No. 13-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

COLORADO CROSS-DISABILITY COALITION, *et al.*,

Plaintiff-Appellees

v.

ABERCROMBIE & FITCH CO., *et al.*,

Defendant-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
DISTRICT COURT NO. 09-cv-02757
(HON. WILEY Y. DANIEL)

_____

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES

_____

JOCELYN SAMUELS
Acting Assistant Attorney General

MARK L. GROSS
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-0714

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 13-1377

COLORADO CROSS-DISABILITY COALITION, *et al.*,

Plaintiffs-Appellees

v.

ABERCROMBIE & FITCH CO., *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
DISTRICT COURT NO. 09-CV-02757
(HON. WILEY Y. DANIEL)

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES

INTEREST OF THE UNITED STATES

This case concerns proper interpretation of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.*, which ensures the accessibility of public accommodations. The United States has substantial responsibility for the enforcement of Title III and an interest in proper construction of Title III and its implementing regulations.

This case also presents questions regarding private enforcement of Title III, which plays a critical role in ensuring compliance, see 42 U.S.C. 12188(a)(1). The United States has an interest in ensuring that private parties can obtain appropriate relief under Title III.

QUESTIONS PRESENTED

The United States addresses the following questions:

1. Whether defendants' stores, which feature an ornate front porch space that is inaccessible to wheelchairs, violate Title III.

2. Whether plaintiffs, wheelchair users who encountered those porches, have standing to challenge the Title III violation regardless of any motivation to be testers.

3. Whether the district court properly entered injunctive relief.

STATEMENT OF THE CASE

1. Title III of the ADA provides, in relevant part:

> No 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).

For "existing facilities" – those that existed before January 26, 1993 – "discrimination" includes a defendant's "failure to remove architectural barriers"

where doing so is "readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv). By contrast, for new construction, *i.e.*, facilities designed and constructed after January 26, 1993, or altered after that date, discrimination includes failure to design, construct, or alter facilities so that they are "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1).

The Attorney General has promulgated regulations requiring new construction to comply with specific standards for accessible design. See 42 U.S.C. 12186(b) and (c); 28 C.F.R. 36.406; 28 C.F.R. Pt. 36, App. A. These Standards for Accessible Design contain precise, objective requirements for designing and constructing places of public accommodation. The Standards do not, however, purport to set forth all the ways that idiosyncratic design or use of certain facilities can deprive individuals with disabilities of the "full and equal enjoyment" of those facilities.

For private litigants, Title III provides a right of action that includes only injunctive relief to "any person who is being subjected to discrimination on the basis of disability in violation of this title." 42 U.S.C. 12188(a)(1).[1] Where a court

[1] Title III does so by providing the same rights and remedies to private litigants as does Title II of the Civil Rights Act of 1964, under which only injunctive relief is available. The Attorney General may obtain more extensive relief under Title III, including damages and civil penalties. See 42 U.S.C. 12188(b).

finds that a covered entity failed to build new or altered facilities in compliance with Title III, "injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by" Title III. 42 U.S.C. 12188(a)(2).

2. This case concerns the accessibility of the ornate front porches of Abercrombie & Fitch's Hollister line of stores, which primarily are located in shopping malls.[2] Defendants operate approximately 500 Hollister stores around the country (Appellant's Appendix (Aplt. App.) 1006), of which approximately 231 currently have the configuration at issue in this case (Aplt. App. 1070). All were built after January 26, 1993 (Aplt. App. 427).

Each Hollister store at issue has a raised front porch. Two steps lead up to the porch from the mall floor. Other stairs then lead down from the porch to the store's two sides: one containing men's clothing and one containing women's clothing. Aplt. App. 296.

The raised porch, according to defendants, is intended to create the feel "of a Southern California surf shack" (Aplt. App. 286) and provide the experience of entering an old-time "beach house" (Aplt. App. 919-920). The porch contains upholstered chairs, pictures, and mannequins displaying merchandise (Aplt.

[2] When this lawsuit was filed, plaintiffs alleged numerous other inaccessible aspects of the Hollister store. The defendants made changes in response, and those issues appear to be resolved (Aplt. App. 713-714).

