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Patching Procedural Potholes in Supplemental Jurisdiction Claims Involving ADA & Unruh Act Litigation in California Federal Courts

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PATCHING PROCEDURAL POTHOLES IN SUPPLEMENTAL JURISDICTION CLAIMS INVOLVING ADA & UNRUH ACT LITIGATION IN CALIFORNIA FEDERAL COURTS

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Since California enacted heighted pleading standards for high-frequency litigants alleging violations of the Unruh Act in state court, California federal courts experienced a significant surge of ADA and Unruh Act claims. This Note explores the reasons for this surge and proposes simple fixes to reduce federal courts' caseloads while ensuring plaintiffs' ability to defend their civil rights.

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I. INTRODUCTION

The opportunity to clerk or extern for a federal judge is one of the most prized experiences an individual beginning their legal career can undertake. The insider knowledge, practice, and hands-on training are invaluable in creating a solid foundation to build their future legal career. Moreover, clerking and externing are ways of giving back to the country in the form of national service.

While clerking and externing are admirable pursuits, they also provide unique snapshots of issues facing the judicial system. Anyone fortunate enough to clerk or extern in the Central District of California over the last six years is likely to notice a pattern in the civil docket involving cases alleging Title III violations of the Americans with Disabilities Act (ADA).[1] Indeed, between 2015 and 2019, the amount of ADA filings in the Central District rose an astonishing 203.4 percent.[2] In the first half of 2020 alone, ADA cases constituted 27 percent of the civil docket.[3] It is not surprising, then, that clerks and externs in the Central District quickly become familiar with ADA complaints. But it raises the question: why are there so many ADA cases?

The answer involves procedural maneuverings by clever plaintiffs' counsel who tack on supplemental state law claims in order to obtain monetary damages. To explain, the ADA only provides injunctive relief.[4] However, the California equivalent of the ADA, known as the Unruh Act,[5] provides monetary damages of three times the amount of actual damages, no less than $4,000 in statutory damages, and any attorney's fees determined by the court.[6] Because the California courts made it difficult for plaintiffs it deems "high-frequency litigants"[7] to allege their Unruh Act causes of action, plaintiff attorneys use supplemental jurisdiction to get their state law claims before federal judges. Increasingly, however, Central District judges deny the supplemental jurisdiction claim, forcing plaintiffs to either split their claims between federal and state courts, or drop their state law claim altogether.

1. 42 U.S.C. §§ 12101–12213 (2018).
2. CENT. DIST. OF CAL., ANNUAL REPORT OF CASELOAD STATISTICS: FISCAL YEAR 2019, at 8 (2019), https://www.cacd.uscourts.gov/sites/default/files/CACD_FY2019_Annual_Report.pdf [https://perma.cc/539K-25DP].
3. Ghadiri v. 3 Day Suit Broker, No. SACV 20-01471, 2020 WL 5778134, at *3 (C.D. Cal. Sept. 2, 2020).
4. 42 U.S.C. § 12188(a)(2) (2018).
5. CAL. CIV. CODE § 51(b) (West 2007).
6. *Id*. § 52(a).
7. CAL. CIV. PROC. CODE § 425.55(b) (West 2016).

At bottom, the denial of supplemental jurisdiction has not dissuaded plaintiffs' counsel from continuing this practice. More concrete measures must be taken to close the procedural loopholes, lighten the federal caseload, maintain comity between the federal and state court systems, and ensure plaintiffs' rights are enforced. The object of this Note is to find this balance by providing two solutions to this issue: amending the ADA to include a reasonable notice and cure provision, and raising the Article III standing burden for ADA plaintiffs.

II. LEGAL BACKGROUND

A. Americans with Disabilities Act

Prior to the ADA's enactment, individuals who faced discrimination based on their disabilities had no legal recourse to redress this issue.[8] Specifically, Congress noted the prevalence of this discrimination in "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[9] Moreover, this discrimination manifested in various forms, ranging from architectural and other barriers preventing access, to the failure to modify such obstacles.[10] In Congress's view, people with disabilities were prevented from fully participating in many, if not all, aspects of society.[11]

In response, Congress crafted the ADA to ensure that the federal government played a central role in eliminating disability discrimination by providing "a clear and comprehensive national mandate" with "clear, strong, consistent, and enforceable standards."[12] Accordingly, on July 26, 1990, President George H.W. Bush signed the ADA into law.[13]

8. 42 U.S.C. § 12101(a)(4) (2018); PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001) ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals.").

9. 42 U.S.C. § 12101(a)(3).

10. *Id*. § 12101(a)(5).

11. *Id*. § 12101(a)(1).

12. *Id.* § 12101(b)(1)–(3).

13. *Introduction to the ADA*, U.S. DEP'T OF JUST., https://www.ada.gov/ada_intro.htm [https://perma.cc/3H4Q-3TY2].

The ADA offers plaintiffs several different paths to address disability discrimination through private rights of action.[14] Title I focuses on discrimination in the employment context,[15] Title II addresses discrimination in public services run by state or local governments,[16] Title III includes public accommodations such as grocery stores or hotels,[17] and Title IV covers miscellaneous instances.[18] Additional provisions encompass telecommunications regulations for the hearing and speech impaired.[19] However, for purposes of this Note, the focus is on Title III claims involving public accommodations.

Title III states 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."[20] It follows, then, that in order to state a Title III claim, a plaintiff must allege that (1) she is disabled as defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of her disability.[21]

As to the first element, discrimination is not limited to "obliviously exclusionary conduct," but rather incorporates "more subtle forms," such as hard to open doors, difficult to navigate restrooms, parking spaces or shopping aisles that are too narrow for wheelchair access, and other architectural barriers that interfere with an individual's full and equal enjoyment of a public accommodation.[22] Importantly, discrimination occurs when the public accommodation

14. 42 U.S.C. § 12188 (2018).
15. *Id*. § 12112(a).
16. *Id*. § 12131-2.
17. *Id*. § 12181-2.
18. *Id*. § 12201-10*; Id.* § 12201(d) ("Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.").
19. *Id*. § 225.
20. *Id*. § 12182(a).
21. Arizona *ex rel.* Goddard v. Harkins Amusement Enters., Inc., 603 F.3d 666, 670 (9th Cir. 2010). The ADA defines a disability as a "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).
22. Chapman v. Pier 1 Imps. (U.S.) Inc., 631 F.3d 939, 945 (9th Cir. 2011); PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) ("Congress noted that the many forms such discrimination takes include 'outright intentional exclusion' as well as the 'failure to make modifications to existing facilities and practices.'"); 42 U.S.C. § 12182(b)(1)(A)(i); *see also id.* § 12181 (lacking a definition of "architectural barrier").

