998.

Act are not applicable.[3/] See 42 U.S.C. 12183(a). However, the CCB is subject to the general nondiscrimination requirements of Section 302, including the requirement to remove barriers to accessibility where such removal is readily achievable. See 42 U.S.C. 12182.

3. At trial, plaintiffs tendered the expert testimony of Gina Hilberry, an architect who had inspected the CCB approximately three weeks before trial (Tr. 95-96; JA 92-98). Ms. Hilberry testified that defendants had failed to remove a significant number of barriers to accessibility in the CCB. Among other things, Ms. Hilberry testified that there were no parking spaces designated for disabled persons (Tr. 98; JA 58-59, 93), that numerous doors lacked accessible hardware, swung

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[3/] Facilities that are designed and constructed for first occupancy after January 26, 1993, must be readily accessible to and usable by persons with disabilities. 42 U.S.C. 12183(a)(1). In addition, if existing facilities are altered after January 26, 1992, the portions that are altered must be readily accessible to and usable by persons with disabilities. 42 U.S.C. 12183(a)(2); 28 C.F.R. 36.402(a). By contrast, facilities that are designed and constructed for first occupancy before January 26, 1993, are only required to remove architectural and communication barriers where such removal is "readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv); 28 C.F.R. 36.304(d)(1)-(2). As a general rule, the ADA "requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible." H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. at 63 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. at 65-66 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong. 2d Sess. at 109-110 (1990). Although the parties stipulated that the CCB was constructed prior to the effective date of the ADA, portions of the CCB may have been altered after the effective date of the ADA (see Tr. 137). Such portions would be subject to the new construction and alteration requirements of 42 U.S.C. 12183. See 28 C.F.R. 36.402.

outward, or closed too quickly and with too much force for a person with disability to open with ease (Tr. 100-109, 112-113, 131; JA 59-60, 93), that the restrooms did not comply with the ADA in a variety of ways (Tr. 136-156; JA 60-62, 94-95), that a water cooler obstructed one of the accessible routes through the building (Tr. 135-136), that numerous doors lacked accessible signs (i.e. raised lettering, contrasting coloring and braille lettering) or the signs were not mounted at the proper location and height (Tr. 114-115, 126-130, 153, 253; JA 60, 94), that some stairs lacked proper handrails (Tr. 117, 119-120, 158-160; JA 59, 93), that certain inaccessible areas were not properly marked as such (Tr. 132-133) and that tile flooring in one area did not meet slip resistant standards (Tr. 136-137). Ms. Hilberry testified as to what measures could be taken to correct the problems she identified and estimated the cost of these measures (Tr. 108, 112, 117, 121-122, 124, 127, 136, 155, 163-168; JA 63-64). In many cases, Hilberry testified, the violations could be corrected with relatively little effort and at little cost (see ibid.).

Three plaintiffs who alleged that they had been injured by defendant's failure to remove barriers to accessibility also testified. Plaintiffs Michelle Steger and Matthew Young are persons with disabilities who use wheelchairs for mobility and who live in the St. Louis area (Tr. 10-11, 14, 32). Steger testified that she had been to Clayton, Missouri many times and

had visited a number of different buildings (Tr. 14). She could not recall, however, whether she had ever been to the CCB (Tr. 17). Young testified that he had been to Clayton in the past and that he had visited the CCB on at least two occasions in 1997, the year after the complaint was filed (Tr. 35-37).

Plaintiff Patrick Burch is a person with a disability who is completely blind (Tr. 57-58). He lives and works in the St. Louis area (Tr. 57-59). Burch frequently goes to Clayton to have lunch, meet friends and business associates, and solicit business from various office buildings in the Clayton area (Tr. 59-60). Burch testified that he had visited the CCB on at least one occasion in 1996, shortly before the complaint was filed (Tr. 60-61). Burch had difficulty finding the first floor men's restroom because the sign on the door did not have raised lettering or braille markings indicating that it was a men's restroom (Tr. 61). Each of the plaintiffs also described how he or she benefitted in their daily activities from many of the accessibility features that were lacking in the CCB (Tr. 14-17, 32-34, 59-63).