App. 907). Defendants said the experience of encountering the porch and entering through it is "a significant aspect of the stores' branding and marketing efforts" (Aplt. App. 336; see Aplt. App. 780-781 (porch is "intended to draw the attention of all shoppers" passing by and is part of a "brand identity designed to draw teen consumers to the store" in lieu of traditional advertising)). Defendants consider the raised porch "more of a design element than an entrance" (Aplt. App. 968).

Shoppers who use wheelchairs cannot access the raised porch, and must instead enter the store through floor-level doors on each side of the porch. These doors are smaller and undecorated, and look more like window shutters (Aplt. App. 864, 913; see Aplt. App. 300 (picture of front porch and side doors), 306 (same), 301 (picture of side door by itself)). Prior to this litigation, they were not always readily identifiable as doors (*e.g.*, Aplt. App. 124, 127, 465). Defendants have made the side doors somewhat more functional, adding operable door handles (the doors previously only could be opened by pushing buttons) and signs indicating which side of the store they lead to (Aplt. App. 715). One side door leads directly into the men's section, and the other directly into the women's section, without the "surf shack" experience.

3. Plaintiffs Julie Farrar and Anita Hansen live in the Denver area. Both use wheelchairs (Aplt. App. 111 (Hansen); 461 (Farrar)). They encountered the raised porch at, and were deterred from entering, two Hollister stores in the area (Aplt.

App. 111, 114 (Hansen); 461-462, 553-554, 659 (Farrar)), one of which later closed (Aplt. App. 714). They intend to return to Hollister stores to shop once the stores are made accessible, and in the meantime they intend to return to test the stores' accessibility (Aplt. App. 115, 467 (Hansen); 463, 644, 663-664 (Farrar)). Other area wheelchair users who are no longer plaintiffs in this case testified to similar experiences and intentions (Aplt. App. 116-118 (Hernandez); 120-122 (Sirowitz), 123-124, 513-514 (Stapen), 126-127 (Stephens)).

4. Five wheelchair users[3] and the Colorado Cross-Disability Coalition (CCDC) sued Abercrombie & Fitch and two subsidiaries, alleging violations of Title III and state anti-discrimination law (Aplt. App. 475-476). Plaintiffs sought class certification and an injunction requiring defendants to modify all stores nationwide with these raised porches (Aplt. App. 489).

a. The district court ruled that plaintiffs had standing with respect to the stores they had visited, because they intended to return once access barriers were remedied (Aplt. App. 361). In a later order, it reaffirmed plaintiffs' standing, finding that plaintiffs were not merely "testers" but sincerely desired to shop at Hollister, and that they would have standing even if they were "testers" (Aplt. App. 692-693).

[3] Four of the original plaintiffs have dropped out of the suit, while Farrar has joined since the filing.

b. The district court awarded summary judgment to plaintiffs. It found that Hollister's design violated a 1991 Title III implementing regulation that required main entrances to be accessible. It rejected defendants' contention that it was unclear whether most customers used the raised platform: "Looking at the photographs attached to Plaintiff's motion, it was not even clear that there are doors on either side of the porch." Aplt. App. 385.

In any event, the district court found, compliance with the design standards governing entrances would not excuse violation of Title III's statutory requirements (Aplt. App. 386). In particular, it observed, Title III bars unnecessarily providing individuals with disabilities with an "accommodation that is different or separate from that provided to other individuals" (Aplt. App. 386 (quoting 42 U.S.C. 12182(b)(1)(A)(iii)). The district court rejected defendants' "micro view that allows them to comply with the details in the regulations without taking the aims of the ADA to heart and fulfilling its overarching aims" (Aplt. App. 386). Defendants, it concluded, "have unnecessarily created a design for their brand that excludes people using wheelchairs from full enjoyment of the aesthetic for that brand" (Aplt. App. 387).

c. The district court certified a nationwide class of individuals with disabilities who were blocked from "full and equal enjoyment" of Hollister stores because of the front porch design (Aplt. App. 685). It granted summary judgment

to the class and rejected defendants' motion to vacate its prior summary judgment ruling. The district court rejected defendants' argument that plaintiffs must identify an individual with standing at each affected Hollister store. Such a requirement, it held, "would convert the case from a class action to a massive individual action, defeating the efficiencies of Rule 23" (Aplt. App. 1012). After reaffirming that the raised porch violated the Standards governing entrances (Aplt. App. 1013-1018), the district court found that the front porches are public "areas" of the store, and so are required to be accessible whether or not they satisfy the entrances requirements (Aplt. App. 1019-1021).