owner fails to remove or remedy such architectural barriers when readily achievable.[23]

Looking at public accommodations, the statute defines twelve distinct categories: places of lodging; establishments serving food or drink; places of entertainment; places of public gathering; retail sales or rental establishments; service establishments; stations for public transportation; places of public display or collections; places of recreation; places of education; social service centers; and exercise establishments.[24]

Moreover, unlike Title I employment claims, which allow plaintiffs to recover compensatory and punitive damages,[25] a plaintiff may only seek injunctive relief for a Title III claim; damages are unavailable.[26]

B. Unruh Act

California's Unruh Civil Rights Act broadly outlaws discrimination in public accommodations based on several prohibited classes.[27] The Act traces its lineage to an 1893 act preventing the owner of an opera house, theater, circus, or other "place of public amusement" from denying entry to any patron with a ticket over the age of twenty-one who was not intoxicated.[28] Later, in 1897, California's legislature passed the public accommodation statute, expanding the types of places covered by the 1893 act to include inns, restaurants, eating-houses, barber shops, and the like, while further preventing owners from denying citizens access to the full and equal enjoyment of their establishment.[29] The public accommodation statute later became

23. 42 U.S.C. § 12182(b)(2)(A)(iii).

24. *Id*. § 12181(7).

25. *Id*. § 1981a(b).

26. Wander v. Kaus, 304 F.3d 856, 858 (9th Cir. 2002) ("Damages are not recoverable under Title III of the ADA—only injunctive relief is available for violations of Title III."); *see* 42 U.S.C. § 12188(a)(1) (stating that remedies for Title III claims are outlined in 42 U.S.C. § 2000a-3(a), which governs civil actions for injunctive relief); Courtney Abbott Hill, Note, *Enabling the ADA: Why Monetary Damages Should Be A Remedy Under Title III of the Americans with Disabilities Act*, 59 SYRACUSE L. REV. 101, 106-07 (2008).

27. *See* Miller v. Fortune Com. Corp., 223 Cal. Rptr. 3d 133, 138 (Cal. Ct. App. 2017). The prohibited classes include sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. CAL. CIV. CODE § 51(b) (2018).

28. Harold W. Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application*, 33 S. CAL. L. REV. 260, 262-63 (1960); Act of Mar. 23, 1893, ch. 185, 1893 Cal. Stat. 220.

29. Horowitz, *supra* note 28, at 263.

sections 51 and 52 of the California Civil Code,[30] and represented the state's response to the *Civil Rights Cases*,[31] infamously decided by the Supreme Court in 1883.[32] Notably, a violation of section 51 resulted in a fine of fifty dollars which subsequently rose to one-hundred dollars.[33]

Finally, in 1959, responding to several California Supreme Court opinions narrowing the types of businesses falling under the 1897 Act, the California Legislature amended the Act, and created the version recognizable today.[34] Now known as the Unruh Civil Rights Act, the 1959 amendment ensured that all citizens within California, "no matter what their race, color, religion, ancestry, or national origin," were entitled to the free, full, and equal accommodations of any business whatsoever.[35] Any entity discriminating on these bases would be liable for a fine of $250.[36] Later amendments broadened the scope of discrimination, adding "sex" to protect against gender-based discrimination in 1974.[37]

The first reference to disability discrimination appeared in the 1987 amendment, but focused only on physical disabilities and blindness.[38] The legislature soon scrapped these distinctions in a 1992 amendment, opting for a broader approach that applied to all

30. Brennon B. v. Superior Ct., 271 Cal. Rptr. 3d 320, 322 (Ct. App. 2020) ("After the United States Supreme Court, in the *Civil Rights Cases*, invalidated the first federal public accommodation statute, California joined a number of other states in enacting its own initial public accommodation statute, the statutory predecessor of the current version of [Civil Code] section 51." (alteration in original) (citations omitted)), *aff'd*, 513 P.3d 971 (Cal. 2022).

31. 109 U.S. 3 (1883).

32. Act of Mar. 13, 1897, ch. 108, 1897 Cal. Stat. 137; Act of May 5, 1919, ch. 210, 1919 Cal. Stat. 309; Horowitz, *supra* note 28, at 263.

33. Act of Mar. 13, 1897, ch. 108, 1897 Cal. Stat. 137.

34. Sande L. Buhai, *One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses*, 36 U.S.F. L. REV. 109, 113 (2001).

35. Horowitz, *supra* note 28, at 270. The full text of the statute reads:

> Section 51: This section shall be known, and may be cited, as the Unruh Civil Rights Act. All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. This section shall not be construed to confer any right or privilege on a citizen which is conditioned or limited by law or which is applicable alike to citizens of every color, race, religion, ancestry, or national origin.

Id.

36. *Id.*

37. Anna Porter, Comment, *Antidiscrimination Statutes and Women-Only Spaces in the #MeToo Era*, 2019 U. CHI. LEGAL F. 497, 498.

38. Act of July 14, 1987, ch. 159, 1987 Cal. Stat. 1094, 1095.

disabilities, such as mental disabilities not previously covered.[39] The California Supreme Court followed suit, and held that the Unruh Act must be construed liberally in order to carry out its purpose.[40] It added that the Act's language and history "compel the conclusion that the Legislature intended to prohibit all arbitrary discrimination by business establishments."[41]

To state a cause of action under the Unruh Act, a plaintiff must allege that: (1) she was denied or discriminated against, depriving her of the full and equal accommodations, advantages, facilities, privileges, or services in a business establishment; (2) her disability was a motivating factor for this denial; (3) the defendant denied the plaintiff the full and equal accommodations, advantages, facilities, privileges, or services; and (4) the defendant's wrongful conduct caused plaintiff to suffer an injury.[42]

Notably, a violation of the ADA constitutes a violation of the Unruh Act.[43] However, a key distinction between the two statutes lies in their remedies: while Title III ADA claims are limited to injunctive relief, a violation of the Unruh Act results in a maximum of three times the amount of actual damages, no less than $4,000 in statutory damages, and any attorney's fees determined by the court.[44]

However, with the availability of monetary damages and attorney's fees, some parties abused the California courts, flooding them with Unruh Act causes of action. To illustrate, the legislature found that:

> [M]ore than one-half, or 54 percent, of all construction-related accessibility complaints filed between 2012 and 2014 were filed by two law firms. Forty-six percent of all complaints were filed by a total of 14 parties. Therefore, a very

39. Tammy L. McCabe, *California Disability Anti-Discrimination Law: Lighthouse in the Storm, or Hunt for Buried Treasure?*, 36 MCGEORGE L. REV. 661, 665 (2005); Curran v. Mt. Diablo Council of the Boy Scouts, 952 P.2d 218, 292 (Cal. 1998) (Mosk, J., concurring) ("In 1992, it was amended for a final time in the same part with the substitution of 'disability' for 'blindness or other physical disability.'"); Munson v. Del Taco, Inc., 208 P.3d 623, 627 (Cal. 2009) ("The Assembly Judiciary Report on Assembly Bill No. 1077 summarized the bill's changes to the Unruh Civil Rights Act as follows: 'Include persons with mental disabilities in the enumerated classes of individuals protected by the Unruh Act.'").