4. At the close of plaintiffs' case, defendants moved for judgment as a matter of law, arguing that plaintiffs had failed to establish that they had standing to maintain the action. (JA 25-30). The court denied defendant's motion, but invited the parties to address plaintiffs' standing in their post-trial submissions (Tr. 256).

5. Following supplemental briefing by the parties, the court dismissed plaintiffs' action for lack of standing (JA 34-42). The court held that standing, because it was a jurisdictional inquiry, had to be determined at the time of filing (JA 37). The court also implicitly assumed that an injury sufficient to confer standing could take place only if the plaintiff actually entered an inaccessible building and encountered some barrier or other discriminatory act there (see JA 36-37). The court held that because Young had never been to the CCB prior to filing the complaint, he was not "injured-in-fact on or before September 26, 1996, [and therefore] does not have standing to sue" (JA 37). The district court did not specifically address Steger's claim, although it dismissed the complaint. As with Young, however, Steger did not establish that she visited the CCB before the complaint was filed.

The court held that Burch had suffered an injury in fact when he had difficulty locating the restroom in the CCB (JA 38). The court found, however, that the defendant had installed an appropriate sign on the first floor men's restroom at some point after Burch's visit and prior to trial (JA 38). Therefore, the court held, Burch could not show that his injury was redressable by an injunction (JA 38-39). The court did not make any findings as to whether any of the other barriers to accessibility identified by Hilberry might impede Burch in using the CCB. Nor did the Court make any findings as to whether Steger, Young, or

Burch was likely to use the CCB in the future. Plaintiffs filed a timely notice of appeal (JA 56).[4/]

SUMMARY OF ARGUMENT

The district court held that ADA plaintiffs have standing to challenge only those violations that have in fact injured them in the past, and not violations that might reasonably injure them in the future. The court's analysis was in error. Under the ADA and the applicable case law, plaintiffs have standing to seek injunctive relief if they establish that (1) a covered facility is inaccessible in a manner that is likely to affect their use of the facility; and (2) they are likely to use the facility in the near future.

The district court erred in holding that plaintiffs had to demonstrate that they had attempted to use the CCB prior to the time that they filed the complaint. In determining whether the plaintiff has standing to seek injunctive relief, the only relevant inquiry is whether the plaintiff is likely to suffer an injury in the future if the injunction is not granted. Past harm

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[4/] Plaintiffs also presented evidence that Ms. Steger is the president of the St. Louis chapter of ADAPT, a national organization that serves the interests of persons with disabilities (Tr. 257-260). Had ADAPT been named as a plaintiff in the suit, it might have been able to establish standing. The organization could have shown that it had had to divert resources from its other activities in order to investigate and document defendants' violations of the ADA and that it would continue to suffer injury until defendants' violations were corrected. See, e.g., Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982); Spann v. Colonial Village, Inc. 899 F.2d 24 (D.C. Cir. 1990). However, ADAPT was not a named plaintiff and plaintiffs presented no evidence as to any injury suffered by ADAPT.

may be relevant to this inquiry, but it is neither a necessary nor a sufficient condition to obtaining prospective relief. Where a facility is known to be inaccessible, there is no reason to force plaintiffs to endure the burden and humiliation of entering the facility in order to maintain a suit. The language and the purpose of the ADA foreclose such a result. So long as the plaintiff adequately alleges and proves that he or she would likely use a facility in the future if the ADA violations were corrected, the violations can properly be said to cause injury, justifying injunctive relief.

For similar reasons, the court erred in dismissing Burch's claim because the defendants had replaced the sign on the first floor men's room. The district court wrongly assumed that Burch's suit must be limited to the first floor bathroom door because that is the only feature of the CCB that had previously caused him harm. Plaintiffs presented evidence that the CCB contains other ADA violations that are likely to affect Burch's access to the CCB in the future. Assuming that Burch is likely to use the CCB in the near future, those alleged violations are sufficient to confer standing on Burch to seek injunctive relief, even if the only ADA violation that Burch personally confronted in the past has been corrected.