The district court ruled that it was required to grant plaintiffs injunctive relief, the only relief Title III permits for private litigants, without a showing of irreparable harm or a balancing of equities (Aplt. App. 1021-1024). It later issued a permanent injunction requiring defendants, by January 1, 2017, to make all elevated entrances accessible to wheelchair users (Aplt. App. 1097). The injunction permits the defendants to level, ramp, or close the raised porches (Aplt. App. 1098). It requires defendants to make at least 77 stores accessible each year and to file a progress report semi-annually (Aplt. App. 1098-1099). The district court accepted the defendants' estimate that compliance would cost $8.5 million over three years, an amount the court found tolerable for a company with annual

profits of $237 million. Tr. of Hearing, 8/16/2013, Doc. No. 213, at 30; Aplt. App. 1070-1071.

SUMMARY OF ARGUMENT

1. Once the defendants made entering through the raised porches a focus of their brand identity and their customers' experience – thus making those porches not merely entrances but distinct and integral areas of their stores – Title III required them to make the porches accessible to wheelchair users. Title III requires that individuals with disabilities receive "*full and equal enjoyment* of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a) (emphasis added). The design of defendants' stores – which are, undoubtedly, public accommodations – denies individuals with disabilities access to what the company itself considers to be a vital part of the shopping experience, depriving them of "full and equal enjoyment" of the stores.

The porch is not merely an entrance, but also a "space" that must comply with the accessibility requirements for such spaces found in Title III's implementing regulations for architectural requirements, the Standards for Accessible Design.[4] The defendants err in contending that it is sufficient that the

[4] The 2010 version of the Standards is available at http://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards_prt.pdf.

porch entrance comply with the Standards specific to entrances. Their arguments depend on a cramped definition of "space" that is contradicted by the Standards' own definition. While this Court need not reach the question if it properly construes the term "space" in the Standards, defendants also err in contending that, so long as the Standards are satisfied, it is immaterial that their design discriminates against individuals with disabilities in ways not specifically addressed by the Standards.

2. The named plaintiffs have standing to challenge the defendants' Title III violations with respect to those facilities they have visited in the past and intend to visit in the future. Whether plaintiffs' visits to defendants' facilities were motivated at least in part by a desire to be testers is immaterial.

3. The district court correctly found that plaintiffs were entitled to an injunction. Injunctive relief, the only remedy available to private plaintiffs for a Title III violation, is mandatory for a failure to comply with Title III when constructing new facilities. The text and legislative history of Title III make clear that it is no defense to injunctive relief that the defendant will face expense in complying.

ARGUMENT

I

TITLE III REQUIRES THAT DEFENDANTS' FRONT PORCHES BE ACCESSIBLE TO INDIVIDUALS WITH DISABILITIES

1. Because the front porch is a "space" as well as a means of entering the store, it is insufficient that defendants comply with the 2010 Standards concerning the number of entrances that must be accessible. The porch does not merely serve to permit the journey from outside to inside, the concern addressed by the provisions of the Standards concerning entrances. Rather, by defendants' own admission, the porch is a distinct space of the store that sets the tone for a consumer's shopping experience. Not only is the inaccessible entranceway the clear "main" entranceway, but it is decorated, elevated, furnished with a couch or chair(s), and otherwise given far more significance to the shopping "experience" than a mere entranceway.

Accordingly, the porch entrance also must comply with the general accessibility requirements applicable to all areas or spaces not specifically exempted. See 2010 ADA Standard 201.1 ("All areas of newly designed and newly constructed buildings and facilities and altered portions of existing buildings and facilities shall comply with these requirements."); 2010 ADA Standard 201.2 (where a "space contains more than one use, each portion shall comply with the applicable requirements for that use"). Such requirements include, for example,

using ramps for floor level changes greater than half an inch, see 2010 ADA Standard 303.4, a requirement that defendants' stores do not meet. And even assuming the raised porch itself meets all other applicable Standards pertaining to "spaces" – a claim that defendants do not make – defendants failed to provide the required accessible route to it, see 2010 ADA Standard 206.2.4.