40. Angelucci v. Century Supper Club, 158 P.3d 718, 721 (Cal. 2007).

41. *In re* Cox, 474 P.2d 992, 999 (Cal. 1970).

42. Judicial Council of California Civil Jury Instructions (CACI) No. 7.92; Wilkins-Jones v. County of Alameda, 859 F. Supp. 2d 1039, 1048 (N.D. Cal. 2012).

43. CAL. CIV. CODE § 51(f) (West 2007).

44. *Id.* § 52(a).

> small number of plaintiffs have filed a disproportionately large number of the construction-related accessibility claims in the state, from 70 to 300 lawsuits each year. Moreover, these lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than correction of the accessibility violation. This practice unfairly taints the reputation of other innocent disabled consumers who are merely trying to go about their daily lives accessing public accommodations as they are entitled to have full and equal access under the state's Unruh Civil Rights Act and the federal Americans with Disability Act of 1990.[45]

Such findings provided the basis for establishing new, stricter procedural requirements for plaintiffs engaging in these activities, otherwise known as "high-frequency litigants."[46]

A high-frequency litigant is either (1) a plaintiff that files ten or more complaints alleging construction-related accessibility violations within a one-year period prior to the current accessibility complaint, or (2) an attorney representing ten or more high-frequency litigants within a one-year period.[47] The consequences of this determination are significant. For one, a plaintiff must plead with heightened particularity the details comprising his complaint, including an explanation of the specific barriers he encountered, how they denied him full and equal use, the specific dates the violation occurred, as well as his reasons for being in the area, and his desire for visiting the defendant's business.[48] Additionally, the plaintiff must verify the complaint.[49] If represented by counsel, the plaintiff must have their attorney certify that several criteria are met, not least of which is that the complaint is not brought for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[50] Despite all of this, the biggest burden on a high-frequency litigant is the requirement to pay a $1,000 filing fee when filing their complaint.

45. CAL. CIV. PROC. CODE § 425.55(a)(2) (West 2016).

46. *Id.* § 425.55(b).

47. *Id.* A "construction-related accessibility" claim is "any civil claim in a civil action with respect to a place of public accommodation, including, but not limited to, a claim brought under [the Unruh Act]." CAL. CIV. CODE § 55.52(a)(1) (West 2007).

48. CAL. CIV. PROC. CODE § 425.50(a) (West 2016).

49. *Id.* § 425.50(b).

50. *Id.* § 425.50(c).

III. FEDERAL JURISDICTION

Federal courts have original jurisdiction over cases and controversies arising under the Constitution or laws of the United States.[51] As a fully executed statute, the private right of action under the ADA arises under the laws of the United States. Accordingly, federal courts have jurisdiction to hear well-pleaded ADA claims when a plaintiff satisfies standing requirements.[52]

Of course, federal courts also have supplemental jurisdiction over all other claims that are so related—such that there is a common nucleus of operative facts connecting the state and federal claims—to the anchor claim that gives rise to federal jurisdiction.[53] This includes state law claims that otherwise have no grounds for jurisdiction in federal courts. Because a violation of the ADA constitutes a violation of the Unruh Act, it follows that federal courts may also hear Unruh Act claims through supplemental jurisdiction.[54]

Nonetheless, supplemental jurisdiction is a doctrine based on discretion.[55] Indeed, it "need not be exercised in every case in which it is found to exist."[56] Considerations based on judicial economy, convenience to the litigants, federalism, and comity to state courts may dissuade a federal court from exercising supplemental jurisdiction in a given instance.[57] Other factors, such as "the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims," discourage the court from exercising jurisdiction.[58]

Accordingly, §1367(c) provides courts four provisions for declining supplemental jurisdiction when a plaintiff alleges a federal question claim. For instance, when the supplemental claim either raises a novel or complex state law issue, or "substantially predominates" over the anchor claim, the district court may decline to hear it.[59]

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51. Wander v. Kaus, 304 F.3d 856, 858 (9th Cir. 2002); 28 U.S.C. §1331 (2018).

52. Standing is discussed further, below.

53. 28 U.S.C. §1367(a). This type of jurisdiction may be described as "arising under" or "federal question" jurisdiction.

54. CAL. CIV. CODE § 51(f) (West 2007); *see* 28 U.S.C. § 1367(a).

55. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right."); 28 U.S.C. § 1367(c) ("The district courts *may* decline to exercise supplemental jurisdiction . . . ." (emphasis added)).

56. *Gibbs*, 383 U.S. at 726.

57. *Id*.

58. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 173 (1997).

59. 28 U.S.C. § 1367(c)(1)–(2) (2018).

Alternatively, if the anchor claim gets dismissed prior to trial, leaving only the supplemental claim, jurisdiction may be declined.[60] The final option is reserved for "exceptional circumstances," such that there are "compelling reasons for declining jurisdiction."[61] While a court need not explain its reasoning for declining supplemental jurisdiction under the first three options of §1367(c), under the fourth provision, the court must "articulate why the circumstances of the case are exceptional" after weighing the values of judicial economy, convenience, fairness, and comity.[62] Nonetheless, as the Ninth Circuit explains, this "inquiry is not particularly burdensome."[63]

On a different note, district courts do not face an *Erie* problem when deciding Unruh Act claims brought by high-frequency litigants.[64] After all, the heightened pleading standard, verification requirement, and filing fee are clearly procedural in nature. As such, these requirements do not apply in federal courts.[65] Herein lies the issue.

IV. ISSUE

To avoid the heightened pleading standards and filing fees enforced by California law, high-frequency litigants turn to the federal courts. By claiming a violation of Title III under the ADA, high-frequency litigants have an anchor claim that satisfies federal question jurisdiction, getting their claim through the doors of the federal court. Since an Unruh Act violation shares a common nucleus of operative fact with the ADA claim, the potential for supplemental jurisdiction exists, and a high-frequency litigant may include this state law claim

60. *Id.* § 1367(c)(3).