The district court failed to appreciate that an "injury" occurs for Article III purposes whenever the defendant invades a

legally cognizable interest. Here the relevant interest is that of plaintiffs to use public accommodations that are accessible. A public accommodation's failure to remove barriers that may reasonably impede a plaintiff's access to a facility violates the plaintiff's legal right to have those barriers removed.

Because the district court did not apply the proper standard, it will be necessary to reexamine plaintiffs' claims under the correct legal principles. The district court made no findings as to whether the plaintiffs were likely to use the CCB in the near future. We take no position on the ultimate disposition of plaintiffs' claims, but simply note that the Court may wish to vacate the judgment and remand for further proceedings in the district court.

ARGUMENT

THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD IN CONCLUDING THAT PLAINTIFFS LACKED STANDING TO MAINTAIN THIS ACTION

D. The District Court Erred In Holding That Plaintiffs Had To Establish That They Had Used The CCB At Some Point Prior To Filing The Complaint

1. Plaintiffs Have Standing To Seek An Injunction To Prevent Future Harm, Even If They Have Not Experienced Such Harm In The Past

In order to establish standing, the plaintiff must prove (1) an injury, that is, the invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not merely conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and

(3) that is likely, and not merely speculative, that the injury will be redressed by a favorable decision. See Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1016-1017 (1998); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). The party invoking federal jurisdiction bears the burden of establishing these elements. See Defenders of Wildlife, 504 U.S. at 561.

When a plaintiff seeks to enjoin a defendant's future conduct, a past injury is not sufficient to establish a plaintiffs' standing to seek such relief. Rather, the plaintiff must either allege that defendant's current conduct is continuing to harm the plaintiff, or 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). In cases under title III of the ADA, courts have generally held that a plaintiff establishes the requisite continuing harm or likelihood of future injury if the plaintiff establishes (1) that the facility in question violates the ADA; and (2) that she intends to use the facility in the future if the violations are corrected. See, e.g., Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1177 (S.D. Fla. 1997); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 707 n.4 (D. Or. 1997); Naiman v. New York Univ., 1997 WL 249970 at *4-*5 (S.D.N.Y. 1997); see also Amy F. Robertson, Standing to Sue Under Title III of the ADA, 27 Colo. Lawyer 51 (1998).

The court held that plaintiffs Matthew Young and Michelle Steger did not have standing because, as of the time that the complaint was filed, they had not been to the CCB. This was error. Under the ADA, plaintiffs have standing to seek injunctive relief if they establish that they are likely to suffer future harm if an injunction is not granted. See Lyons, 461 U.S. at 105. Because an injunction is prospective relief, the injury that enables the plaintiff to seek an injunction is the threat of future harm, not the past harm that the plaintiff may have suffered. See Lyons, 461 U.S. at 102; Nelsen v. King County, 895 F.2d 1248, 1251 (9th Cir. 1990) (stating that the existence of past harm is "largely irrelevant" to determining whether plaintiff has standing to seek injunctive relief).

There is no requirement that a plaintiff have suffered an injury in the past in order to have standing to prevent future harm. For standing purposes, the alleged harm may be "actual or imminent" as long as it is not "conjectural or hypothetical." See Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (emphasis added) (quoting Lyons, 461 U.S. 95, 101-102 (1983)); accord Department of Commerce v. United States House of Representatives, 119 S. Ct. 765, 774 (1999). Thus, courts often grant injunctions to prevent future harm, even though the threatened harm has not yet occurred. See, e.g., Dimarzo v. Cahill, 575 F.2d 15, 18 (1st Cir. 1978); Cutler v. Kennedy, 475 F. Supp. 838, 848 (D.D.C. 1979). In such cases, the risk of future harm that violates a

statutory or constitutional provision "constitutes a distinct and palpable injury" that is sufficient to establish standing. Ibid.

Of course, evidence that the defendant's conduct has previously injured the plaintiff may be relevant in determining the likelihood of future injury. See Lyons, 461 U.S. at 102 ("Past wrongs [a]re evidence bearing on whether there is a real and immediate threat of repeated injury.") But so long as the plaintiff shows that he or she is likely to be harmed in the future, the absence of proof that he or she has already been harmed is not fatal to the claim for injunctive relief.