It thus is irrelevant whether defendants comply with the 2010 Standards' requirement that 60 percent of entrances be accessible. See Defendants' Br. 37-43 (citing 2010 ADA Standard 206.4.1).[5] To be sure, a facility with multiple, truly equivalent entranceways can have one of those entranceways be inaccessible; it is not a *per se* Title III violation to construct an inaccessible entranceway. Here, however, the complaint is not the *existence* of an inaccessible entranceway but its idiosyncratic *use* as an integral part of the shopping experience at defendants' stores.

The defendants suggest, incorrectly, that the Standards govern only very limited types of "areas" or "spaces" – those in which "items are sold or business is transacted." See Defendants' Br. 44, 46. They cite no authority for this

[5] Defendants argue that one of the 1991 Standards requirements relied on by the district court – the requirement to provide access to the entrance used by the majority of people (1991 ADA Standard 4.1.3(8)(a)) – was not included in the 2010 Standards. Because the raised porch so clearly violates Title III on other grounds, this Court need not address the applicability of that provision.

proposition. In fact, the Standards define the term "space" more broadly, as "[a] definable area, such as a room, toilet room, hall, assembly area, *entrance*, storage room, alcove, courtyard, or lobby." See 2010 ADA Standard 106.5 (emphasis added). Thus, the Standards explicitly provide that an entrance feature like this porch can be a "space."[6]

The raised porch here is a "definable area." It is open to patrons and is experienced by them as a distinct area of the public accommodation, separate from the mall outside and the portions of the store that are inside. Indeed, the porch's purpose is to provide the experience of leaving the mall environment and entering a very different one, setting the tone for the shopping experience.

In light of the porch's unique nature and purpose, finding it to be a "space" would not require the same finding about every other entrance. See Defendants' Br. 45. While the question may be debatable in other cases, here the defendants deliberately made the porch integral to their brand identity and the customer experience. Therefore, the porches at issue here are clearly more than just doorways into a facility.

Nor is there a basis for defendants' contention that, so long as the porch's elements are visible from the ground, physical access is not required. Defendants'

---

[6] An identical definition of "space" appears in the 1991 Standards. See 1991 ADA Standard 3.5. The 1991 Standards also impose substantively the same requirements for spaces.

Br. 45-46. The Standards guarantee people with disabilities physical access to spaces, not merely the ability to look at them. While the "space" requirements do not apply to purely decorative areas not intended for patron access, *e.g.*, window displays, here the display is intended to be experienced from the porch, not from below.[7] While we perceive no ambiguity on this point, to the extent there is ambiguity, our construction of the Standards – our own regulation – should receive considerable deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

The bottom line is that defendants fail to grapple with the harm caused in suggesting that only the entrance-specific requirements of the Standards apply here. The problem is not that wheelchair users cannot enter the store and access defendants' merchandise. Rather, it is that defendants exclude them from a part of the store that defendants themselves have made a part of the shopping experience. Having chosen to imbue the porch with such significance, the defendants cannot, as here, exclude individuals with disabilities from it and consign them to a wholly different experience.

---

[7] The Standards exempt from the "space" requirements certain areas that are not meant for general public access or serve functions requiring them to be raised or otherwise inaccessible. See, *e.g.*, 2010 ADA Standards 203.2 (construction sites); 203.3 (areas raised for security or safety purposes, such as observation galleries or lifeguard stands); 203.5 (areas frequented only by service personnel); 203.9 (employee work areas).