61. *Id.* § 1367(c)(4).

62. San Pedro Hotel Co. v. City of Los Angeles, 159 F.3d 470, 478 (9th Cir. 1998); Schutza v. Cuddeback, 262 F. Supp. 3d 1025, 1028 (S.D. Cal. 2017).

63. Exec. Software N. Am., Inc. v. U.S. Dist. Ct., 24 F.3d 1545, 1558 (9th Cir. 1994), *overruled on other grounds by* Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008) ("[T]he court must identify the predicate that triggers the applicability of the category (the exceptional circumstances), and then determine whether, in its judgment, the underlying *Gibbs* values are best served by declining jurisdiction in the particular case (the compelling reasons).")

64. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 64 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.")

65. Barekat v. BPI Brea LLC, No. SACV-20-01365, 2020 WL 6065920, at *3 (C.D. Cal. Sept. 8, 2020) ("Unlike the Unruh Act's statutory damages provision, these restrictions are procedural and do not apply in federal court.").

in their complaint.[66] As such, a high-frequency litigant may seek injunctive relief under the ADA, as well as statutory damages and attorney's fees under the Unruh Act.

However, this practice ultimately "circumvent[s] the will of Congress by seeking money damages while retaining federal jurisdiction."[67] In *Molski v. Mandarin Touch Restaurant*,[68] the court illustrated this practice:

> The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance," a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.[69]

There are several practical consequences of such procedural maneuvering by high-frequency litigants. For one, litigation becomes driven by attorney's fees and damages, rather than fixing the architectural barriers underlying the plaintiff's Title III injury. Plaintiffs, whether knowingly or not, act as "professional pawn[s] in an ongoing scheme to bilk attorney's fees."[70] Still, courts perceive this gamesmanship and temper such requests as necessary.

To illustrate, in *Davidson v. Bobos Corp.*,[71] the plaintiff moved for entry of default judgment on his ADA and Unruh Act claims in the Central District.[72] His counsel sought $3,200 in attorney's fees for work done in the case.[73] Despite the absence of any opposition in the litigation, counsel explained that he spent eight hours on the case and suggested that a rate of $400 per hour appropriately compensated him for his work.[74] Although granting the default judgment, the court did

66. *See* 28 U.S.C. § 1367(a); CAL. CIV. CODE § 51(f) (West 2007).
67. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 862 (C.D. Cal. 2004).
68. 347 F. Supp. 2d 860 (C.D. Cal. 2004).
69. *Id.* at 863.
70. *Id*.
71. No. CV 20-05016, 2020 WL 7232131 (C.D. Cal. Nov. 4, 2020).
72. *Id*. at *4.
73. *Id*.
74. *Id*. at *4–5.

not agree with the counsel's estimates.[75] It noted that neither the plaintiff nor his counsel were strangers to this type of litigation, pointing to seventeen similar cases filed in the Central District alone over the last year.[76] Moreover, the court explained that plaintiff's counsel routinely files carbon-copy complaints, adding that this type of litigation is entirely boilerplate in nature.[77] Because of the boilerplate nature of the complaint, the court found it hard to imagine the case required eight hours in the absence of any discovery, hearings, or opposition.[78] As such, after conducting its lodestar analysis, the court cut the award to a third of the original request, providing $1,200 in attorney's fees for four hours of work at $300 per hour.[79] Still, it is unclear whether the defendants, who ignored the entirety of the proceedings, remedied the architectural barriers at issue in *Bobos Corp*.

These procedural maneuverings have resulted in a drastic increase in the caseloads of federal courts sitting in California. For instance, prior to California enacting its requirements for high-frequency litigants, the Central District of California only heard 419 ADA cases in 2013, accounting for 3 percent of the total civil docket.[80] That number jumped to 928 in 2014, amounting for 7 percent of the civil docket.[81]

However, after California enacted its heightened pleading standards, federal courts saw a steep increase in ADA claims. To illustrate, the Office of the Clerk in the Central District reports the following statistics for ADA filings by fiscal year and their respective percentages of the total civil docket: 1,043 in 2015 (7.2%); 1,370 in 2016 (9.3%); 1,734 in 2017 (12.1%); 2,571 in 2018 (16.8%); and 3,374 in 2019 (21.7%).[82] In other words, from fiscal years 2015 to 2019, ADA claims rose a whopping 223.5 percent.[83] Between the fiscal years 2018 and 2019 alone, the Central District saw an increase of 31.2 percent in

75. *Id*. at *5.

76. *Id*. For a small sample size of litigation by plaintiffs Davidson and his counsel Jason T. Yoon, see Davidson v. S. Pac. Mkt. 1 Inc., No. CV 20-4249, 2020 WL 5991502, at *1 (C.D. Cal. Sept. 1, 2020); Davidson v. Fainbarg III, LP, No. 20-CV-1674, 2020 WL 6587529, at *1 (C.D. Cal. Sept. 21, 2020); and Davidson v. Fry's Elecs., Inc., No. CV 20-04830, 2020 WL 7230969, at *1 (C.D. Cal. Aug. 19, 2020).

77. *Bobos Corp.*, 2020 WL 7232131, at *4.

78. *Id*. at *5.

79. *Id*.

80. Ghadiri v. 3 Day Suit Broker, No. SACV 20-01471, 2020 WL 5778134, at *3 (C.D. Cal. Sept. 2, 2020).

81. *Id*.

82. CENT. DIST. OF CAL., *supra* note 2, at 8.

83. *Id*.