2. The ADA Does Not Require Plaintiffs To Enter Non-Compliant Facilities In Order To Bring Suit To Correct Violations In Such Facilities

The language of the ADA further demonstrates that an ADA plaintiff is not required to enter an inaccessible facility in order to seek an injunction requiring the owner to bring the facilities into compliance with the ADA. Section 308(a)(1) of the ADA, which authorizes private lawsuits to enforce the ADA, states that:

> The remedies and procedures set forth in section 2000a-3(a) of this title 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) (emphasis added).

The underlined provision grants plaintiffs the right to bring suit because they are being "subjected to discrimination" in violation of the ADA. The ADA defines "discrimination" to include a defendant's "failure to remove architectural barriers" in a public accommodation, where such removal is readily achievable. 42 U.S.C. 12182(b)(2)(A)(iv). A plaintiff who plans to use a public accommodation that contains barriers to access, therefore, experiences unlawful "discrimination" within the meaning of the ADA, if it is readily achievable for the public accommodation to remove those barriers.

Section 308(a)(1) further states that,

> Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.

42 U.S.C. 12188(a)(1). This "futile gesture" provision makes clear that a plaintiff may bring suit against a non-compliant facility without first subjecting himself or herself to the humiliation and burden (and, in some cases, possible danger) of entering an inaccessible facility. See, e.g., Jankey v. Twentieth Century Fox Film Corp., 14 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998); 136 Cong. Rec. E1913 (June 13, 1990) (statement of Rep. Hoyer). In Jankey, for example, the court held that a plaintiff had standing to seek modifications to facilities even though the defendant had arguably not unlawfully denied plaintiff access to those facilities in the past. Jankey, 14 F. Supp. 2d

at 1180. The court held that the threat of future harm conferred standing on the plaintiff. Ibid.

The court erroneously concluded that the above cited "futile gesture" language only applies to violations of Section 303 of the Act, 42 U.S.C. 12183, which governs new construction and alterations (JA 41). The court was mistaken. Section 308(a)(1) states that a person with a disability is not required to engage in a futile gesture if the person "has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." 42 U.S.C. 12188(a)(1) (emphasis added). The reference to "this subchapter" makes clear that the "futile gesture" provision encompasses a violation of any part of Title III of the ADA, not merely the new construction and alteration provisions.

The court also erroneously relied on the language in Section 308(a)(1) authorizing a lawsuit by a person "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) (JA 41). The court assumed that the plaintiffs were complaining only of future discrimination that had not yet occurred, and then reasoned that such claims could only be brought for violations of the new construction and alteration provisions of 42 U.S.C. 12183(a), not for claims under the barrier removal provisions of 42 U.S.C. 12182(b)(2)(A)(iv) (see JA 41).

The court's analysis was flawed, however, because the plaintiffs are not complaining only of future discrimination, but also of present discrimination.[5/] As noted above, when a disabled plaintiff plans to use a public accommodation that includes barriers to access and removing those barriers is readily achievable, the violation of the ADA is complete. The "about to be subjected to discrimination" language, which applies to the new construction and alteration requirements of section 303, merely clarifies that plaintiffs may challenge plans for buildings for which the design or construction is not yet complete. See, e.g., Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1177 (S.D. Fla. 1997); 28 C.F.R. Pt. 36, App. B, subpart E, § 36.501. In such a case, the discrimination that violates Section 303 arguably has not yet occurred. It is only "about to" occur. By contrast, if the defendant has failed to remove barriers to accessibility in an existing facility and removing those barriers is readily achievable, the discrimination is already taking place. See 42 U.S.C. 12182(b)(2)(A)(iv). There is, therefore, no need for plaintiffs to rely on the "about to be subjected to discrimination" clause in order to maintain this action.

[5/] The court's analysis also ignores the last sentence of section 308(a)(1) -- the "futile gesture" provision -- which makes clear that a person with a disability is not required to enter a noncompliant facility in order to bring suit. See 42 U.S.C. 12188(a)(1).