2. In addition to violating the ADA Standards, defendants' raised porch fails to satisfy the statutory requirements of Title III. While we believe our argument below gives Title III its most natural reading, to the extent there is ambiguity, our interpretation is entitled to deference and should be upheld if reasonable. See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998).

a. The defendants do not argue that their raised porch comports with Title III's plain text. Such an argument would fail. An individual with a disability must be provided "full and equal enjoyment" of the public accommodation, 42 U.S.C. 12182(a). Title III also bans the unnecessary provision to individuals with disabilities of accommodations or services "different or separate from that provided to other individuals." See 42 U.S.C. 12182(b)(1)(A)(iii). And it requires that public accommodations be provided "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. 12182(b)(1)(B). The gratuitous provision of "separate but equal" store experiences – let alone the separate and unequal entrance experiences here – cannot satisfy these requirements.

b. The defendants' argument that compliance with the Standards immunizes them from any Title III claim is meritless. See Defendants' Br. 33. Because the defendants do, in fact, violate the Standards governing "spaces," this Court need not reach that argument. In any event, not all of Title III's statutory mandate has been, or can be, reduced to specific regulatory requirements.

Actionable discrimination under Title III "includes," but is not limited to, designing and constructing new facilities not "readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1). Implementing regulations, including the Standards, set forth specific requirements for newly constructed facilities to be "readily accessible to and usable." *Ibid.*; accord 42 U.S.C. 12204(b) (guidelines shall ensure that buildings are "accessible, in terms of architecture and design"); see also 28 C.F.R. 36.406. That a facility satisfies the Standards, and thus is "readily accessible," is *required* to satisfy Title III's non-discrimination mandate, but in some unusual cases, such as this one, it is not *sufficient*. The Standards "provide guidance on the application of the statute to specific situations." 28 C.F.R. 36.213. They are not intended to contemplate every idiosyncratic way that a facility can violate the ADA.

In particular, the required provision of "full and equal enjoyment" of public accommodations is not always reducible to compliance with standardized architectural requirements. It requires fact-specific comparison of the experience of individuals with disabilities compared with that of others using the same facility. See, *e.g.*, *Baughman* v. *Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) ("Public accommodations must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience."); *Antoninetti* v. *Chipotle Mexican Grill, Inc.*, 643

F.3d 1165, 1174 (9th Cir. 2010) (restaurant deprived customer of the full "Chipotle experience," which, the court found, included the ability to "see and evaluate the various available foods and decide which or how much of each he wanted" and "watch the food service employee combine those ingredients to form his order"), cert. denied, 131 S. Ct. 2113 (2011). Public accommodations can meet the standardized architectural guidelines for accessibility, yet still fail to provide "full and equal enjoyment." For example, a movie theater might meet the requirements for design and placement of wheelchair seating but still violate Title III by not permitting companions to sit with those using such seating. See *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1085 (9th Cir. 2004).

To be sure, where the Standards set forth precise requirements for avoiding certain types of discrimination, compliance with them precludes reliance on Title III's more general non-discrimination requirements with respect to that issue. See 28 C.F.R. 36.213 ("The specific provisions, including the limitations on those provisions, control over the general provisions in circumstances where both specific and general provisions apply."). Here, for example, the Standards' requirement that 60 percent of public entrances be accessible precludes a claim that it is *per se* discriminatory to have one out of three public entrances inaccessible. But the claim here is that the defendants' unnecessarily discriminatory design – which serves no functional purpose – makes wheelchair users feel unwelcome and

excluded. See, *e.g.*, Aplt. App. 555 ("I wouldn't want to patronize a store that just built a brand-new inaccessible entrance[.] * * * There's a message there."); accord Aplt. App. 667. Even if sending such an exclusionary message might not violate the Standards, it violates Title III's plain language and clear purpose. See *Chapman* v. *Pier 1 Imports*, 631 F.3d 939, 945 (9th Cir. 2011) (en banc) (it is "obviously exclusionary conduct" to place "a sign stating that persons with disabilities are unwelcome or an obstacle course leading to a store's entrance").