ADA filings.[84] Framed in another light, the Office of the Clerk reports that while the total amount of civil filings rose 6.6 percent between 2015 and 2019, ADA filings "have surged," increasing 203.4 percent in that same timeframe.[85] This pace does not appear to be slowing down: in just the first half of 2020, plaintiffs filed 2,149 ADA claims, amounting to "an incredible" 27 percent of the civil docket.[86]

In order to the curb the drastic increase of ADA and Unruh Act claims, courts turn to the discretion provided in §1367(c) for denying supplemental jurisdiction of Unruh Act claims. Some courts decline jurisdiction using §1367(c)(2), reasoning that the plaintiff's Unruh Act claim substantially predominates over the ADA claim. For example, in *Schutza v. Cuddeback*,[87] the plaintiff, a paraplegic who filed over one hundred cases in the Southern District and elsewhere, asserted nine separate violations of the ADA and Unruh Act in federal court against the defendant trailer company.[88] As such, the plaintiff requested $36,000 in statutory damages under the Unruh Act.[89]

However, the court did not oblige. Instead, the court considered the number of violations alleged by the plaintiff, and noted that only injunctive relief would be permitted in the context of ADA relief.[90] It then struggled to find "what advantage—other than avoiding state-imposed pleading requirements—Plaintiff gains by being in federal court since his sole remedy under the ADA is injunctive relief, which is also available under the Unruh Act."[91] Ultimately, the court reasoned that because of the numerous alleged violations, the plaintiff's "predominant focus is recovering monetary damages under state law."[92] Furthermore, the plaintiff framed the violations in terms of intentionality, which is not an element of an ADA cause of action, but "is relevant to Plaintiff's state law claim because it allows Plaintiff to maintain an independent action under the Unruh Act."[93] As such, the court granted

84. *Id*.
85. *Id*.
86. *Ghadiri*, 2020 WL 5778134, at *3.
87. 262 F. Supp. 3d 1025 (S.D. Cal. 2017).
88. *Id.* at 1027, 1029–30.
89. *Id*. at 1030.
90. *Id*.
91. *Id*. at 1031.
92. *Id*. at 1029.
93. *Id*. at 1030.

the defendant's motion to dismiss the Unruh Act claim on the grounds that it substantially predominated over the ADA claim.[94]

Nonetheless, when denying supplemental jurisdiction, most courts opt for the exceptional circumstances prong provided by §1367(c)(4).[95] For instance, in *Whitaker v. Mac*,[96] the plaintiff, a disabled individual who used a wheelchair, filed an ADA and Unruh Act claim against the defendant, the owner of a Chevron gas station in Sherman Oaks, alleging inaccessible paths of travel that were not compliant with handicap accessibility requirements under the ADA.[97] The defendant moved to dismiss both causes of action, arguing that the plaintiff lacked standing to assert his ADA claim, and that the court should decline to exercise supplemental jurisdiction of his Unruh Act claim.[98]

Although the court disagreed with the defendant regarding the plaintiff's ADA claim, it dismissed the plaintiff's Unruh Act claim under §1367(c)(4).[99] The court began its discussion with the principle of comity in mind, noting that in enacting its high-frequency litigant requirements, "California has expressed a desire to limit the financial burdens California's businesses may face for claims for statutory damages under the Unruh Act."[100] It went further:

> California's elected representatives, not this Court, have enacted laws restricting construction-related accessibility claims, and, as a result, dictated that these claims be treated differently than other actions. That the astronomical growth in the filing of these cases in federal court has coincided with California's limitations on construction-related accessibility claims suggests that it is precisely because the federal courts have not adopted California's limitations on such claims that federal courts have become the preferred forum for them.[101]

94. *Id.* at 1031–32; *see also* Fernandez v. Martinez, No. 20-cv-11388, 2021 WL 816740, at *5 (C.D. Cal. Jan. 6, 2021) (dismissing plaintiff's Unruh Act claim under § 1367(c)(2)); Reyes v. Flourshings Plus, Inc., No. 19cv261, 2019 WL 1958284, at *2 (S.D. Cal. May 2, 2019) (same).

95. *See* Bouyer v. Rocky's Racquet World, No. CV 20-4710, 2021 WL 1146384, at *7 (C.D. Cal. Mar. 25, 2021) (providing extensive string citation of Californian district courts denying supplemental jurisdiction under § 1367(c)(4)).

96. 411 F. Supp. 3d 1108 (C.D. Cal. 2019).

97. *Id.* at 1111–12.

98. *Id*. at 1111.

99. *Id.*

100. *Id*. at 1116.

101. *Id*. at 1117.

Because California has a "substantial interest in discouraging unverified disability discrimination claims," the court prevented the plaintiff from using the "federal court as an end-around to California's pleading requirements."[102]

Turning to principles of judicial economy and convenience, the *Whitaker* court explained that ADA and Unruh Act claims filed in the Central District have "skyrocketed," with "nearly nine times more construction-related accessibility actions being filed in the Central District in 2019 than were filed in 2013," and cited the Office of the Clerk's statistics.[103] Because of the subsequent "burden the ever-increasing number of such cases poses to the federal courts," the court found these considerations to be exceptional circumstances that provided compelling reasons for declining supplemental jurisdiction.[104]

Still, while federal courts are within their discretion in denying supplemental jurisdiction of Unruh Act claims under several prongs of § 1367(c), such denials give rise to other issues. For one, some may argue that denying a valid supplemental Unruh Act claim results in an abdication of the court's responsibility to hear cases rightfully brought before it. After all, "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."[105] Since a violation of the ADA constitutes a violation of the Unruh Act, the question of what additional judicial energy and resources the federal court would extend in deciding the Unruh Act claim after reaching a conclusion regarding the ADA claim remains unclear. It follows that the court *might as well* hear both claims and decide them accordingly.

Additionally, while one reason for denying supplemental jurisdiction is to cut down on the federal courts' caseloads, by issuing such denials the federal courts inadvertently risk increasing the caseloads of state courts. To illustrate, when the federal court denies a plaintiff's Unruh Act claim, that plaintiff must now litigate two separate yet identical claims, using the same evidence for each, in both the federal and state courts individually. Assuming the plaintiff is a high-frequency litigant who satisfies the pleading requirements and filing fees for the California courts, he must now bear the additional costs, time, and energy of arguing two simultaneous lawsuits happening in separate courts. This is unnecessary, especially when the federal court could

102. *Id*. (quoting Schutza v. Cuddeback, 262 F. Supp. 3d 1025, 1031 (S.D. Cal. 2017)).
103. *Id.* at 1116-17; *see supra* text accompanying notes 82–86.
104. *Whitaker*, 411 F. Supp. 3d at 1116.
105. Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014).

have resolved both claims. By splitting the claims, more litigation may ensue.

Another issue arises when the plaintiff is a high-frequency litigant who cannot satisfy the heightened pleading standard or filing fee. In effect, he is forbidden from bringing his valid Unruh Act claim, or any future Unruh Act claims, in any court, until the one-year limitation resets. Such blanket prohibitions against potential civil rights plaintiffs risk running against the underlying principles of the ADA and Unruh Act, namely, providing a cause of action for disabled individuals to address discrimination.

V. PROPOSAL

With an understanding of the issues established, the proposals provided below may not only lighten the load off federal dockets, but may also ensure that the spirit of the ADA is protected from abusive litigants seeking monetary damages instead of proper enforcement.