3. The District Court's Holding Frustrates The Purposes Of The ADA

The district court's holding also threatens to undermine the ADA's goal of protecting persons with disabilities from the harms posed by inaccessible facilities. Under the district court's analysis, a plaintiff would have to attempt to enter an inaccessible building before bringing suit even if the plaintiff knew in advance that the building did not comply with the Act. That holding not only contravenes the plain language of the statute, it leads to results that cannot be squared with the ADA's remedial purpose. Persons with disabilities would have to subject themselves to the very conduct that the Act was intended to prevent in order to obtain relief. The ADA does not require such a result. So long as the plaintiff adequately alleges and proves that he or she would likely use a facility in the future if architectural barriers were removed, the presence of those barriers can properly be said to cause injury. See Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 707 n.4 (D. Or. 1997); cf. International Bhd. of Teamsters v. United States, 431 U.S. 324, 365-366 (1977) (persons who have not applied for employment may under some circumstances receive equitable relief under Title VII).

Of course, Article III requires that future injury be "imminent." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Imminence, however, "is concededly a somewhat

elastic concept * * * ." Id. at 564 n.2. It must be applied in light of its purpose, "which is to ensure that the alleged injury is not too speculative" to erode the case or controversy requirement of Article III. Ibid.; id. at 579 (Kennedy, J. concurring in part).

At least as applied to a public accommodation that offers goods or services to the general public, Article III does not require potential customers to establish that they have concrete plans to use a facility or to identify a date certain they intend to go there. See Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, No. 96-WY-2490, Order Denying Defendants' Motion For Summary Judgment 3, 9-10 (D. Colo. Aug. 5, 1997)(unpublished opinion)[6/]. It is sufficient for plaintiffs to establish it is likely that they will visit the public accommodation in the relatively near future. See, e.g., Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175, 1177 (S.D. Fla. 1997); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 707 n.4 (D. Or. 1997); cf. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-212 (1995).

B. The District Court Erred In Holding That Plaintiffs May Only Seek Relief To Correct Barriers To Accessibility That They Have Personally Encountered

For reasons similar to those articulated above, the court's analysis of Burch's claim was flawed. The court reasoned that

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[6/] Pursuant to Local Rule 28(i), a copy of this opinion is contained in the addendum to this brief. See 8th Cir. Loc. R. 28(i).

Burch had no standing because the specific problem that Burch experienced at the CCB — the defendant's failure to post a raised sign on the first floor men's room -- may have been corrected by the time of Hilberry's last inspection before trial.[7/] The court did not address the fact that there were other barriers to accessibility at the CCB that might reasonably impede accessibility by a blind person. For example, plaintiffs presented evidence that numerous doors either did not have signs with raised lettering or that the signs were not mounted correctly (Tr. 114-115, 119-120, 126-130, 153, 253), that the elevator closed on people in the doorway and did not have audible signals (Tr. 124), that some stairs lacked proper handrails that would permit a person with a disability to safely traverse the stairs (Tr. 117, 119-120, 158-160), that tile flooring in one area did not meet slip resistant standards (Tr. 136-137), and that a water cooler obstructed the hallway in such a manner that a blind person was likely to bump into it (Tr. 135-136).

The district court erred in assuming that Burch's suit must be limited to the first floor bathroom door merely because that is the only feature of the CCB that has already caused him injury. Once it is understood that proof of prior injury is not

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[7/] The defendants did not present evidence that the problem had been corrected. On cross-examination, however, plaintiffs' expert testified that she was not sure whether or not the sign on the first floor men's room had raised lettering or complied with the Act (Tr. 185).

an essential aspect of the standing inquiry, the defect in the court's analysis becomes apparent. If other architectural features of the CCB are likely to cause Burch injury in the immediate future, he has standing to seek injunctive relief, even if the only ADA violation that has harmed him in the past has been corrected.

The court's analysis confuses the issue of injury with that of damages.[8/] An "injury" occurs for purposes of standing whenever the defendant invades a "legally cognizable interest." See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). 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; 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); Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-374 (1982) (testers who alleged that they were given false information had standing by virtue of Fair Housing Act provision making it unlawful to misrepresent the availability of housing based on race). The

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[8/] Monetary damages are awarded retrospectively to redress past injury, while injunctions are typically awarded prospectively to prevent future injury. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983). Monetary damages are not available in private actions under Title III of the ADA. See 42 U.S.C. 12188(a)(1); 42 U.S.C. 2000a-3(a).

legal interest at issue in this case is that of persons with disabilities to enjoy accessible public accommodations. At the very least, a public accommodation's failure to remove barriers that may reasonably impede a plaintiff's access to a facility violates the plaintiff's legal right to have those barriers removed.

It is, therefore, not relevant for standing purposes that the plaintiff may have suffered no material inconvenience or harm other than the ADA violation itself. See Public Citizen, 491 U.S. at 449; Duffy v. Riveland, 98 F.3d 447, 453 (9th Cir. 1996) (holding that an ADA plaintiff had standing to challenge the state's failure to provide an interpreter at a disciplinary hearing even though the plaintiff "alleged no damage or prejudice from the lack of an interpreter" at the hearing). Assume, for example, that a plaintiff who uses a wheelchair frequents a shopping mall that has a ramp that is too steep for her to ascend by herself. The plaintiff has standing to seek an injunction compelling the mall to install a ramp which meets the requirements of the ADA. Standing is not defeated merely because, on the previous occasions when the plaintiff went to the mall, a bystander pushed her up the ramp and she was able to get inside.

It is also not necessary for plaintiffs to demonstrate that they will necessarily use all aspects or features of a public accommodation in order to seek injunctive relief concerning the

facility. Many public accommodations are sufficiently large that it may be unlikely that any one plaintiff will ever use all aspects of the public accommodation. Nevertheless, 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, e.g., Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 762 (D. Or. 1997) (ordering relief with respect to entire arena even though it "is unlikely that any individual plaintiff will ever sit in each of the seats in the area, or use each of the restrooms, or attempt to reach each of the ketchup dispensers in the arena"); Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, No. 96-WY-2490, Order Denying Defendants' Motion For Summary Judgment 3, 9 (D. Colo. Aug. 5, 1997)(unpublished opinion)(plaintiff who frequented shopping area could seek relief with respect to all four inaccessible buildings in that area). The court erred, therefore, in focusing only on the barrier that Burch had encountered in the past. If Burch is likely to use the CCB in the future, then he should also have standing to seek relief to remove other barriers that may reasonably impede his access in the future.

C. Plaintiffs Have Standing If They Have Established That They Are Likely To Use The CCB In The Near Future

In this case, the district court never made any findings as to whether the plaintiffs are likely to use the CCB in the future. Plaintiffs presented evidence that they frequently go to Clayton and that two of them had used the CCB in the past (Tr. 14, 35-37, 59-61). These facts may be sufficient to support an inference that plaintiffs are likely to use the CCB in the near future. See City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1992) ("Past wrongs [a]re evidence bearing on whether there is a real and immediate threat of repeated injury."); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-212 (1995) (analyzing likelihood of future injury by reference to plaintiffs' past experiences); Jankey v. Twentieth Century Fox Film Corp., 14 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998) (plaintiff had standing to challenge accessibility of ATM where he had used ATM on two occasions in the past).

In light of the lack of findings on the plaintiffs' future use of the CCB, and in light of the district court's misapplication of standing doctrine, it may be appropriate for this Court to vacate the judgment and remand for further proceedings. See, e.g., Bragdon v. Abbott, 118 S. Ct. 2196, 2212 (1998); Lanning v. Southeastern Pennsylvania Transp. Auth., Nos. 98-1644, 98-1755, 1999 WL 432595 at *11 (3d Cir. June 29, 1999). The district court may also wish to reopen the record to allow both parties an opportunity to present additional evidence on

plaintiffs' future use of the CCB in light of this Court's clarification of the appropriate legal standards. See, e.g., Lanning, supra. We take no position on the disposition of plaintiffs' claims under the correct legal analysis.

CONCLUSION

This court should hold that the district court applied the wrong legal analysis when it dismissed plaintiffs' claims for lack of standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 1999, I served the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, by mailing it on a 3 1/2" disk which had been scanned for viruses and determined to be virus free, and by mailing two hard copies, by first class mail, postage pre-paid, to counsel at the following addresses:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE complies with Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 5,889 words.

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