The cases the defendants cite are not to the contrary; rather, they hold that the Standards preclude more generalized claims of discrimination where they speak to the precise discrimination alleged and thus define its scope. For example, in *United States* v. *National Amusements, Inc.*, 180 F. Supp. 2d 251 (D. Mass. 2001), aff'd *sub nom. United States* v. *Hoyt Cinemas Corp.*, 380 F.3d 558 (1st Cir. 2004), the United States brought two distinct claims regarding the same features of movie theaters' design. One alleged a violation of a Standards requirement that wheelchair areas provide "lines of sight comparable to those for members of the general public"; the other alleged, based on the same design, a violation of Title III's statutory requirements. See *id.* at 256. The district court found that, because the Standards set forth specific requirements for providing a comparable view to individuals with disabilities, reliance on the statute itself would improperly amend the Standards' requirements for accomplishing that objective. (The statute,

however, still barred discrimination not contemplated by the Standards' line-of-sight requirement, such as refusal to permit wheelchair users to enter. See *id.* at 262.) The United States did not contest this finding on appeal, see *Hoyt Cinemas*, 380 F.3d at 565-566. Other cases involving the same theater design requirements are to the same effect. See *Fortyune*, 364 F.3d at 1084; *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000). Those cases are inapposite here, where the Standards do not address the unusual discrimination alleged – the inaccessibility of an idiosyncratic entrance that is an integral part of the shopping experience.

II

PLAINTIFFS HAVE STANDING TO CHALLENGE DEFENDANTS' TITLE III VIOLATION

Defendants contend that plaintiffs lack standing merely because their motivations for initially visiting and later returning to the defendants' stores may include, in part, a desire to be testers. But Title III provides a private right of action to "*any person* who is being subjected to discrimination on the basis of disability in violation of" Title III. 42 U.S.C. 12188(a)(1) (emphasis added). The only relevant question here is whether a person is "subjected to discrimination" that violates Title III. Title III confers broad standing to private litigants, "not subject to any of the prudential limitations that apply in other contexts." *Kreisler* v. *Second Ave. Diner Corp.*, 731 F.3d 184, 188 (2d Cir. 2013).

It suffices that a plaintiff (1) personally encounter features of a public accommodation that violate Title III and (2) make some sort of showing – for example, by expressing intent to return – that he or she would benefit from the injunction sought. See, *e.g.*, *Steger* v. *Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000). Moreover, Title III provides that an individual with a disability need not make the "futile gesture" of attempting to access a facility known to be inaccessible. 42 U.S.C. 12188(a)(1). A plaintiff, therefore, can establish standing by expressing the intent to return after the facility is made compliant. See, *e.g.*, *Dudley* v. *Hannaford Bros. Co.*, 333 F.3d 299, 306-307 (1st Cir. 2003); *Pickern* v. *Holiday Quality Foods*, 293 F.3d 1133, 1135 (9th Cir.), cert. denied, 537 U.S. 1030 (2002); cf. *Davoll* v. *Webb*, 194 F.3d 1116, 1132 (10th Cir. 1999) (employee need not make futile request for accommodation from employer's unbending policy before suing under Title I of the ADA). Defendants' assertion that a plaintiff must demonstrate a "non-contingent intention to patronize each store in the future," see Defendants' Br. 18 – *i.e.*, that the plaintiff must intend *with certainty* to patronize the store whether or not it is brought into compliance – finds no support in the case law and is inconsistent with Title III's "futile gesture" language.

Here, both named plaintiffs established standing. They encountered barriers violating Title III and they intend to return, either once those barriers are removed

or in order to test defendants' compliance. Aplt. App. 115, 467 (Hansen); 463 (Farrar). No more is required.

It is immaterial whether plaintiffs' interest in defendants' stores stems partly or entirely from desire to be testers who facilitate Title III compliance. See Defendants' Br. 19-21. Title III guarantees "any person" experiencing discrimination on the basis of disability the right to challenge it. 42 U.S.C. 12188(a)(1). That right "does not depend on the motive behind [the plaintiffs'] attempt to enjoy the facilities." *Houston* v. *Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332 (11th Cir. 2013).