A. Notice & Right to Cure Provision

The most commonsensical and least burdensome remedy for all parties is for Congress to amend the ADA to include a notice and right to cure provision. This provision provides that, prior to a prospective ADA plaintiff filing their claim in federal court, the plaintiff must first notify the prospective defendant business allegedly violating Title III. Notification includes providing specifics as to what violations took place, such as where and when said violations occurred in the store. The business then must remedy the specified violations within a prescribed time limit. If the business successfully fixes the problem, then the plaintiff's claim becomes moot, and no further legal action is necessary. However, if the business fails to remedy the issues or ignores the notice altogether, then the plaintiff may proceed with filing their ADA claim.

Congress is no stranger to notice and cure proposals for the ADA. Over twenty years ago, the House of Representatives first considered H.R. 3590, the ADA Notification Act, but the Act, and its many subsequent versions, failed to go anywhere.[106] And as recently as 2018, the House of Representatives passed H.R. 620, the ADA Education and Reform Act of 2017, which included the latest notice and cure

106. ADA Notification Act, H.R. 3590, 106th Cong. (2000); *see also* ADA Notification Act of 2013, H.R. 777, 113th Cong. (2013); ADA Notification Act of 2011, H.R. 881, 112th Cong. (2011).

iteration.[107] That Act provides that a prospective plaintiff may not bring forward an ADA violation unless the plaintiff (1) "has provided to the owner or operator of the accommodation a written notice specific enough to allow such owner or operator to identify the barrier," and (2) "during the period beginning on the date the notice is received and ending 60 days after that date, the owner or operator fails to provide to that person a written description outlining improvements that will be made to remove the barrier."[108] Alternatively, if the owner provides a written description, but still "fails to remove the barrier," or in the case of larger fixes, "fails to make substantial progress in removing the barrier during the period beginning on the date the description is provided and ending 60 days after that date," then the plaintiff may bring suit.[109] Nonetheless, the legislation stalled in the Senate.[110] Even now in 2021, a new bill— H.R. 77, the ADA Compliance for Customer Entry to Stores and Services Act—is making its way through Congress and includes the same language of H.R. 620.[111] Still, its ultimate fate remains unclear.

Opponents of these proposed notice and cure amendments point to a number of issues included in the bills. For starters, the late Congressman John Lewis, champion of the Civil Rights movement, on the floor of the House of Representatives, described H.R. 620 as "a bill that turns the clock backwards and strikes a devastating blow in the fight for civil rights."[112] Senator Tammy Duckworth, who uses a wheelchair after serving in Iraq,[113] warned against passing H.R. 620 because it would "segregate" the disability community as "the only protected class under civil rights law that must rely on 'education'—rather than strong enforcement—to guarantee access to public spaces."[114] Indeed, most ADA plaintiffs "view themselves as champions of the disabled" because the ADA relies on private

107. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018).

108. *Id*.

109. *Id.*

110. *Id.*

111. ADA Compliance for Customer Entry to Stores and Services Act, H.R. 77, 117th Cong. (2021).

112. John Lewis, *Congressman Lewis' Floor Statement opposing H.R. 620, the ADA Education and Reform Act*, YOUTUBE (Feb. 15, 2018), https://youtu.be/41Tp_Q0UxBQ.

113. *About Tammy*, TAMMY DUCKWORTH, U.S. SENATOR FOR ILLINOIS, https://www.duckworth.senate.gov/about-tammy/biography [https://perma.cc/Q85F-VW47].

114. Tammy Duckworth, *Congress Wants to Make Americans with Disabilities Second-Class Ctitzens Again*, WASH. POST (Oct. 17, 2017), https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17/f508069c-b359-11e7-9e58-e6288544af98_story.html [https://perma.cc/93TQ-UH2J].

enforcement.[115] Moreover, "[n]o other civil rights law permits businesses to discriminate without consequence unless and until the victims of discrimination notify the business that it has violated the law."[116] It follows that the additional burden of providing specific notice to a defendant who violated a civil rights statute may be unfair to place on an ADA plaintiff, who is the only party that may enforce compliance with these rights.

Additionally, opponents point to the amount of time granted to prospective defendants to remedy the Title III violation. Senator Duckworth criticized H.R. 620 for allowing businesses to "discriminate for 120 days following notification," noting that businesses would have 60 days simply to acknowledge the problem, and have an additional 60 days only to make "substantial progress" towards said improvements.[117] This substantial progress requirement is also problematic, the argument follows, because a "business could spend years without actually removing barriers to come into compliance with longstanding access standards, and face no penalty, as long as 'substantial progress' can be claimed."[118] The end result leaves a prospective ADA plaintiff waiting indefinitely for a cure while prohibited from seeking further enforcement in the courts. Essentially, the prolonged grace period for violating defendants and lack of clarity surrounding substantial progress dissuades opponents from signing onto a notice and cure provision.

These arguments are persuasive and must be considered with drafting a notice and cure provision. Nonetheless, the fact remains that federal courts are inundated with ADA claims containing supplemental state law claims. The result is a compromise factoring in these different considerations.

Looking at other state laws, Arizona provides a reasonable model for incorporating a notice and cure requirement into the current ADA legislation. The Arizonans with Disabilities Act (AzDA) states that,

115. Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007).

116. *Overview of Concerns with H.R. 620, the ADA Education and Reform Act of 2017, and Similar Bills*, DISABILITY RTS. EDUC. & DEF. FUND, https://dredf.org/hr620/overview-of-concerns-with-h-r-620/ [https://perma.cc/FAT6-JDYY].

117. *Duckworth & Senate Democrats Vow to Defeat House GOP-Led Effort to Curtail Civil Rights of Americans with Disabilities*, TAMMY DUCKWORTH, U.S. SENATOR FOR ILLINOIS (Mar. 29, 2018), https://www.duckworth.senate.gov/news/press-releases/duckworth-and-senate-democrats-vow-to-defeat-house-gop-led-effort-to-curtail-civil-rights-of-americans-with-disabilities [https://perma.cc/ZT9P-4KWG]; DISABILITY RTS. EDUC. & DEF. FUND, *supra* note 116.

118. DISABILITY RTS. EDUC. & DEF. FUND, *supra* note 116.

prior to filing a cause of action in Arizona state court, a plaintiff must "provide written notice with sufficient detail to allow the private entity to identify and cure the violation or comply with the law."[119] The burden then shifts to the defendant business, who must "cure the violation or comply with the law within thirty days after receiving the notice."[120] If the improvement requires a permit or other governmental approval, then the defendant, 30 days after receiving notice, must provide the aggrieved party "with a corrective action plan and submit[] the completed application for the building permit or other similar form of government approval to the appropriate governmental entity for a determination."[121] The plaintiff may file a civil lawsuit only after sixty days pass upon receiving the corrective action plan.[122] Additionally, the time between the defendant submitting the permit application and its approval is tolled and not included in the sixty days.[123]

The AzDA's notice and cure requirement is reasonable for a number of reasons. First, it significantly reduces the grace period—from sixty days to thirty days—allotted to defendant businesses to address the issue.[124] Under H.R. 620 & 77, defendants were given sixty days just to *provide a plan* on how they would cure the violation, and then given another sixty days to implement the plan.[125] However, under the AzDA, defendants must actually fix the constructional barrier within thirty days, lest they seek litigation.[126] The AzDA provides more incentive and urgency to defendants to take action and fix the problem. And thirty days is more than enough time to fix many different ADA violations, such as replacing mirrors that are the incorrect length, or clearing doorways and pathways that are blocked by storage supplies or other moveable obstacles. On the other hand, thirty days is not a significant amount of time for the plaintiff to await a cure for the construction violations. Again, this is only the maximum amount of time allotted to defendant businesses; many violations could be cured in a shorter amount of time, assuring that the plaintiff would have access to the particular public accommodation in less than a month's time.

119. ARIZ. REV. STAT. ANN. § 41-1492.08(E) (2017).
120. *Id.*
121. *Id.* § 41-1492.08(F).
122. *Id.*
123. *Id.*
124. *Id.*
125. ADA Education and Reform Act of 2017, H.R. 620, 115th Cong. (2018); ADA Compliance for Customer Entry to Stores and Services Act, H.R. 77, 117th Cong. (2021).
126. § 41-1492.08(E).

Second, when it comes to more significant modifications, such as those requiring building permits, the AzDA's notice and cure requirement alleviates the doubts raised by the "substantial progress" requirements in H.R. 620 & 77. Under the AzDA, defendant public accommodations cannot rely on empty promises that they are working towards remedying the construction barrier, forever kicking the can down the road by making only minimal improvements to maintain the pretense of compliance with the law. Instead, the defendants must provide a corrective action plan detailing the improvements they seek to make within thirty days of the initial notice, including copies of any applications for building permits submitted by the defendants. A detailed corrective action plan gives the plaintiff a full picture of how and when the violation will be remedied. Moreover, by requiring the defendant to provide proof of necessary permit applications, it forces the defendant to invest in the project because permits cost money, thus giving the plaintiff some insurance that the defendant is up to the task since the defendant is now financially involved. Lastly, even if the defendant fails to provide a corrective action plan, apply for the necessary permits, or remedy the violation, the plaintiff may file their complaint a mere sixty days after the initial notice was served—half the amount of time proposed in H.R. 620 & 77. Sixty days is a good balance for both parties: it forces defendants to act with purpose to take concrete actions to fix the violation in order to avoid litigation within a limited time frame, while providing the plaintiff with assurances that the violation will be cured; and if not, litigation will always be available.

It is for these reasons that Congress should amend the ADA to include a notice and cure requirement incorporating the AzDA framework.

B. Increasing the Standing Burden

In order for an ADA plaintiff to proceed litigating their claim in federal court, he or she must establish Article III standing, an "irreducible constitutional minimum" requirement.[127]

Article III standing restricts the power of federal courts to hear and decide only "cases" and "controversies" properly brought before them.[128] When it comes to the ADA and other civil rights cases, the

127. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 225 (2003).
128. U.S. CONST. art. III.

Supreme Court instructed the lower courts to take a "broad view" of standing.[129] Still, to meet this burden, the ADA plaintiff must demonstrate that they "ha[ve] suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision."[130] The "injury must affect the plaintiff in a personal and individual way."[131] Moreover, standing must persist throughout the life of the litigation, "supported at each stage of litigation in the same manner as any other essential element of the case."[132]

However, to establish standing in relation to claims for injunctive relief, an ADA plaintiff must demonstrate a real and immediate threat of repeated injury in the future.[133] Indeed, as the Court noted in *City of Los Angeles v. Lyons*,[134] "[p]ast 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."[135] Thus, an ADA plaintiff has the additional burden of demonstrating that there is "a sufficient likelihood that he will again be wronged in a similar way."[136] Put differently, the plaintiff must prove a "real or immediate threat that the [public accommodation] will again subject [them] to discrimination."[137]

This additional burden is satisfied one of two ways. One route requires the plaintiff to demonstrate an intention to return to the noncompliant public accommodation where they will likely suffer a repeated injury.[138] For instance, in *Fortyune v. American Multi-Cinema, Inc.*,[139] the quadriplegic plaintiff filed an ADA claim against the defendant movie theater chain because the theater refused to provide disability seating for him and his family for sold-out movie screenings.[140] Specifically, the theater had a written policy that failed to ensure that

129. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1039 (9th Cir. 2008).

130. Hollingsworth v. Perry, 570 U.S. 693, 704 (2013).

131. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992).

132. Chapman v. Pier 1 Imps. (U.S.) Inc., 631 F.3d 939, 946 (9th Cir. 2011) (noting that standing must exist at each stage of the litigation); Cent. Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002).

133. *Chapman*, 631 F.3d at 946.

134. 461 U.S. 95 (1983).

135. *Id.* at 95–96.

136. *Id.* at 111.

137. Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1020 (9th Cir. 2002).

138. *See Chapman*, 631 F.3d at 948 (noting the First and Second Circuits also find standing upon a showing of a likelihood to return).

139. 364 F.3d 1075 (9th Cir. 2004).

140. *Id.* at 1078–79.

disabled patrons would be able to sit with their companions in the designated handicap seats for sold out shows.[141] Despite no other repeated instances from the initial violation to the time the plaintiff filed his complaint, the court held that the plaintiff had standing because he alleged that he attended the defendant movie theater three to four times a week, and since the theater made no effort to change the policy, the injury was likely to recur.[142]

Alternatively, for an ADA plaintiff to satisfy standing for injunctive relief, they must demonstrate that they are deterred from visiting a noncompliant public accommodation because they previously encountered a barrier there.[143] To illustrate, in *Doran v. 7-Eleven, Inc.*,[144] the paraplegic plaintiff sued the defendant convenience store, claiming that he was deterred from returning to the store after experiencing nine different ADA violations.[145] Notably, the plaintiff lived 550 miles from this particular store,[146] and even returned to the store once after filing his complaint alleging his deterrence.[147] Nonetheless, the court found that he had standing because he alleged that he was sufficiently deterred from returning since he visited the store between ten to twenty times before, planned to visit the store at least once a year during his annual Disneyland trip, and because the store was located next to his favorite fast food restaurant.[148]

One of the more important holdings of *Doran*, however, is that when an ADA plaintiff has standing to sue in relation to at least one architectural barrier, the plaintiff has standing to "challenge all barriers in that public accommodation that are related to his or her specific disability."[149] Indeed, the plaintiff "need not have personally encountered all the barriers that impede his access to the Store in order to seek an injunction to remove those barriers."[150] This is the case regardless

141. *Id.* at 1081.

142. *Id.*; *Id.* at 1081–82 ("Given [the written policy], and the frequency with which Fortyune continues to attend the Theater, the possibility of his injury recurring cannot be said to be so remote as to preclude standing. Rather, AMC's ongoing policy coupled with Fortyune's past injury establishes a 'real and immediate threat' of his injury occurring again.").

143. *Chapman*, 631 F.3d at 939, 950 ("[A] plaintiff who is deterred from patronizing a store suffers the ongoing 'actual injury' of lack of access to the store.").

144. 524 F.3d 1034 (9th Cir. 2008).

145. *Id.* at 1038.

146. Surely, there must have been a closer 7-Eleven.

147. *Doran*, 524 F.3d at 1040.

148. *Id.*

149. *Id.* at 1047.

150. Chapman v. Pier 1 Imps. (U.S.) Inc., 631 F.3d 939, 951 (9th Cir. 2011).

of whether the plaintiff argues a likelihood of return or deterrence for standing.[151]

Conversely, an ADA plaintiff does not have standing when he is indifferent or lacks a genuine intent to return to the public accommodation,[152] or if the physical barriers do not pose a real or immediate threat to him and his particular disability.[153]

In order to curb the flood of ADA litigation storming the federal courts in the Ninth Circuit, the standing burden must be increased for plaintiffs. To do this, federal courts may consider a number of different factors to determine if the plaintiff has standing. These factors include: the distance from the plaintiff's home or work and the defendant public accommodation; the frequency with which the plaintiff attends the defendant public accommodation; the types of goods or services sold at the defendant public accommodation; the reason for the plaintiff's visit; and the respective ADA litigation histories of the plaintiff and defendant.

Each of these factors will inform the others and may be used interchangeably whether analyzing claims of a likelihood to return or deterrence. Yet, none of these factors should be dispositive, rather all should be considered under the totality of circumstances.

At first blush, distance would seem to be the most relevant and weighty factor. For instance, when a plaintiff travels an extended distance from their home to a public accommodation, the court should be on notice that standing may be questionable. Clear red flags will be large distances, like fifty to a hundred or more miles. But in some cases, it may be more subtle. To illustrate, in *Rocca v. Den 109 LP*,[154] the plaintiff, a resident of Lancaster on their way to Redondo Beach, made a pit stop at a Denny's in Lynwood where he experienced an ADA violation.[155] Rather than taking the "obvious and direct" route to the beach, the plaintiff took a circuitous path, adding twenty miles in the opposite direction from the beach, in order to visit the Denny's.[156]

151. *Id.* at 951 n.7 ("Though *Doran* involved the deterrent effect doctrine, the *Doran* court did not limit the applicability of this rule to cases where standing is predicated upon deterrence as opposed to imminently threatened injury.").

152. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").

153. *Chapman*, 631 F.3d at 953.

154. No. 14-cv-00538, 2015 WL 4935499 (C.D. Cal. Aug. 19, 2015), *aff'd in part, rev'd in part and remanded*, 684 F. App'x 667 (9th Cir. 2017).

155. *Id.* at *3.

156. *Id.*

The court found that the "purpose in visiting the Denny's in the instant case was to identify potential ADA violations, not actually take a rest stop on the way to the beach," and concluded that the plaintiff lacked standing for several claims.[157]

Of course, there will be instances when large distances are justified for other reasons, such as a plaintiff regularly traveling a far distance to visit or care for a family member in another city. This is why no one factor is dispositive. Nonetheless, distance will offer important insight into the standing analysis.

Frequency is another strong factor. The amount a plaintiff previously visited the specific public accommodation informs both their intent to return and the likelihood of deterrence from returning. Like the plaintiffs in *Fortyune* and *Doran*, a complaint has a stronger standing argument when the plaintiff alleges a previous habit or routine of engaging with the public accommodation. On the other hand, if the complaint alleges that the ADA violation occurred on a mere pit stop, like in *Rocca*, the standing argument becomes weaker because the likelihood of the injury recurring is more remote.

The types of goods or services provided by the public accommodation, and the reason for the plaintiff's visit to the public accommodation, are also informative factors. If the goods or services are readily available at other reasonable public accommodations that follow ADA guidelines, then a court must inquire further as to the reasons why the plaintiff found themselves at the violating public accommodation. For example, a hundred-mile drive to a violating convenience store to purchase a bag of chips that was readily available at a store much closer to the plaintiff's home or work raises questions as to the likelihood of the injury recurring for standing purposes. On the other hand, a local convenience store within a reasonable distance of the plaintiff's home or work is much more likely to face valid ADA claims if their store is out of compliance. Similarly, a store that specializes in particular goods or services faces a greater need to be ADA complaint because a plaintiff has fewer options to obtain the particular good or service, and thus has a higher likelihood of facing injury.

Finally, the respective litigation histories of both the plaintiff and defendant will be revealing for standing analysis. If the plaintiff has an extensive history of filing ADA claims, similar to the criteria identifying a high-frequency litigant for Unruh Act claims, then a court

157. *Id.*

should be wary of the plaintiff's intentions when filing the current ADA claim, especially when supplemented by an Unruh Act violation. But, if the public accommodation has a history of defending various ADA suits, then a court may be more likely to find that an injury is likely to recur, assuming that the plaintiff's complaint sufficiently alleges a claim.

The broader holding in *Doran*—that a plaintiff has standing to challenge all ADA violations so long as they experience one at the public accommodation, even if they were not injured by the specific violations—presents an interesting challenge.[158] On one hand, collecting all violations into one complaint may streamline litigation, forcing defendants to address the problem all at once and avoiding future piecemeal litigation regarding each individual issue. On the other hand, it is difficult to see how the current Supreme Court would find standing in cases where the plaintiff was not directly injured by the violation.

VI. CONCLUSION

Something needs to be done to curb the flood of ADA litigation inundating the federal courts. Hopefully, the proposals presented in this Note offer a step towards that direction.

158. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1047 (9th Cir. 2008).