Congress may create the "legal right[]" to be treated in non-discriminatory fashion, "the invasion of which creates standing" even if the plaintiff "fully expect[ed]" to suffer discrimination and not to complete a transaction. See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982). *Havens* found that Congress created such a right in 42 U.S.C. 3604(d), which provides in relevant part that it is unlawful discrimination to falsely represent to "any person" because of race or other protected characteristic that any dwelling is unavailable. A tester receiving false information "has suffered injury in precisely the form the statute was intended to guard against," *Havens* concluded, and, therefore, has standing. 455 U.S. at 373-374. Title III similarly confers standing upon "any person" experiencing discrimination covered by Title III. Any further requirement that

such person have particular motivation finds no more support in Title III's text than in the language at issue in *Havens*.[8]

Accordingly, the only circuit to address tester standing under Title III held that those who encounter discriminatory construction have standing, regardless of motives. *Houston*, 733 F.3d at 1334. While this Court has not addressed tester standing under Title III, it has held that testers may seek similar injunctive relief under Title II of the ADA, which regulates the provision of state and local government services. See *Tandy* v. *City of Wichita*, 380 F.3d 1277, 1286-1287 (10th Cir. 2004). It reasoned that Title II's broadly worded private right of action – which extends to "any person alleging discrimination on the basis of disability" – and the ADA's far-reaching mandate to "eradicate discrimination" made the statute much like the Fair Housing Act provision at issue in *Havens*. *Id.* at 1287. Three plaintiffs, consequently, could challenge the accessibility of bus service based on their stated commitment to test the service several times per year. *Id.* at 1287-1289. The only tester plaintiff without standing failed to submit any affidavit

[8] In addition to arguing that testers have standing under Title III, plaintiffs argue that their motivations are not solely to be testers. See Plaintiffs' Br. 15, 17. We take no position on that factual question, which we believe is not legally relevant. Should this Court find that plaintiffs are not testers, it need not address the legal question we brief here, but we ask that it not say anything that suggests that testers do not have standing.

regarding his intention to test the service again. *Id.* at 1289. This case is not materially distinct from *Tandy*.

Defendants do not explain why plaintiffs' motivation for visiting facilities should matter; they merely cite to unpersuasive district court cases and a student note that disagrees with their position. See Defendants' Br. 19-21. In fact, ideological goals may make it more likely that plaintiffs will follow through on their stated commitment to return to defendants' stores. See Aplt. App. 664-665 (plaintiff will "reward" stores that comply with ADA obligations); accord *Houston*, 733 F.3d at 1340; *Norkunas* v. *HPT Cambridge, LLC*, No. 11-12183, 2013 U.S. Dist. LEXIS 133396, at *15 (D. Mass. Sept. 18, 2013) (collecting cases).

To be sure, there may be times when it seems implausible that a plaintiff (whether "tester" or not) will return to the public accommodation, for example when the plaintiff resides far away and visited the accommodation on a trip. See, *e.g.*, *Judy* v. *Pingue*, No. 2:08-cv-859, 2009 U.S. Dist. LEXIS 109990, at *8 (S.D. Ohio Nov. 25, 2009) (plaintiff lived 800 miles from inaccessible restaurant). But that is not this case, where the named plaintiffs can readily return to a store they have visited previously.

III

THE DISTRICT COURT PROPERLY ENTERED INJUNCTIVE RELIEF

Title III provides that, for any failure to construct new facilities in an accessible manner, "injunctive relief *shall* include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title." 42 U.S.C. 12188(a)(2) (emphasis added). Title III plainly required an injunction here to remedy defendants' violation.

This remedial scheme comports with Congress's choice, throughout the ADA, to require only modest changes for most existing facilities while requiring compliance with the new rules, without exception, for new construction. It is always discriminatory to build new facilities in an inaccessible manner unless compliance is "structurally impracticable," see 42 U.S.C. 12183(a)(1); 28 C.F.R. 36.401("Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features").[9] Removing architectural barriers existing prior to the ADA, conversely, is only required where "readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv), which means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. 12181(9); see, *e.g.*,

[9] Defendants do not contend that it was structurally impracticable for them to design their porches accessibly, nor would such an argument succeed.

Colorado Cross Disability Coal. v. *Hermanson Family Ltd. P'ship*, 264 F.3d 999, 1007-1008 (10th Cir. 2001).

Congress thus required courts to consider a defendant's costs in determining whether to order changes to facilities built prior to the ADA, but chose not to make those costs relevant to whether injunctive relief should issue regarding new construction. This policy accomplishes important goals illustrated well by this case. First, it provides a powerful incentive to make new construction accessible from the outset, a task Congress anticipated would be considerably less expensive than remedying a failure to do so later. If defendants could interpose remediation's costs as a defense to any injunctive remedy for a violation, they could, perversely, immunize even the most blatant Title III violations, which are easy to avoid but which may be expensive to fix later. Here, defendants – years after the ADA's passage – constructed their stores in a manner that obviously discriminates against wheelchair users. If remedying that Title III violation proves expensive, they have only themselves to blame. Second, having cost not be a defense to the requirement to remedy Title III violations encourages defendants to think creatively about remedying their violations, rather than submitting inflated cost estimates to avoid compliance. Once required to remedy their violation, defendants might well find cheaper ways to do so.

Defendants' brief does not acknowledge Title III's plain language or the considerable appellate jurisprudence recognizing that Title III requires newly constructed facilities to "be made accessible even if the cost of doing so – financial or otherwise – is high." See *Roberts* v. *Royal Atl. Corp.*, 542 F.3d 363, 371 (2d Cir. 2008), cert. denied, 556 U.S. 1104 (2009); accord *Disabled in Action of Pa.* v. *SEPTA*, 635 F.3d 87, 96 (3d Cir. 2011). Had the district court declined to issue injunctive relief because of defendants' costs, as defendants urged, it would have committed reversible error. See *Long* v. *Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001).

Defendants erroneously rely instead on an unpublished decision, *Rothberg* v. *Law School Admission Council*, 102 F. App'x 122 (10th Cir. 2004). See Defendants' Br. 53-54. Not only is *Rothberg* not binding precedent, but it concerned the entirely different question of whether *preliminary* injunctive relief should be granted prior to adjudication of a Title III claim, not permanent relief after a violation is found. Moreover, the allegation in *Rothberg* – failure to provide testing accommodations – did not involve Title III's new-construction requirements, and so this Court had no occasion to consider the statutory language discussed above. Defendants also err in relying on *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982). That case holds that, where a statutory scheme provides that "[a]n injunction is not the only means of ensuring compliance,"

district courts must weigh the equities before granting injunctive relief. *Id.* at 314. But a different rule applies where, as here, "the purpose and language of the statute" make clear that "only an injunction could vindicate the objectives of the Act." *Ibid.*; accord *Garcia* v. *Board of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1127 (10th Cir. 2008) (specific statute at issue can determine extent of district court's discretion in equity).

The bottom line is that defendant cites no decisions, and we are aware of none, finding that a defendant has violated Title III's new-construction requirements yet declining to grant permanent injunctive relief to remedy the violation.[10] Nor would such a decision be consistent with Title III's plain language and Congress's clear purposes.

Defendants assert, incorrectly, that the district court failed to consider their costs in fashioning an injunction that would bring defendants into compliance with Title III. See Defendants' Br. 55. In fact, the district court – permissibly – did consider defendants' claimed costs in choosing among different remedial options that would achieve full compliance with the new construction standards. Rather than ordering defendants to immediately bring all stores into compliance, it

---

[10] The passage defendants rely on from *Gregory* v. *Otac, Inc.*, 247 F. Supp. 2d 764 (D. Md. 2003), Defendants' Br. 52, is dicta. *Gregory* found that the alleged violation did not cause plaintiff's injuries and plaintiff accordingly lacked standing. See 247 F. Supp. 2d at 771-772. The other cases cited by defendant that are not described herein do not involve Title III.

allowed them three years to do so (Aplt. App. 1097). It gave defendants three options for compliance, one of which (simply closing the raised porches) was unlikely to impose substantial costs (Aplt. App. 1098). And it found that, even if the defendants choose the most expensive option (leveling the porches) and even assuming the validity of the defendants' estimate that doing so would cost $8.5 million over three years, defendants could absorb such costs. Tr. of Hearing, 8/16/2013, Doc. No. 213, at 30. The district court thus acted well within its discretion, particularly considering the defendants did not below and do not now proffer any alternative remedy that would bring them into full compliance with Title III within a reasonable period of time.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Sasha Samberg-Champion
MARK L. GROSS
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-0714

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d), because it contains 6158 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

Date: February 10, 2014

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

Date: February 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Seven copies of the same were sent by Federal Express to the Court.

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

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney