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# Testers Standing up for the Title III of the ADA

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## NOTES

### TESTERS STANDING UP FOR TITLE III OF THE ADA

One of the things Americans cherish most is autonomy. We want choices and the ability to make them on our own, without interference from anything or anyone. Each and every day we make choices; where to eat, buy gas, or shop for groceries, what movies theaters or playhouses to visit—the list is endless. This ability to choose is an integral aspect of being an American, yet millions of Americans lack this freedom due to disability.

Imagine being paralyzed from the waist down and having to rely on a wheelchair for mobility. You stop at a restaurant, only to find out that there is no ramp to get into the establishment, so you politely ask those you are with to lift you up as numerous other patrons watch and point. Then, the hostess escorts you to a table. You struggle to maneuver your wheelchair through the narrow aisles only to realize that the tables are too low for your wheelchair to fit. The manager apologizes, inadvertently making a scene as you decide to just leave. You stop at the restroom before leaving, but it is not handicapped-accessible. Then when you try to wash your hands the sink is too high up, and as you strain to lift yourself out of the wheelchair you slip causing injury to your arms. You leave the restaurant embarrassed and frustrated, knowing that you can never go back to that restaurant again.

As a result, the ability to choose has been taken away—you no longer have the choice to visit a restaurant frequented by your friends and family. This scenario is unfortunately the reality that some people are forced to face as a result of public accommodations failing to

comply with Title III of the Americans with Disabilities Act (“ADA”).<sup>1</sup>

Congress passed the ADA in 1990 to fix a serious problem—namely, the seclusion of people with disabilities resulting in explicit and implicit discrimination.<sup>2</sup> It was called the “20<sup>th</sup> Century Emancipation Proclamation for all persons with disabilities.”<sup>3</sup> Title III of the ADA contained broad language covering numerous public accommodations; both new construction and existing facilities were required by the statute to remove barriers to access.<sup>4</sup> The disabled population hoped that, as a result of the ADA, their lives would no longer be shaped by limited access and the inability to choose.<sup>5</sup> However, reality—a lack of compliance with the ADA and severe underenforcement of the statute—soon destroyed this hope.<sup>6</sup>

Eighteen years after the passage of the ADA, numerous facilities are still not compliant,<sup>7</sup> leaving the disabled population in a second-class citizenship limbo. Title III of the ADA allows both the U.S. Attorney General<sup>8</sup> and private individuals to sue,<sup>9</sup> but the rate at which both the Attorney General and individuals are bringing suit seeking compliance is extremely low.<sup>10</sup> The Department of Justice’s Disability Section, tasked with ADA enforcement, is understaffed, and many individuals are dissuaded from bringing suits because of the statute’s complexity.<sup>11</sup>

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<sup>1</sup> See, e.g., *Bruni v. FMCO, L.L.C.*, No. 2:06-cv-293-FtM-29SPC, 2007 U.S. Dist. LEXIS 18641, at \*2–3 (M.D. Fla. Mar. 16, 2007) (discussing how a plaintiff was denied access due to barriers and dangerous conditions in violation of Title III).

<sup>2</sup> See H.R. REP. NO. 101-485, pt. 2, at 28–29 (1990).

<sup>3</sup> D. Russell Hymas & Brett R. Parkinson, Comment, *Architectural Barriers Under the ADA: An Answer to the Judiciary’s Struggle with Technical Non-Compliance*, 39 CAL. W. L. REV. 349, 350 (2003) (quoting 136 CONG. REC. 17,369 (1990) (statement of Sen. Tom Harkin)) (discussing how facilities have failed to comply with the ADA by not removing physical barriers that impede access).

<sup>4</sup> See 42 U.S.C. § 12188(a) (2000) (stating that individuals with disabilities should have the same access to public accommodations as those without disabilities).

<sup>5</sup> See Elizabeth Keadle Markey, Note, *The ADA’s Last Stand?: Standing and the Americans with Disabilities Act*, 71 FORDHAM L. REV. 185 (2002) (arguing for a more lenient standard for standing under the ADA).

<sup>6</sup> Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 3 (2006) (discussing the need for private enforcement in Title III of the ADA and the fact that the limitations courts are placing on ADA plaintiffs are causing abusive litigation).

<sup>7</sup> *Id.*

<sup>8</sup> 42 U.S.C. § 12188(b).

<sup>9</sup> *Id.* § 12188(a).

<sup>10</sup> See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 381 (2000) (discussing how Title III has been unsuccessful in remedying the lack of accommodation for people with disabilities in public places).

<sup>11</sup> See, e.g., *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 763 (D. Or. 1997) (“Plaintiffs also have the incentive and resources to prosecute an action such as this, which often is not the case with an individual suite guest, especially one from out-of-town who may have no

Clearly the enforcement mechanism for Title III is inadequate, resulting in continued discrimination against people with disabilities. The answer to the problem of underenforcement may lie in tester standing. Testers are qualified individuals with disabilities who visit places of public accommodation to determine their compliance with Title III.<sup>12</sup> Testers have historically been used to uncover housing and employment discrimination,<sup>13</sup> but recently these individuals are taking on roles as private attorneys general in an attempt to increase compliance with Title III. These testers go out to places of public accommodation in an effort to “test” a facility’s accessibility against the statutory mandates of the ADA. If a facility is not accessible, then the testers file lawsuits for injunctive relief, forcing the businesses to comply with the ADA. While these suits seem like a simple and effective solution, federal courts have been extremely skeptical of testers as plaintiffs and have dismissed many of the testers’ cases for lack of standing.<sup>14</sup>

This Note will explore the problems that arise as a result of the decisions that deny testers standing to sue under the ADA. Despite the skepticism about tester standing, courts should allow testers to bring Title III lawsuits, as it is the only way to finally bring the change intended under the ADA. Part I will discuss the intricacies of the standing doctrine. Part II will highlight the history of tester standing in cases brought under other civil rights statutes, specifically the Fair Housing Act and Title VII of the Civil Rights Act of 1964. Part III will detail the function of an ADA tester and chronicle the case law addressing tester standing under the ADA. Finally, Part IV will present the arguments in support of tester standing.

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plans to ever return to Portland.”)

<sup>12</sup> See *Lucibello v. McGinley*, No. 2:07-cv-217-FtM-34SPC, 2008 U.S. Dist. LEXIS 10433, at \*2–3 (M.D. Fla. Feb. 12, 2008).

<sup>13</sup> See EEOC NOTICE No. 915.002, ENFORCEMENT GUIDANCE: WHETHER “TESTERS” CAN FILE CHARGES AND LITIGATE CLAIMS OF EMPLOYMENT DISCRIMINATION (1996), available at <http://www.eeoc.gov/policy/docs/testers.html> [hereinafter EEOC NOTICE].

<sup>14</sup> See, e.g., *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001); *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1208 (S.D. Cal. 2007); *Cross v. Boston Mkt. Corp.*, No. 07cv486J (LSP), 2007 U.S. Dist. LEXIS 39407 (S.D. Cal. May 30, 2007); *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115 (S.D. Cal. 2006); *Moss v. Comfort Inn Woodland Hills*, No. CV04-7939FMC (Mcx), 2006 U.S. Dist. LEXIS 81429 (C.D. Cal. 2006), *aff’d*, 275 F. App’x 717 (9th Cir. 2008); *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924 (C.D. Cal. 2005), *aff’d sub nom.* *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); *Molski v. Kahn Winery*, 381 F. Supp. 2d 1209 (C.D. Cal. 2005), *aff’d sub nom.* *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004); *Brother v. Tiger Partner, LLC*, 331 F. Supp.2d 1368 (M.D. Fla. 2004); *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000).

## I. THE ABYSS THAT IS THE STANDING DOCTRINE

The standing doctrine satisfies Article III of the Constitution's "case or controversy" requirement<sup>15</sup> as a gloss that the Supreme Court has put on Article III,<sup>16</sup> making it a requirement for any party that seeks to invoke federal jurisdiction.<sup>17</sup> A plaintiff must show he or she has "'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."<sup>18</sup> Standing is a limitation on judicial power, and, therefore, a court can address it at any stage without motion by either party.<sup>19</sup> While this seems like a straightforward inquiry, that is the farthest thing from the truth. Scholars have consistently noted "'the law of standing has for some time been the one of the most criticized aspects of constitutional law."<sup>20</sup> Authors have gone as far as to call the standing doctrine "'incoheren[t],"<sup>21</sup> and "inappropriate."<sup>22</sup> This criticism is in response to the federal courts continually raising and lowering the "standing hurdle," demonstrating judicial manipulation of the doctrine.<sup>23</sup>

The federal courts' inconsistent analyses make it difficult to determine what is required for a plaintiff to have standing to sue. However, standing requirements have generally been divided into constitutional and judicially created prudential categories.<sup>24</sup>

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<sup>15</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* at 561.

<sup>18</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

<sup>19</sup> *Markey*, *supra* note 5, at 191.

<sup>20</sup> Eugene Kontorovich, *What Standing Is Good For*, 93 VA. L. REV. 1663, 1664 n.1 (2007) (quoting LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 390 (3d ed. 2000)) (detailing some of the criticisms of the standing doctrine and applying an economic analysis to standing to demonstrate how the standing doctrine serves the purpose of efficiency).

<sup>21</sup> *Id.* (alteration in original) (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60 (3d ed. 2006)).

<sup>22</sup> *Abram Chayes, Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 8 (1982).

<sup>23</sup> Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 637-44 (1985) (discussing the erratic treatment of the standing doctrine, specifically focusing on the Supreme Court's decision in *Allen v. Wright*, 468 U.S. 737 (1984), which limited standing based on a separation of powers concern).

<sup>24</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that although some of the elements of standing "express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

### A. Constitutional Requirements for Standing

The Supreme Court articulated that Article III of the Constitution contains three requirements for standing.<sup>25</sup> A plaintiff must first establish a case or controversy by alleging an “injury in fact” that is “concrete and particularized” and “actual or imminent, not conjectural.”<sup>26</sup> The particularized requirement means that the injury must affect the plaintiff in an individual and personal way.<sup>27</sup> Second, a causal connection must be present between the alleged injury and the conduct of the defendant. Specifically, “the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”<sup>28</sup> Finally, it must be likely, rather than speculative, that the “injury will be ‘redressed by a favorable decision.’”<sup>29</sup> These three requirements are the constitutional minimum, not merely pleading requirements.<sup>30</sup> The Supreme Court has stated that the requirements are “an indispensable part of the plaintiff’s case.”<sup>31</sup> Therefore, the plaintiff bears the same burden of proof for the standing requirements as is necessary for all other evidence at each stage of the litigation.<sup>32</sup>

While these three requirements seem logical and easy to analyze, one can question whether this straightforward formula tries to simplify a very complicated and fact-specific analysis too much, thereby disregarding the intricacies of the case or controversy analysis.<sup>33</sup> This three-part inquiry overlaps with other concerns of separation of powers, enforcement, and judicial accountability.<sup>34</sup> Professor Gene Nichol argues that the result draws “[l]ines . . . that can’t be sustained, or even understood.”<sup>35</sup>

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<sup>25</sup> See *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>26</sup> *Lujan*, 504 U.S. at 560 (internal quotation marks omitted).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) (alterations in original)).

<sup>29</sup> *Id.* at 561 (quoting *Simon*, 426 U.S. at 38).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 302–04 (2002) (arguing the injury standard has resulted in incomprehensible and irreconcilable federal court decisions on standing).

<sup>34</sup> *Id.* at 304.

<sup>35</sup> *Id.*

### B. Prudential Requirements for Standing

In addition to the constitutional requirements for standing, courts have created further conditions for standing.<sup>36</sup> These requirements make the standing analysis even more incomprehensible and extremely malleable. Three prudential requirements arise frequently. First, a plaintiff cannot allege a "generalized grievance," because courts refuse to hear a case where a plaintiff is affected in the same way as all other citizens.<sup>37</sup> Additionally, a plaintiff cannot assert the rights of a third party.<sup>38</sup> Finally, a plaintiff's claim must "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"<sup>39</sup>

The constitutional and judicially created standing requirements create a maze that plaintiffs must navigate to avoid dismissal. As this Note will later highlight, tester standing under the ADA involves an additional layer of fog.

### C. Special Issue: Requirement for Standing in Cases Seeking Injunctive Relief

Beyond the constitutional and prudential standing requirements, a plaintiff seeking injunctive relief in federal court must satisfy the prerequisite the Supreme Court laid out in *City of Los Angeles v. Lyons*,<sup>40</sup> a case where the plaintiff was placed in a chokehold after a traffic stop. The plaintiff sought an injunction that would prevent the police from utilizing chokeholds, but the Court denied his request for equitable relief, articulating a specific requirement for standing in injunctive relief cases, which the plaintiff had failed to meet.<sup>41</sup> The Court in *Lyons* established the rule that "[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."<sup>42</sup> Because injunctive relief concerns future conduct, in order to fulfill the present case or controversy requirement, a plaintiff must demonstrate that "he 'has sustained or is

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<sup>36</sup> See *Lujan*, 504 U.S. at 560.

<sup>37</sup> *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

<sup>38</sup> *Id.*

<sup>39</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

<sup>40</sup> 461 U.S. 95 (1983).

<sup>41</sup> *Id.* at 110-11.

<sup>42</sup> *Id.* at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)) (alterations in original).

immediately in danger of sustaining some direct injury.”<sup>43</sup> Further, the “injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”<sup>44</sup> The Court rationalized that past wrongs do not satisfy the requirement for “real and immediate threat of injury.”<sup>45</sup> While plaintiffs may claim that they fear future injury, the Court’s requirement focused on the reality of the threat, not the plaintiffs’ subjective concern.<sup>46</sup> The interplay between Title III cases and the standard articulated in *Lyons* is particularly important and will be examined later in this Note.

## II. TESTER STANDING IN OTHER CIVIL RIGHTS CASES

The use of testers has become common practice in the enforcement of other civil rights statutes, such as the Fair Housing Act (“FHA”) and Title VII of the Civil Rights Act of 1964.<sup>47</sup> Scholars label testing as a useful practice to uncover cases of discrimination.<sup>48</sup> Numerous successful testing programs exist to aid in the enforcement of the FHA.<sup>49</sup> For ten years the Department of Justice has run a successful fair housing testing program.<sup>50</sup> Federal and state governmental agencies use testers to detect employment discrimination under Title VII, such as the tester program initiated by the Office of Federal Contract Compliance and Programs.<sup>51</sup>

The Supreme Court addressed standing for testers in what is likely the most significant case in this area, *Havens Realty Corp. v. Coleman*.<sup>52</sup> In *Havens Realty* housing testers and the organization that employed them brought suit alleging racial steering practices (i.e., directing possible home buyers interested in similar properties to

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<sup>43</sup> *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)).

<sup>44</sup> *Id.* (quoting *Golden v. Zwickler*, 394 U.S. 103, 109–10 (1969); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89–91 (1947)).

<sup>45</sup> *Id.* at 103.

<sup>46</sup> *Id.* at 107.

<sup>47</sup> See EEOC NOTICE, *supra* note 13 (discussing the common use of testers in identifying discriminatory practices and these testers’ ability to bring suit under civil rights laws if they are subjected to discrimination during the course of their work).

<sup>48</sup> *Id.*

<sup>49</sup> Stephen E. Haydon, Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, 44 UCLA L. REV. 1207, 1235–40 (1997) (reviewing the arguments for tester standing in housing discrimination cases).

<sup>50</sup> Samuel R. Bagenstos, *Mend It, Don’t End It* 14 (Wash. Univ. in St. Louis Sch. of Law Faculty Working Paper Series, Working Paper No. 07-04-05, 2007), available at <http://ssrn.com/abstract=981927>; see also *Department of Justice Oversight: Hearing Before the S. Committee on the Judiciary*, 109th Cong. 309–10 (2006) (prepared statement of Alberto R. Gonzales, Attorney General, Department of Justice) (discussing his civil rights initiative, a housing discrimination testing program called Operation Home Sweet Home).

<sup>51</sup> EEOC NOTICE, *supra* note 13 (citing EMPLOYMENT DISCRIMINATION REPORT (BNA), Vol. 6, No. 6, at 142–43 (Feb. 7, 1996)).

<sup>52</sup> 455 U.S. 363 (1982).



different areas based on their race) in violation of the FHA.<sup>53</sup> A unanimous Supreme Court held that the testers and the organization had standing to sue for monetary damages and injunctive relief under the FHA, finding “[the fact t]hat the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury . . . .”<sup>54</sup> The Court employed a broad test for standing, recognizing that Congress intended standing under the FHA to “extend to the full limits of Art. III.”<sup>55</sup>

The civil rights movement has a long history of using testers to uncover discrimination in the employment context as well.<sup>56</sup> Tester lawsuits under Title VII have received endorsement from the U.S. Equal Employment Opportunity Commission,<sup>57</sup> which issued a notice stating: “[T]esters (persons who apply for employment for the purpose of testing for discriminatory hiring practices, but do not intend to accept such employment), and the organizations that send testers to respondents, may challenge any discrimination to which they were subjected while conducting the tests.”<sup>58</sup> Employment discrimination testers are viewed as a useful tool to uncover subtle employment discrimination, especially in low-skill and entry-level positions.<sup>59</sup>

However, case law is mixed in connection with tester standing under Title VII because there seems to be more contention with employment testers.<sup>60</sup> Opponents of employer testing usually argue that testers have not suffered an injury because they voluntarily subjected themselves to the harm.<sup>61</sup> In *Fair Employment Council of*

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<sup>53</sup> *Id.* at 368–70.

<sup>54</sup> *Id.* at 374; see also Haydon, *supra* note 49, at 1212.

<sup>55</sup> *Havens Realty*, 455 U.S. at 372 (internal quotation marks omitted).

<sup>56</sup> EEOC NOTICE, *supra* note 13.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Daniel M. Tardiff, Comment, *Knocking on the Courtroom Door: Finally an Answer From Within for Employment Testers*, 32 LOY. U. CHI. L.J. 909, 927 (2001) (citing Michael J. Yelnosky, *Filling an Enforcement Void: Using Testers to Uncover and Remedy Discrimination in Hiring for Lower-Skilled, Entry-Level Jobs*, 26 U. MICH. J.L. REFORM 403, 410, 411, 413 (1993)).

<sup>60</sup> See, e.g., *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994) (denying standing to testers who were no longer employed by the tester organization, but granting standing to the organization); *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (denying tester standing); *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978) (stating that whether an application is bona fide is relevant in determining standing); *Parr v. Woodmen of the World Life Ins. Soc’y*, 657 F. Supp. 1022 (M.D. Ga. 1987) (denying standing to a tester plaintiff challenging employment discrimination).

<sup>61</sup> Michelle Landever, Note, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. § 1981*, 41 CLEV. ST. L. REV. 381, 393 (1993) (citing Roderic V. O. Boggs et al., *Use of Testing in Civil Rights Enforcement*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT

*Greater Washington, Inc. v. BMC Marketing Corp.*,<sup>62</sup> a district court established a clear precedent against Title VII tester standing, ruling that the testers were prevented from seeking injunctive relief because they cannot argue the possibility of future injury.<sup>63</sup> The *BMC* court decided that since the plaintiffs were no longer employed as testers and they were known to the defendant company as testers, there was no possibility that they would ever again apply for employment with the defendant.<sup>64</sup> As another court commented: “[Testers] are investigators; they suffer no harm other than that which they invite in order to make a case against the persons investigated . . . . The idea that their legal rights have been invaded seems an arch-formalism.”<sup>65</sup>

Despite the negative precedent, other courts have found that Title VII testers should be afforded standing. Two courts suggested that the primary motives of the plaintiffs should not be considered in the standing analysis.<sup>66</sup> The argument is that Title VII does not require a person to have an actual desire to work for the employer in order to bring a claim under the statute.<sup>67</sup> Courts also support the idea that individuals should function as “private attorneys general,” and, therefore, that Title VII allows such individuals to enforce the statute through civil actions.<sup>68</sup> Courts also focus on the similarities between Title VII and the FHA, noting that the testers in *Havens Realty* did not want the housing, just like the employment testers did not wish to receive a job out of their testing efforts.<sup>69</sup>

Those who believe Title VII testers deserve standing argue that the language in the statute, which says “persons aggrieved,” eliminates the need for a plaintiff to fulfill judicially created requirements for standing.<sup>70</sup> This is based on the rationale in *Trafficante v.*

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OF DISCRIMINATION IN AMERICA 345 (Michael Fix & Raymond Struyk eds., 1993)).

<sup>62</sup> 28 F.3d 1268 (D.C. Cir. 1994).

<sup>63</sup> *Id.* at 1274.

<sup>64</sup> *Id.* at 1273–74.

<sup>65</sup> *Bellwood*, 895 F.2d at 1526 (denying tester standing because the congressional grant of standing was more expansive under the FHA).

<sup>66</sup> *Kyles v. J.K. Guardian Servs., Inc.*, 222 F.3d 289 (7th Cir. 2000); *Molovinsky v. Fair Employment Council of Greater Wash., Inc.*, 683 A.2d 142 (D.C. 1996).

<sup>67</sup> Anthony F. Spalvieri, Note, *Employment Testers: Obstacles Standing in the Way of Standing Under § 1981 and Title VII*, 52 CASE W. RES. L. REV. 753, 784 (2002) (discussing arguments for allowing tester standing under Title VII).

<sup>68</sup> *See, e.g., Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); *Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 735 (7th Cir. 2002) (“[A] civil rights plaintiff may act as a ‘private attorney general vindicating a policy that Congress considered of the highest importance.’” (quoting *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 872 (7th Cir. 1995))); *Kyles*, 222 F.3d at 300.

<sup>69</sup> *Kyles*, 222 F.3d at 297–99.

<sup>70</sup> Spalvieri, *supra* note 67, at 767 (citing 42 U.S.C. § 2000e-5(b), (c), (f)(1) (2000)).

*Metropolitan Life Insurance Co.*,<sup>71</sup> in which the Supreme Court held that the FHA's language of "person claiming to be aggrieved" demonstrated "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."<sup>72</sup> Therefore, a Title VII tester need only satisfy the standing requirements contained in Article III.<sup>73</sup> When courts, such as the court in *BMC*, focus on the motivation of a plaintiff for bringing a lawsuit, they are arguably adding an additional hurdle a plaintiff must overcome to secure standing in federal court. Nothing in the Supreme Court's standing requirements focuses on a plaintiff's motivation for filing a lawsuit. In fact, the Supreme Court's analysis focuses on injury in fact, not subjective intentions.

Overall attitudes are favorable towards FHA testers since *Havens Realty*. While Title VII testers have met some skepticism, the courts have continually recognized the importance of testers and their ability to uncover discrete acts of discrimination that the remedial statutes were enacted to combat. The important point is that Title VII testers have at least had the opportunity to have their cases heard, an opportunity consistently denied to ADA testers.

### III. ADA TESTERS

#### A. What is a Title III ADA Tester?

Title III of the ADA prohibits discrimination against disabled individuals in numerous places of public accommodation. The purpose of the ADA is to provide the disabled population with access to public places in order to integrate a population that was once plagued with segregation and seclusion.<sup>74</sup> The key provision reads: "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."<sup>75</sup> Title III requires accessibility of statutorily covered facilities through the removal of

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<sup>71</sup> 409 U.S. 205 (1972).

<sup>72</sup> Spalvieri, *supra* note 67, at 767 (quoting *Trafficante*, 409 U.S. at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971))).

<sup>73</sup> *Id.* at 768.

<sup>74</sup> H.R. REP. NO. 101-485, pt. 2, at 28-29 (1990).

<sup>75</sup> 42 U.S.C. § 12182(a) (2000).

architectural barriers when doing so is “readily achievable.”<sup>76</sup> The Act defines discrimination to include:

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.<sup>77</sup>

Therefore, failure by a public accommodation to remove any architectural and/or communication barriers that are structural in nature is likely a violation of the statute.<sup>78</sup> Public accommodations are private entities whose operations fall into the non-exclusive categories listed in the statute.<sup>79</sup> Title III also covers “[a]ny person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.”<sup>80</sup>

In return for the broad coverage of facilities in Title III, the section included a limited set of remedies.<sup>81</sup> Compensatory damages are not available under Title III, leaving private parties with only injunctive relief and attorneys’ fees.<sup>82</sup> Another limit on remedies is that plaintiffs must be a “prevailing party” in order to recover attorneys’ fees.<sup>83</sup>

ADA testers seek to uncover facilities in violation of Title III. These individuals are part of the class of people protected by the ADA, many of them in wheelchairs, paralyzed, deaf, or blind.<sup>84</sup> A tester routinely visits places of public accommodation such as restaurants, movie theaters, or gas stations to check compliance with

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<sup>76</sup> *Id.* § 12182(b)(2)(A)(iv).

<sup>77</sup> *Id.* § 12182(b)(2)(A)(iii).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* § 12181(7).

<sup>80</sup> *Id.* § 12189.

<sup>81</sup> *See Colker, supra* note 10, at 387.

<sup>82</sup> 42 U.S.C. § 12188.

<sup>83</sup> *Id.* § 12205.

<sup>84</sup> *See, e.g.,* Access 4 All, Inc. v. Chi. Grande, Inc., No. 06-C-5250, 2007 U.S. Dist. LEXIS 35304, at \*4 (N.D. Ill. May 10, 2007) (plaintiff suffered from quadriplegia); D’Lil v. Best W. Encina Lodge & Suites, 415 F. Supp. 2d 1048, 1049 (C.D. Cal. 2006) (physically disabled plaintiff required wheelchair for mobility), *rev’d*, 538 F.3d 1031 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (Feb. 3, 2009) (No. 08-993); Molski v. Mandarin Touch Rest., 359 F. Supp. 2d 924, 926 (C.D. Cal. 2005) (physically disabled plaintiff relied on wheelchair), *aff’d sub nom.* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1369 (M.D. Fla. 2004) (plaintiff was deaf and paralyzed in one leg).

the ADA. One court provided a detailed explanation of the testing process:

As a “tester” he utilizes a routine practice when he visits places of public accommodation: “he engages all of the barriers to access, or at least all of those that he is able to access; and he tests all of those barriers to access to determine whether and the extent to which they are illegal barriers to access; he proceeds with legal action to enjoin such discrimination . . . .”<sup>85</sup>

The testers attempt to use the facilities in the same way as a person without a disability.<sup>86</sup> A tester will visit these establishments to ensure there are appropriate accommodations—such as ramps for wheelchairs, Braille on elevators and doors, and handicapped-accessible restrooms and hotel rooms—and to look for barriers to access that are likely illegal. Often testers return to the place to check its compliance after a complaint is filed.<sup>87</sup> Many testers perform these tests during the normal course of their life: they stop at a gas station to get gas and, while there, they attempt to use a restroom or get into the convenience store to buy a snack, or try to rent a hotel room for the night after a long trip.<sup>88</sup> Other testers travel to places both near to and far from their homes to test the facilities. In one case a tester traveled to numerous restaurants in one day and ended up filing suit against each one.<sup>89</sup> Numerous non-profit organizations also seek individuals with disabilities to participate in their testing programs. For example, Access Living encourages individuals with disabilities to talk to its testing coordinator if they are interested in becoming a tester.<sup>90</sup> Another group, Access Now, Inc., asks individuals with disabilities who are frustrated with access barriers to join class action

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<sup>85</sup> *Bruni v. FMCO, L.L.C.*, No. 2:06-cv-293-FtM-29SPC, 2007 U.S. Dist. LEXIS 18641, at \*2 (M.D. Fla. Mar. 16, 2007) (quoting Complaint, *Bruni*, No. 2:06-cv-293-FtM-29SPC) (allowing standing for a tester who found numerous ADA violations at defendant’s facility).

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., *Disability Advocates & Counseling Group, Inc. v. Betancourt*, No. 05-CIV-60740-COOKIE/BROWN, 2005 U.S. Dist. LEXIS 38939, at \*4 (S.D. Fla. June 7, 2005) (denying standing to plaintiff who returned to public accommodation to assess the facility’s compliance or noncompliance with the ADA).

<sup>88</sup> See *Disability Advocates & Counseling Group, Inc. v. 4SK, Inc.*, No. 6:04-cv-327-Orl-31JGG, 2005 U.S. Dist. LEXIS 44389, at \*4-5 (M.D. Fla. Apr. 6, 2005) (while out of town for a deposition, plaintiff, who used a wheelchair for mobility, was given a hotel room without wheelchair accessibility).

<sup>89</sup> *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 864-65 (C.D. Cal. 2004), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008).

<sup>90</sup> Access Living, [http://www.accessliving.org/Civil\\_Rights.htm](http://www.accessliving.org/Civil_Rights.htm) (last visited Jan. 10, 2008).

suits the organization has filed, even offering guidance to help such individuals become comfortable with the idea of being plaintiffs.<sup>91</sup>

ADA testers are different from testers used in other civil rights contexts, because they are patrons who are attempting to use the facilities and the services offered. While the primary intention of the tester is to review the establishments for compliance with the ADA, the tester is generally visiting the establishment as both a patron and a private attorney general for the ADA by checking on compliance with Title III of the ADA on behalf of themselves as well as other people with disabilities. It is important to note that, while ADA testers are investigating for all people with disabilities, they are traveling to these places and bringing these suits based on their own interests. The testers have sought to utilize the facilities and have been injured by the facilities' lack of compliance. This Note will address those who voluntarily define themselves as testers, as well as those who are fulfilling the same purpose but refuse to accept the label due to the negative connotation courts and the media have attached to the term.

### *B. Standing for Title III ADA Lawsuits*

Title III of the ADA presents an additional obstacle for testers seeking standing. Individuals can only seek injunctive relief under Title III,<sup>92</sup> and courts require supplemental facts to assert standing for injunctive relief because injunctions regulate future conduct. Therefore, a plaintiff must present the court with a case that threatens future injury.<sup>93</sup> The Supreme Court addressed this issue in two landmark cases. As noted above, *City of Los Angeles v. Lyons*<sup>94</sup> established the rule that “[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.”<sup>95</sup> The Court found that the plaintiff, who was placed in a chokehold by arresting officers that caused him to pass out, lacked standing to seek an injunction against the police practice—“[t]he emotional consequences of a prior act simply are not a sufficient basis for an

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<sup>91</sup> Access Now, Inc., Understanding the Word “Plaintiff”, <http://www.adaaccessnow.org/plaintiff.htm> (last visited Jan. 10, 2008).

<sup>92</sup> 42 U.S.C. § 12188(a)(1) (2000).

<sup>93</sup> Disability Advocates & Counseling Group, Inc. v. Betancourt, No. 05-CIV-60740-COOKIE/BROWN, 2005 U.S. Dist. LEXIS 38939, at \*3 (S.D. Fla. June 7, 2005) (citing *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001)) (denying standing *sua sponte* to plaintiff because he did not allege a chance of future injury necessary for injunctive relief).

<sup>94</sup> 461 U.S. 95 (1983).

<sup>95</sup> *Id.* at 102 (alterations in original) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)).

injunction absent a real and immediate threat of future injury by the defendant.”<sup>96</sup> The Court ruled that despite Lyons’ fear that the brutality could happen again, his allegation of future injury was speculative and did not warrant injunctive relief because he could not prove that the police would ever stop him again or that the officers would choke him.<sup>97</sup> The Court, assuming that people would conduct their activities in a lawful way, found the allegation that the plaintiff would again commit a crime to establish standing was absurd.<sup>98</sup> Essentially, the Court in *Lyons* was concerned that the future conduct would never happen again because the plaintiff’s claim was based on third-party conduct, and it refused to accept the plaintiff’s assertions concerning his own future conduct.<sup>99</sup>

*Lyons* was later endorsed by another Supreme Court case, *Lujan v. Defenders of Wildlife*.<sup>100</sup> In *Lujan* environmental groups claimed the potential for future harm existed because they would not be able to observe endangered species in foreign countries as a result of projects that an American agency was funding. The plaintiffs sought injunctive relief against the funding, and the plaintiffs’ members, who had previously visited the foreign countries, expressed the intent to return at an unspecified date. However, the Court denied standing, stating, “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.”<sup>101</sup> Despite denying standing, the Court in *Lujan* affirmed the idea that Congress can grant standing to a plaintiff pursuant to a statute,<sup>102</sup> which is important in the context of standing under the ADA.

As a result of these two Supreme Court cases, the Article III requirement of “actual or imminent” has become “actual *and* imminent.” This seemingly inconsistent standard has created a huge roadblock for Title III tester plaintiffs, because testers harmed by public accommodation violations are limited to injunctive relief. As a result of *Lyons* and *Lujan*, testers will lack standing if they do not subject themselves to the harm again or make plans to subject themselves to the harm again. While this seems odd, courts have repeatedly relied on the holdings in *Lyons* and *Lujan* as a basis for

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<sup>96</sup> *Id.* at 107 n.8.

<sup>97</sup> *Id.* at 108.

<sup>98</sup> *Id.* at 105–06.

<sup>99</sup> *Id.* at 105–113.

<sup>100</sup> 504 U.S. 555 (1992).

<sup>101</sup> *Id.* at 564.

<sup>102</sup> *Id.* at 578.

denying standing in Title III cases. One court even stated that “every court to have considered the standing requirements under Title III of the ADA has held that in order for a private litigant to prove standing, she must show a risk of future harm.”<sup>103</sup>

### C. Case Law Concerning ADA Testers

Testers attempting to assert standing under Title III of the ADA have met animosity in federal courts throughout the nation. The vast majority of courts that have dealt with the issue have denied standing to plaintiffs.<sup>104</sup> District courts have become extremely skeptical of tester lawsuits, calling them a “cottage industry” that is driven by attorneys’ fees<sup>105</sup> and referring to an ADA plaintiff as a “professional pawn in an ongoing scheme to bilk attorney’s fees.”<sup>106</sup> These appraisals are grounded in the fact that the ADA allows recovery of attorney’s fees and litigation costs for successful plaintiffs.<sup>107</sup>

Many courts denying standing have argued that the plaintiffs are barred from receiving injunctive relief, because, although the plaintiffs had admittedly been injured in the past, they could not prove the potential for harm in the future.<sup>108</sup> In *Bird v. Lewis & Clark College*,<sup>109</sup> the plaintiff was in a wheelchair and decided to participate in an overseas program offered by her college. While overseas, the plaintiff suffered numerous obstacles that prevented her from enjoying her experience. She could not get in and out of her dorm

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<sup>103</sup> *Blake v. Southcoast Health Sys., Inc.*, 145 F. Supp. 2d 126, 132–33 (D. Mass. 2001).

<sup>104</sup> See *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001); *Harris v. Stonecrest Care Auto Ctr.*, 472 F. Supp. 2d 1208 (S.D. Cal. 2007); *Cross v. Boston Mkt. Corp.*, No. 07cv486J (LSP), 2007 U.S. Dist. LEXIS 39407 (S.D. Cal. May 30, 2007); *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115 (S.D. Cal. 2006); *Moss v. Comfort Inn Woodland Hills*, No. CV 04-7939 FMC (Mx), 2006 U.S. Dist. LEXIS 81429 (C.D. Cal. Oct. 20, 2006), *aff’d*, 275 Fed. App’x 717 (9th Cir. 2008); *Molski v. Kahn Winery*, 381 F. Supp. 2d 1209 (C.D. Cal. 2005), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); *Molski v. Mandarin Touch Rest.*, 359 F. Supp. 2d 924 (C.D. Cal. 2005), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278 (M.D. Fla. 2004); *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004); *Moreno v. G & M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000); *Naiman v. N.Y. Univ.*, No. 95 Civ. 6469 (LMM), 1997 U.S. Dist. LEXIS 6616 (S.D.N.Y. May 12, 1997).

<sup>105</sup> Carri Becker, Note, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN’S L.J. 93, 97, 113–14 (2006) (quoting *Rodriguez*, 305 F. Supp. 2d at 1280–81) (discussing the serial ADA litigation and suggesting reforms that would allow a safe haven for businesses that make a good faith effort to comply with the ADA).

<sup>106</sup> *Rodriguez*, 305 F. Supp. 2d at 1285.

<sup>107</sup> 42 U.S.C. § 12205 (2000).

<sup>108</sup> See Adam A. Milani, *Wheelchair Users Who Lack “Standing”: Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 84 (2004).

<sup>109</sup> 303 F.3d 1015 (9th Cir. 2002).



room, could not use the toilet or shower unless someone assisted her, had to be carried up several stairs to reach the cafeteria, and was consistently forced to stay at lodging that was not wheelchair accessible.<sup>110</sup> However, even after these events the plaintiff was denied Title III standing because she had not alleged that she planned to return or participate again in the overseas program.<sup>111</sup>

In *Bird* the plaintiff did not assert the threat of future injury, but even when plaintiffs make such an averment, the courts still deny standing. In *Brother v. Tiger Partner, LLC*<sup>112</sup> a wheelchair-ridden plaintiff visiting his mother with his deaf and blind wife entered a hotel where the concierge told them there were neither wheelchair accessible bathrooms nor any services, such as text telephones, available for the deaf.<sup>113</sup> Despite the plaintiff's claims that he visited the hotel in the past and frequently visited his mother, the court found that he lacked standing, stating: "Plaintiff here has not sufficiently established a credible threat of future injury. . . . And, in view of his extensive litigation history, Mr. Brother's professed intent to return to the property is insufficient."<sup>114</sup> *Brother* is not the only case to apply this rationale; it demonstrates what numerous courts are now considering to be an important factor in the standing analysis: the motivation of the plaintiff. The court in *Brother* cited a great number of cases in support of the proposition that a plaintiff who brings numerous cases under Title III of the ADA can and will be denied standing.<sup>115</sup>

Courts attempt to disguise their animosity towards ADA testers by commenting that their focus on the plaintiff's litigation history is not "outcome determinative."<sup>116</sup> However, the plaintiff's history and motivation is often the primary, or sole, focus of a court's standing analysis.<sup>117</sup> For example, in *Wilson v. Costco Wholesale Corp.*<sup>118</sup> the

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<sup>110</sup> *Id.* at 1017–18.

<sup>111</sup> *Id.* at 1019–20.

<sup>112</sup> 331 F. Supp. 2d 1368 (M.D. Fla. 2004).

<sup>113</sup> *Id.* at 1370–71.

<sup>114</sup> *Id.* at 1374.

<sup>115</sup> *See id.* at 1373–75.

<sup>116</sup> *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115, 1123 (S.D. Cal. 2006) (denying standing to a mobility-impaired store patron who encountered several architectural barriers, even though he had visited the store twice before and visited the area three to four times per year).

<sup>117</sup> *See Harris v. Stonecrest Care Auto Ctr.*, 472 F. Supp. 2d 1208, 1216–17 (S.D. Cal. 2007) (giving weight to plaintiff's extensive litigation history because a large number of previous Title III claims raised credibility issues); *D'Lil v. Best W. Encina Lodge & Suites*, 415 F. Supp. 2d 1048, 1055 (C.D. Cal. 2006) (noting that plaintiff's comments regarding other pending ADA suits were insufficient to express any return to the relevant geographic area), *rev'd*, 538 F.3d 1031 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (Feb. 3, 2009) (No. 08-993); *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1046–48 (C.D. Cal.

plaintiff encountered architectural barriers while visiting a Costco store. The plaintiff demonstrated that he had visited the store before and traveled to the area a few times a year, but the court held that these facts did not establish standing and went on to comment that the plaintiff had filed over eighty lawsuits throughout California.<sup>119</sup> The court heavily relied on the plaintiff's motivation as the reason for denying standing.

The court in *Wilson* is not alone; many courts have actually concluded that a serial plaintiff's extensive litigation history can undermine his professed intent to return.<sup>120</sup> In *D'Lil v. Best Western Encina Lodge & Suites*<sup>121</sup> the parties signed a consent decree, and the case came to the court to determine attorney's fees. Instead of concentrating on the appropriate attorney's fees, the court decided to go into an extensive, *sua sponte* analysis of standing.<sup>122</sup> While the plaintiff claimed that she wished to return to the hotel because of her trust in the Ramada brand, the court commented: "[S]he obviously knows such a preference would be relevant."<sup>123</sup> The district court ultimately denied standing, but the decision was later reversed, with the Ninth Circuit Court stating that "we must be particularly cautious about affirming credibility determinations that rely on a plaintiff's past ADA litigation."<sup>124</sup> However, most courts still follow the rationale of the district court in *D'Lil*. In a more recent case, the court took the same stance concerning credibility, finding the plaintiff's

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2005) (explaining why plaintiff's extensive ADA litigation history undercut both his credibility and alleged intent to return to the defendant restaurant), *aff'd sub nom.* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); Molski v. Kahn Winery, 381 F. Supp. 2d 1209 (C.D. Cal. 2005) (denying supplemental jurisdiction over plaintiff's ADA claim and citing plaintiff's litigation history as proof of impermissible forum shopping), *aff'd sub nom.* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008); Brother v. CPL Investments, Inc., 317 F. Supp. 2d 1358, 1369 (S.D. Fla. 2004) (denying standing because of plaintiff's extensive litigation history and failure to stay at the inaccessible hotel).

<sup>118</sup> 426 F. Supp. 2d 1115 (S.D. Cal. 2006).

<sup>119</sup> *Id.* at 1122–23.

<sup>120</sup> *Mandarin Touch Rest.*, 385 F. Supp. 2d at 1046 ("[T]he Court finds that Mr. Molski's litigation history undercuts his credibility and belies an intent to return to the Mandarin Touch."); *Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d 1278, 1279, 1284–85 (M.D. Fla. 2004) (noting that plaintiff had filed nearly two hundred ADA lawsuits and was merely trying to swindle attorney's fees from defendants).

<sup>121</sup> 415 F. Supp. 2d 1048 (C.D. Cal. 2006), *rev'd*, 538 F.3d 1031 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (Feb. 3, 2009) (No. 08-993).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1056.

<sup>124</sup> *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3449 (Feb. 3, 2009) (No. 08-993).

testimony unreliable when viewed in conjunction with his litigation history.<sup>125</sup>

Even specific individual plaintiffs are being labeled as vexatious. Jarek Molski, a self-proclaimed “sheriff”<sup>126</sup> and activist for the ADA, felt the wrath of the court in *Molski v. Mandarin Touch Restaurant*.<sup>127</sup> Molski relies on a wheelchair for mobility and sued the defendant for failure to comply with Title III of the ADA.<sup>128</sup> The opinion contains a section labeled “Statement of Facts,” but all the court discussed was the plaintiff’s litigation history.<sup>129</sup> The court completely disregarded the facts of the case. Instead, the sole focus was on the large number of lawsuits Molski had filed under Title III.<sup>130</sup> The court admitted that “this complaint appears credible standing alone,” but ultimately concluded that the complaint’s “validity is undermined when viewed alongside Molski’s other complaints.”<sup>131</sup> The court did not stop at denying him standing. The court stated, “It is possible, even likely, that many of the businesses sued were not in full compliance with the ADA,”<sup>132</sup> and added, “[a]fter examining Plaintiff’s extensive collection of lawsuits, the Court believes that most, if not all, were filed as part of a scheme of systematic extortion, designed to harass and intimidate business owners into agreeing to cash settlements.”<sup>133</sup> In the end, the court labeled Molski a vexatious litigant and required him to file an order with any new complaint to essentially warn a judge of his litigious past.<sup>134</sup>

There are few cases in which the courts have granted standing to ADA testers. The rationale behind granting standing is that the plaintiffs are prevented from visiting the facility and suffer an actual and imminent injury.<sup>135</sup> But in those cases that have granted standing, the court usually refused to dismiss the case for lack of standing because it will not throw out the case at the early stages of litigation.<sup>136</sup>

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<sup>125</sup> *Harris v. Stonecrest Care Auto Ctr.*, 472 F. Supp. 2d 1208, 1216–17 (S.D. Cal. 2007).

<sup>126</sup> *Molski v. Arby’s Huntington Beach*, 359 F. Supp. 2d 938, 942 (C.D. Cal. 2005), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008).

<sup>127</sup> 347 F. Supp. 2d 860 (C.D. Cal. 2004), *aff’d sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008).

<sup>128</sup> *Id.* at 862.

<sup>129</sup> *Id.* at 861.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 864.

<sup>132</sup> *Id.* at 865.

<sup>133</sup> *Id.* at 864.

<sup>134</sup> *Id.* at 866–67.

<sup>135</sup> Milani, *supra* note 108, at 93–94.

<sup>136</sup> See *Loskot v. Super Star, LLC*, No. C 06-7199 CW, 2007 U.S. Dist. LEXIS 45237, at \*7–8 (N.D. Cal. June 12, 2007); *Bruni v. FMCO, L.L.C.*, No. 2:06-cv-293-FtM-29SPC, 2007 U.S. Dist. LEXIS 18641, at \*11 (M.D. Fla. Mar. 16, 2007); *Cross v. Pac. Coast Plaza Inv., L.P.*,

or before discovery has occurred.<sup>137</sup> Other courts have granted standing to a plaintiff who consistently utilized the services of a chain or had acquired a taste for a restaurant's food.<sup>138</sup> In addition, courts have granted standing where defendants blatantly refused to change policies and caused accessibility problems to continue to exist.<sup>139</sup> A review of the case law reveals only one court that has completely rejected the arguments proposed for denying injunctive relief to Title III plaintiffs. In *Independent Living Resources v. Oregon Arena Corp.*,<sup>140</sup> the federal district court granted standing to a disabled attorney and a nonprofit advocacy organization, stating: "The court is reluctant to embrace a rule of standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice."<sup>141</sup>

All in all, the case law paints a dreary picture for those attempting to seek compliance with Title III of the ADA. Courts are generally suspicious of these plaintiffs and will deny standing based on their assessments of the credibility of the plaintiff's statements. The largest obstacle that now confronts ADA testers is the courts' focus on the testers' motivation for visiting the defendants' facilities.

#### IV. TITLE III OF THE ADA MAY HAVE ONLY ONE LEG TO STAND ON: TESTER LAWSUITS

##### *A. Support for Tester Standing: Legislative Intent of the ADA*

The ADA was meant to be a solution to what Congress felt was a severe problem in America. The House report on the bill stated:

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with

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No. 06 CV 2543 JM (RBB), 2007 U.S. Dist. LEXIS 16138, at \*8 (S.D. Cal. Mar. 6, 2007); *Org. for the Advancement of Minorities with Disabilities v. Brick Oven Rest.*, 406 F. Supp. 2d 1120, 1132 (S.D. Cal. 2005); *Molski v. Arby's Huntington Beach*, 359 F. Supp. 2d 938, 947 n.10 (C.D. Cal. 2005) (allowing standing but warning that "[a]t successive stages in the litigation, however, Mr. Molski may be required to submit additional evidence to support his standing"), *aff'd sub nom. Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 594 (2008).

<sup>137</sup> *See, e.g., Access 4 All, Inc. v. Chi. Grande, Inc.*, No. 06 C 5250, 2007 U.S. Dist LEXIS 35304, at \*12-13 (N.D. Ill. May 10, 2007).

<sup>138</sup> *See, e.g., Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1079-80 (D. Haw. 2000).

<sup>139</sup> *See, e.g., Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133 (9th Cir. 2002).

<sup>140</sup> 982 F. Supp. 698 (D. Or. 1997).

<sup>141</sup> *Id.* at 762.

disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.<sup>142</sup>

Congress also passed the ADA because it felt that existing federal and state laws were inadequate to address the problems faced by people with disabilities.<sup>143</sup> The House report explained: “[O]ur society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right.”<sup>144</sup> Congress recognized the isolation, suicides, and dependency on welfare programs that resulted from discrimination against people with disabilities.<sup>145</sup>

Not only was the ADA as a whole passed as a broadly sweeping remedy, Title III is specifically meant to be extremely broad.<sup>146</sup> Title III covers an unprecedented number of places and providers, including virtually all commercial public establishments.<sup>147</sup> However, Congress’s intent was not only to codify the rights of people with disabilities, but also to generate inclusion and end discrimination as a result of strong enforcement of the statute. Congress emphasized that there is not enough compliance with state laws and that “the rights guaranteed by the ADA are meaningless without effective enforcement provisions.”<sup>148</sup> To ensure effective enforcement Congress provided for individual enforcement<sup>149</sup> with a private right of action for “any person who is being subjected to discrimination on the basis of disability . . . or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 . . . .”<sup>150</sup>

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<sup>142</sup> H.R. REP. NO. 101-485, pt. 2, at 22–23 (1990).

<sup>143</sup> *Id.* at 23.

<sup>144</sup> *Id.* at 31 (quoting *Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomms. on Select Educ. and Employment Opportunities of the H. Comm. on Educ. and Labor*, 101st Cong. 62 (1989) (prepared statement of Dustin Dart, Jr., Chairman, Task Force on the Rights and Empowerment of Americans with Disabilities)).

<sup>145</sup> *Id.* at 42–43.

<sup>146</sup> See Ann Hubbard, *The Major Life Activity of Belonging*, 39 WAKE FOREST L. REV. 217, 255 (2004) (discussing how belonging is the heart of the ADA and arguing for judicial recognition of belonging as a major life activity).

<sup>147</sup> H.R. REP. NO. 101-485, pt. 2, at 34–35 (1990).

<sup>148</sup> *Id.* at 40.

<sup>149</sup> *Id.*

<sup>150</sup> 42 U.S.C. § 12188(a)(1) (2000).

Tester standing is imperative in order to ensure that the rights guaranteed by the ADA do not become meaningless abstractions. Many people are reluctant to bring lawsuits against businesses for violations of the ADA or are unaware of what constitutes a violation under a very cumbersome and technically detailed statute.<sup>151</sup> Other victims of ADA violations may not have the incentive or the resources to bring ADA lawsuits.<sup>152</sup> Thus testers, as private attorneys general, serve a vital role in redressing the injuries suffered due to violations of Title III of the ADA. Overall, denying injunctive relief to individuals who prove they were victims of discrimination, even as testers, weakens and undercuts congressional intent to deter and remedy discrimination through utilization of private individuals to enforce the statute. The Supreme Court supported the idea of private attorneys general in the employment context, stating: “We have rejected the unclean hands defense ‘where a private suit serves important public purposes.’”<sup>153</sup> Analogously, the unclean hands defense is inapplicable to Title III testers who serve the important public purpose fighting for access for the disabled population.

Some experts have argued that the litigiousness of testers is a result of the private enforcement provision of the ADA. Numerous courts have denied standing to plaintiffs based on their litigious past, but, arguably, these plaintiffs are merely taking advantage of the congressionally created private enforcement structure. This raises the question, “why should they be punished for utilizing the statute?” The numerous cases that are filed are generally commenced by individuals enforcing their statutory rights in a way Congress intended. Further, “litigation rates are no measure of abusive litigation,”<sup>154</sup> especially when it seems the violations of Title III are so numerous. In addition, it should be noted that suits against businesses comprise the largest category of civil cases overall.<sup>155</sup>

Courts are not allowed to overlook congressional intent when determining standing,<sup>156</sup> but that is exactly what courts are doing when they deny standing to ADA testers. As long as the plaintiffs are

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<sup>151</sup> *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 763 (D. Or. 1997) (“Plaintiffs also have the incentive and resources to prosecute an action such as this, which often is not the case with an individual suite guest, especially one from out-of-town who may have no plans to ever return to Portland.”).

<sup>152</sup> *Id.*

<sup>153</sup> *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 360 (1995) (quoting *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 138 (1968)).

<sup>154</sup> *Bagenstos*, *supra* note 6, at 21 n.86 (quoting Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 *DUKE L.J.* 447, 457 (2004)).

<sup>155</sup> *Id.*

<sup>156</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

fulfilling the constitutional requirements for standing, the courts should not create additional standing requirements contrary to congressional intent. ADA expert Ruth Colker stated: "Congress clearly concluded that injunctive relief was necessary to remedy the evils that it made unlawful through the passage of ADA Title III. It is wrong to use Article III's standing requirements to undermine Congress' purpose in enacting the ADA."<sup>157</sup>

*B. Support for Tester Standing: Congressional Creation of Broad Standing Rights Under the ADA*

Tester standing is also appropriate under the broad rights Congress created in the ADA. The Supreme Court has established that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."<sup>158</sup> When there are statutorily created standing rights "courts accordingly lack the authority to create prudential barriers to standing."<sup>159</sup> Congress therefore may create statutory rights that expand the definition of what constitutes an injury and override the judicially created prudential limitations on standing,<sup>160</sup> but "it may not eliminate the constitutional "case or controversy" requirement."<sup>161</sup> The creation of a statutory right persuaded the Supreme Court in *Havens Realty* to allow tester standing,<sup>162</sup> because "Congress had conferred a sort of legal interest on testers."<sup>163</sup>

On its face, Title III of the ADA allows a court to award an injunction to "any person who is being subjected to discrimination."<sup>164</sup> This constitutes a broad grant of statutory standing,<sup>165</sup> comparable to the FHA, that should only require ADA plaintiffs to fulfill the constitutional elements of standing and not be

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<sup>157</sup> Colker, *supra* note 10, at 399.

<sup>158</sup> *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (discussing the constitutional requirements for standing).

<sup>159</sup> *Havens Realty*, 455 U.S. at 372 (citing *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979)).

<sup>160</sup> *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1278 (D.C. Cir. 1994) (citing *Havens Realty*, 455 U.S. at 372) (denying standing to the individual testers under Title VII, but granting standing to the organization to seek injunctive relief to the extent the effects impaired its programs).

<sup>161</sup> *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1078 (D. Haw. 2000) (quoting *Hoepfl v. Barlow*, 906 F. Supp. 317, 323 (E.D. Va. 1995)).

<sup>162</sup> *Havens Realty*, 455 U.S. at 373.

<sup>163</sup> Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 190 (1992) (arguing that the decision in *Lujan* came out the wrong way because the Court ignored the congressional grant of standing, which was dispositive).

<sup>164</sup> 42 U.S.C. § 12188(a)(1) (2000).

<sup>165</sup> Markey, *supra* note 5, at 208.

faced with judicially created hurdles such as the focus on the motivation of the plaintiff.<sup>166</sup> As standing expert Cass R. Sunstein argues in highlighting the downfalls of *Lujan*, Congress's grant of standing "create[s] the relevant injury for Article III purposes."<sup>167</sup> Thus ADA plaintiffs should not be required to meet prudential requirements. The courts that have created other barriers to standing that go beyond proving the propensity of the injunctive relief, such as looking at the plaintiff's motivation or past litigation history to deny standing, are in opposition to the congressional conferral of broad standing rights to individuals harmed under Title III.

Congress' addition of the "futility doctrine" to the ADA is another factor supporting standing for testers.<sup>168</sup> The doctrine states that "nothing . . . shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions."<sup>169</sup> The doctrine permits a plaintiff to sue if he or she actually would visit the inaccessible facility if the barriers were removed.<sup>170</sup> Representative Steny Hoyer provided the House with a description of the futile gesture language before the ADA was passed:

"[A] person does not have to engage in a 'futile gesture' if the person has notice that an entity covered under [T]itle III does not intend to comply with its provisions. For example, if a theatre has turned away six people with cerebral palsy . . . a person with cerebral palsy can bring suit without first subjecting himself or herself to the humiliation of being turned away by the theatre."<sup>171</sup>

One court addressing the futility doctrine stated:

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<sup>166</sup> See *Havens Realty*, 455 U.S. at 372 (citing *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979)).

<sup>167</sup> Sunstein, *supra* note 163, at 223.

<sup>168</sup> 42 U.S.C. § 12188(a)(1).

<sup>169</sup> *Id.*

<sup>170</sup> *Access 4 All, Inc. v. Chi. Grande, Inc.*, No. 06 C 5250, 2007 U.S. Dist. LEXIS 35304, at \*21–22 (N.D. Ill. May 10, 2007) (granting standing to the tester and the organization that employed him for a Title III suit).

<sup>171</sup> Milani, *supra* note 108, at 128 (quoting *Sharp v. Waterfront Rests.*, No. 99-CV-200 TW (AJB), 1999 WL 1095486, at \*5 (S.D. Cal. Aug. 2, 1999) (quoting 136 CONG. REC. E1913-01, E1920 (daily ed. May 22, 1990))) (analyzing the proposed ADA Notification Act that would require plaintiffs to give notice to, allegedly inaccessible businesses ninety days before filing a lawsuit and determining it to be unnecessary because the Congress meant for Title III to incorporate all of the Civil Rights Act Title II's remedies, which would include a thirty day notice requirement to defendants before filing a suit).



If the 'futile gesture' language of Title III is to mean anything, it means that those in [plaintiff's] position may sue to bring into compliance with the ADA places of public accommodation that they know are non-complaint [sic], without having to allege an intention to return to such places before their lawsuits can have the effect of forcing compliance.<sup>172</sup>

Recognizing this argument, the Ninth Circuit in *Pickern v. Holiday Quality Foods Inc.*<sup>173</sup> held that, based on the futility doctrine, injury continues if a plaintiff learns of the inaccessibility of a public accommodation and, therefore, is deterred from visiting the defendant's facility.<sup>174</sup> As long as a plaintiff is deterred from visiting the facility, the injury continues for standing purposes.<sup>175</sup> Courts that have refused to believe the plaintiff's assertions that he or she will return are not only wrong in questioning the plaintiff's assertions and motivations, but also in placing an unnecessary barrier for standing on the plaintiff in light of the futility doctrine.

### C. Support for Tester Standing: Underenforcement of the ADA

Standing should also be granted because the ADA is severely underenforced. Tester standing is one way to ensure this important remedial statute does not become a symbolic gesture by Congress rather than the solution Congress intended. There is a strong accord among experts and other commentators that Title III of the ADA is underenforced,<sup>176</sup> providing limited effectiveness in light of continuing setbacks.<sup>177</sup> Overall, the goal of Congress—to grant people

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<sup>172</sup> *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 229 (D.N.J. 2003).

<sup>173</sup> 293 F.3d 1133 (9th Cir. 2002).

<sup>174</sup> *Id.* at 1136–37.

<sup>175</sup> *Id.* at 1137.

<sup>176</sup> See Katherine R. Annas, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams: Part of an Emerging Trend of Supreme Court Cases Narrowing the Scope of the ADA*, 81 N.C. L. REV. 835 (2003) (arguing that the ADA has not made the changes that were intended and court decisions continue to narrow the scope of the statute, which exacerbates the problem of underenforcement); Bagenstos, *supra* note 6, at 4 (discussing the need for private enforcement in Title III of the ADA and the fact that the courts are causing the abusive litigation); Colker, *supra* note 10 (discussing how Title III has been unsuccessful in remedying the lack of accommodation for people with disabilities in public places); Hymas & Parkinson, *supra* note 3, at 352–53 (noting that many facilities have not conformed with the requirements of the ADA); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1832–34 (2005) (supplying survey data relating to people with disabilities and areas covered by Title III).

<sup>177</sup> See, e.g., Michael W. Kelly, Note, *Weakening Title III of the Americans with Disabilities Act: The Buckhannon Decision and Other Developments Limiting Private Enforcement*, 10 ELDER L.J. 361 (2002) (discussing court decisions that have limited the impact of Title III, for example narrowing the definition of prevailing party for those who can receive

with disabilities access to all aspects of society—is far from being realized.<sup>178</sup>

Studies have demonstrated that the ADA has not created the equality of access that Congress intended. The National Organization on Disability/Harris Poll survey concluded that people with disabilities lag behind those without disabilities on most of the quality of life factors that Title III addresses,<sup>179</sup> with significant disparities in areas such as socializing, eating out, transportation, and health care.<sup>180</sup> At congressional hearings for a proposed ADA amendment, numerous advocates discussed how the majority of businesses across the country remain inaccessible, even in cases where accommodation would be easy and inexpensive.<sup>181</sup> In her article titled *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, Bonnie Poitras Tucker, a professor of law who suffers from a hearing disability, expressed frustration that many hotels she has visited are still not compliant with the ADA.<sup>182</sup> Her story is just one example of the burdens people are forced to deal with despite the presence of the ADA. It has been estimated that less than 2 percent of public buildings in the United States fully comply with Title III.<sup>183</sup> Even more disturbing, businesses are not making necessary changes even where barriers are easily removable.<sup>184</sup> “[Eighteen] years after enactment of [the ADA] a reasonable Utopia has not yet been created,” because business owners still refuse to spend money to expend the efforts necessary to benefit the disabled.<sup>185</sup>

Even the cases brought to enforce Title III are not resulting in accessibility. In 2005, Professor Michael Waterstone concluded that 80 percent of all Title III cases brought resulted in a pro-defendant ruling.<sup>186</sup> Waterstone argued that these extremely pro-defendant outcomes demonstrate that there is underenforcement of Title III, not

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attorney's fees and the denial of architect liability).

<sup>178</sup> Milani, *supra* note 108, at 109.

<sup>179</sup> Waterstone, *supra* note 176, at 1832.

<sup>180</sup> *Id.* at 1832–33 (stating that, for example, there is a 10 percent gap in the high school graduation rate between people with disabilities and people without disabilities).

<sup>181</sup> See *ADA Notification Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 49–50 (2000) (statement of Rick A. Schotz, ADA Consulting Associates, Ft. Lauderdale, Fla.).

<sup>182</sup> Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 382–83 (2001) (discussing the problems with drafting the ADA as a civil rights statute).

<sup>183</sup> Becker, *supra* note 105, at 99.

<sup>184</sup> Bagenstos, *supra* note 6, at 4.

<sup>185</sup> Tucker, *supra* note 182, at 337.

<sup>186</sup> Waterstone, *supra* note 176, at 1830 (reviewing thirteen years of appellate cases from 1991–2004).

that plaintiffs are just unwilling to bring the cases.<sup>187</sup> Another study by Professor Ruth Colker found a small number of cases were filed under Title III, only twenty-five appellate cases in six years between 1992 and 1998, with Title III lawsuits making up only 5 percent of all the cases filed under the ADA.<sup>188</sup> Of the small number of appellate cases, defendants won 72 percent of the cases through summary judgment or dismissal.<sup>189</sup>

Title III's limited effectiveness and underenforcement is often attributed to the continual setbacks to a plaintiff's ability to sue for a violation.<sup>190</sup> "[M]any courts have not been receptive to the principles upon which the ADA is premised and have not helped to foster promotion of those principles."<sup>191</sup> The ADA has been called a free ride, encountering judicial and public backlash since its inception,<sup>192</sup> and in the context of Title III this backlash has resulted in underenforcement. Experts have noted trial judges' strong tendency to grant motions for summary judgment in favor of defendants.<sup>193</sup> As noted above, judges are ruling for defendants even though, in a significant number of cases, the defendants were violating the statute and therefore injuring the plaintiffs that were before the court.<sup>194</sup> The courts seem to be ignoring the purpose of the statute and instead substituting their own ideas of what is fair.<sup>195</sup> People with disabilities are dealt a serious setback when their lawsuits are dismissed for lack of standing. Standing for testers is crucial to remedy the underenforcement of the statute, because "[i]f the ADA's public accommodations title is to be enforced to any significant extent under current law, serial litigation is probably essential."<sup>196</sup> Therefore, the statute's effect depends almost entirely on private enforcement, and

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<sup>187</sup> *Id.* at 1854.

<sup>188</sup> Colker, *supra* note 10, at 400.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 401 ("The verdict data confirms that plaintiffs are unlikely to sue under ADA Title III.").

<sup>191</sup> Tucker, *supra* note 182, at 383.

<sup>192</sup> Kelly, *supra* note 177, at 369-70 (citing Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223, 227-31 (2000)).

<sup>193</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999) (discussing the antagonistic and skeptical views judges have displayed towards ADA cases, and the negative decisions that plaintiffs have faced at bench trials).

<sup>194</sup> Bagenstos, *supra* note 6, at 5 (noting that in the case of serial ADA plaintiffs, judges tend to think the practices of such plaintiffs and their counsel are abusing the system).

<sup>195</sup> Tucker, *supra* note 182, at 340 (noting that the ADA's language can send conflicting messages and judges tend to interpret the act through their own sense of fairness).

<sup>196</sup> Bagenstos, *supra* note 6, at 6-7.

private enforcement, in turn, depends on allowing tester standing in cases that meet the necessary constitutional requirements.

Further adding to the underenforcement problem, and contrary to the predictions of Congress, state law is not adequately supplementing the ADA.<sup>197</sup> While many states have supplemental statutes, in 2005 only twenty-one of those states provide for compensatory damages in the event of a violation,<sup>198</sup> and only five states had anti-discrimination statutes that were certified by the Department of Justice.<sup>199</sup> Even those states with significant devotion to elimination of discrimination based on disability have not passed legislation for more expansive relief than that available under Title III.<sup>200</sup> Many people hoped state law would fill the remedial gap left open by Title III. However, plaintiffs currently have no refuge in state law claims. Because, in the end, the majority of states do not provide for compensatory damages and cases in federal court are frequently dismissed for lack of standing, businesses do not have sufficient incentives to comply with Title III.<sup>201</sup> Businesses are apparently willing to take the limited risk that a plaintiff will succeed in winning injunctive relief rather than voluntarily complying with the statute. The result is, once again, severe underenforcement of Title III.

In addition, there is reason to believe that the Attorney General is not bringing these cases at an appropriate rate. A report by the National Council on Disability discovered that the Department of Justice's Disability Section is understaffed, resulting in "significant operational consequences."<sup>202</sup> Overall, the public enforcement system cannot handle the responsibility placed on it under the ADA.<sup>203</sup> As a result, the enforcement of Title III against businesses that are not in the public eye almost completely rests on private individuals.<sup>204</sup> The Department of Justice, the agency charged with national enforcement, rarely relies on litigation to enforce the ADA, focusing instead on settlement agreements,<sup>205</sup> further, on average,

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<sup>197</sup> Colker, *supra* note 10, at 405.

<sup>198</sup> Waterstone, *supra* note 176, at 1870.

<sup>199</sup> *Id.* at 1858–59.

<sup>200</sup> Colker, *supra* note 10, at 405.

<sup>201</sup> *Id.* at 411 (noting that it may be cheaper for a business to deal with a single plaintiff years down the road rather than having to incur the expenses of compliance from the beginning).

<sup>202</sup> Bagenstos, *supra* note 6, at 9 (quoting NAT'L COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 38 (2000)).

<sup>203</sup> Waterstone, *supra* note 176, at 1873.

<sup>204</sup> Kelly, *supra* note 177, at 362 (citing Paul V. Sullivan, Note, *The Americans with Disabilities Act of 1990: An Analysis of Title III and Applicable Case Law*, 29 SUFFOLK U. L. REV. 1117, 1141–42 (1995)).

<sup>205</sup> Waterstone, *supra* note 176, at 1873.

only one settlement agreement per month is brought.<sup>206</sup> The Department's principle concentration is also on the future, removing barriers over time rather than now.<sup>207</sup> Given the enormity of the task placed on the Attorney General, private suits by necessity represent the main tool for ensuring compliance with Congress's intent in passing the ADA.<sup>208</sup>

*D. Support for Tester Standing: The History of Tester Standing in Other Civil Rights Contexts*

The consistent (though sometimes qualified) acceptance of tester standing under the FHA and Title VII supports the argument that courts should grant expansive standing rights under the ADA. Numerous analogies are appropriately drawn between the ADA, the Civil Rights Act of 1964, and the FHA. The ADA expressly incorporates the remedies under Title VII of the Civil Rights Act of 1964,<sup>209</sup> and Title III specifically incorporates enforcement provisions in private actions comparable to the provisions in the Civil Rights Act of 1964.<sup>210</sup> As with the ADA, complaints by private persons are the primary method of obtaining compliance with the FHA despite the statute's grant of authority to the Attorney General to bring lawsuits.<sup>211</sup> In addition to the comparable language in the statutes, the ADA, the Civil Rights Act of 1964, and the FHA are all broad, sweeping civil rights statutes with purposes and structures that are functionally identical.

The Supreme Court has established that the standing doctrine should be liberally applied in civil rights cases.<sup>212</sup> In *Trafficante v. Metropolitan Life Insurance Co.*,<sup>213</sup> the Court concluded that where private enforcement suits "are the primary method of obtaining compliance with the Act" and where Congress defined discrimination broadly, Article III standing should be construed as widely as possible.<sup>214</sup> The broad standing doctrine used in these civil rights contexts has been applied where both damages and injunctive relief

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<sup>206</sup> Colker, *supra* note 10, at 404.

<sup>207</sup> Kelly, *supra* note 177, at 366.

<sup>208</sup> *Id.* at 367; *see also* Bagenstos, *supra* note 6, at 10.

<sup>209</sup> H.R. REP. NO. 101-485, pt. 2, at 126 (1990).

<sup>210</sup> *Id.*

<sup>211</sup> Haydon, *supra* note 49, at 1237 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

<sup>212</sup> *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982); *Trafficante*, 409 U.S. at 209.

<sup>213</sup> 409 U.S. 205 (1972).

<sup>214</sup> *Id.* at 209.

are sought.<sup>215</sup> A tester plaintiff who prevails under Title VII or the FHA can receive injunctive relief, compensatory and punitive damages, attorney's fees, and other equitable relief.<sup>216</sup> The rationale for allowing broad standing in these contexts is therefore not limited to one form of relief over the other. This is an important point, considering the limited remedies available under Title III. Consistent with the Supreme Court's approval of a liberal standing doctrine, as a civil rights statute the ADA should enjoy at least the same standard for standing in injunctive relief cases granted to the FHA and Title VII.

The ADA's underenforcement, pro-defendant record, and narrow interpretation of standing are not due to its unique features.<sup>217</sup> In fact, the ADA has been hailed as the broadest of the civil rights statutes, going beyond the protections afforded to women and minorities under the Civil Rights Act of 1964.<sup>218</sup> Yet courts continue to interpret standing narrowly under the ADA, which is completely inconsistent with the standard set by other decisions concerning standing, including the clear Supreme Court precedent in *Havens Realty* that granted standing for injunctive relief to testers.<sup>219</sup> As a result, the history of tester standing in the context of the FHA and Title VII clearly supports standing for testers under the ADA.

Cases brought in the civil rights context demonstrate that the plaintiff's motivation is not sufficient grounds to deny standing. In *Evers v. Dwyer*<sup>220</sup> the plaintiff boarded a bus solely for the purpose of instituting litigation for racial segregation in violation of a state statute, and he only rode the bus that one time. Although the lower court decided the plaintiff did not present a case or controversy, the Supreme Court granted declaratory relief, arguing that the fact that the tester acted for the purpose of investigating litigation was not significant.<sup>221</sup> In another case, the Court was presented with a provision of the FHA that gave all persons a right to "truthful

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<sup>215</sup> See, e.g., *Havens Realty*, 455 U.S. 363.

<sup>216</sup> Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217, 1225 (1992) (arguing for tester standing under Title VII due to judicial precedent, executive grants of standing, and separation of powers issues).

<sup>217</sup> See Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 242-43 (2001) (reviewing appellate court decisions in ADA employment discrimination cases and concluding that ADA outcomes are far more pro-defendant than other civil rights statutes).

<sup>218</sup> Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 906 (2003) (analogizing rationales for accommodation statutes with antidiscrimination statutes).

<sup>219</sup> See *Havens Realty*, 455 U.S. 363.

<sup>220</sup> 358 U.S. 202 (1958).

<sup>221</sup> *Id.* at 204.

information about available housing.<sup>222</sup> The Court decided that the tester's intent regarding purchasing the home was irrelevant and did not change the fact there was an injury when the statute was violated.<sup>223</sup> Based on these precedents, courts that focus on plaintiffs' motivations in ADA tester cases are wrong in both discounting and dismissing the plaintiffs' injuries based upon their intentions for initiating the litigation. Courts also wrongly discount plaintiffs' intentions to return to the defendants' facilities, because no precedent says that a plaintiff's intent to return cannot be motivated in some way to advance his/her lawsuit.<sup>224</sup> In the end, the focus of the court should be on the discriminatory action of the defendant that harmed and continues to harm the plaintiff, not the subjective motivation of the plaintiff. Motivation does not negate the injury.

*E. Support for Tester Standing: Unreasonable Application of Lyons and Lujan*

Courts are mistaken in applying *Lyons* and *Lujan* to prevent standing to ADA testers. While the law of these two cases should not be abandoned, the Court's rationale for denying standing in the cases is inapplicable to ADA testers. First, the facts of *Lyons* and *Lujan* are clearly distinguishable from any ADA tester case. The Supreme Court in *Lyons* denied standing for injunctive relief at least in part because the plaintiff could not control whether he would suffer future injury.<sup>225</sup> This concern is not present for testers under Title III of the ADA, who are not arguing cases where the only way future harm can occur is dependent upon extreme speculation or the plaintiff's contention that he will again commit a crime<sup>226</sup>—the suit is in court because the defendant refuses to make the necessary changes, so there is little doubt a plaintiff would be subjected to the harm if he or she were to return. Public accommodations testers can plausibly claim that they will return to the place of violation,<sup>227</sup> which is different from claiming that police will choke you or that you plan on traveling to a faraway country to see exotic animals in the near future. In fact,

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<sup>222</sup> *Havens Realty*, 455 U.S. at 373 (discussing the Congress's intention in passing 42 U.S.C. §§ 3604(d), 3612(a)).

<sup>223</sup> *Id.* at 373–75.

<sup>224</sup> *Molski v. Price*, 224 F.R.D. 479, 483 (C.D. Cal. 2004) (granting standing to a plaintiff that had a dual motivation for visiting the defendant's facilities).

<sup>225</sup> *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1274 (D.C. Cir. 1994).

<sup>226</sup> *Colker*, *supra* note 10, at 397.

<sup>227</sup> *Haydon*, *supra* note 49, at 1241.

testers have the sole ability to “put themselves in the position of having to face unlawful conduct in the future.”<sup>228</sup>

Additionally, a tester’s assertions that he or she plans to return to a public accommodation are quite likely true, because the tester would probably be the first person to make sure the changes were made for compliance. In one case, the court granted standing to a tester because the tester had visited the defendant’s facility before; the court found it dispositive that the tester would most likely visit the place again both to avail himself of the services and to assure that the facility was in compliance with the ADA.<sup>229</sup> One court noted: “The fact that Plaintiffs have been and/or are currently involved in other ADA lawsuits does not itself automatically render their professed intent to return to [the defendant’s establishment] disingenuous.”<sup>230</sup>

The Court in *Lyons* was persuaded to deny standing for injunctive relief because the plaintiff was able to receive monetary damages.<sup>231</sup> The Court stated, “withholding injunctive relief does not mean that the ‘federal law will exercise no deterrent effect in these circumstances.’”<sup>232</sup> Unfortunately, when courts deny standing for injunctive relief to plaintiffs harmed under the ADA, the result is the absence of a deterrent effect. Title III only provides for injunctive relief,<sup>233</sup> and an individual’s other form of relief, attorney’s fees, is reliant on the success of the injunctive relief claim.<sup>234</sup> The result in *Lyons* may have been very different if the plaintiff in the case was faced with the grim reality facing plaintiffs under Title III: no leg to stand on in court and a defendant who is in violation of a federal statute but walks away scot-free.

The facts of *Lujan* are also clearly distinguishable from an ADA tester case. In *Lujan* the plaintiffs were environmental groups who sought associational standing for a claim that challenged regulations enforced by the executive branch.<sup>235</sup> Their claims created separation of powers issues, which the Court felt would usurp executive authority.<sup>236</sup> In clear contrast, claims brought by ADA testers do not raise a separation of powers concern.<sup>237</sup> The *Lujan* Court imposed

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<sup>228</sup> Colker, *supra* note 10, at 398.

<sup>229</sup> *Disabled Patriots of Am., Inc. v. Port Hospitality, LLC*, No. 1:06CV2889, 2007 U.S. Dist. LEXIS 83035 (N.D. Ohio Nov. 8, 2007).

<sup>230</sup> *Norkunas v. Wynn Resorts Holdings, LLC*, No. 2:07-cv-00096-RLH-PAL, 2007 U.S. Dist. LEXIS 77355, at \*11–12 (D. Nev. Oct. 9, 2007).

<sup>231</sup> *City of Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983).

<sup>232</sup> *Id.* at 112–13 (quoting *O’Shea v. Littleton*, 414 U.S. 488 (1974)).

<sup>233</sup> 42 U.S.C. § 12188(a)(1) (2000).

<sup>234</sup> *See id.*

<sup>235</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>236</sup> *Id.* at 577.

<sup>237</sup> Tardiff, *supra* note 59, at 958 (“The absence of important federalism concerns in



stringent requirements on standing for injunctive relief because judicial restraint is necessary when courts are asked to enjoin the conduct of the Secretary of the Interior.<sup>238</sup> ADA testers are not seeking to enjoin federal actors or the legislature; they are seeking injunctive relief against businesses run by private citizens. It would be hard to argue that the same jurisprudential concerns in *Lujan* are present when one citizen seeks to enforce a federal statute against another citizen.

On a supplemental note, the facts of *Lujan* are further distinguishable because the *Lujan* plaintiffs did not allege any time at which they would return, only that they intended to return sometime in the future.<sup>239</sup> In many cases where courts have denied standing to ADA testers, the plaintiffs went beyond a vague future intention to return and expressed exactly when and why they would return.<sup>240</sup> Testers are not making someday assertions, but rather are usually arguing they will return to the facility as soon as it is made accessible<sup>241</sup>—and the majority opinion in *Lujan* did not require specific dates.<sup>242</sup> Furthermore, *Adarand Constructors, Inc. v. Peña*<sup>243</sup>

employment tester cases eliminates the need for such strict standards because the courts are not being asked to supervise a local or state governmental agency.” (citing Jonathan Levy, Comment, *In Response to Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*, 80 MINN. L. REV. 123, 160 (1995))).

<sup>238</sup> *Lujan*, 504 U.S. at 577.

<sup>239</sup> *Id.* at 564.

<sup>240</sup> See *D’Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031 (9th Cir. 2008) (finding standing when plaintiff said she would visit the hotel again because she frequented the area and she trusted the hotel brand); *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135–39 (9th Cir. 2000) (finding standing when plaintiff said he would visit the grocery store regularly because it was near his grandmother’s home, where he visited weekly); *Access 4 All, Inc. v. Chi. Grande, Inc.*, No. 06-C-5250, 2007 U.S. Dist. LEXIS 35304, at \*6 (N.D. Ill. May 10, 2007) (finding standing when plaintiff said he would return to use the services of the hotel, he actually made a reservation to return, and wished to return to check the compliance of the facility); *Moss v. Comfort Inn Woodlands Hills*, No. CV 04-7939 FMC (Mcx), 2006 U.S. Dist. LEXIS 81429, at \*6–7 (C.D. Cal. Oct. 20, 2006) (denying standing when plaintiff would be visiting the city where the defendant’s hotel was located and would need a room there because she was in a serious relationship with someone in the city and therefore planned to stay there every other month for two to three days), *aff’d*, 275 Fed. App’x 717 (9th Cir. 2008); *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115, 1122 (S.D. Cal. 2006) (denying standing when plaintiff stated he will continue to visit the store to check compliance and has done so twice since the suit was filed); *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1077–83 (D. Haw. 2000) (finding standing when plaintiff traveled to the restaurant franchise several times a year to order the restaurant’s local dish).

<sup>241</sup> See generally *Milani*, *supra* note 108, at 115 (noting that one of the purposes of the ADA was to make facilities readily accessible).

<sup>242</sup> *Lujan*, 504 U.S. at 565 n.2 (“[I]mminence’ is concededly a somewhat elastic concept . . .”).

<sup>243</sup> 515 U.S. 200 (1995) (dealing with an equal protection issue but ruling the plaintiff established standing for injunctive relief because his work would contain subcontractor

suggests that the exact date for future conduct is not required for a plaintiff to receive standing for injunctive relief.<sup>244</sup> The plaintiffs in *Adarand* did not provide a specific date, and the Supreme Court held that future conduct that happened annually would be sufficient to support standing to sue for injunctive relief.<sup>245</sup> In addition, the requirement of exact dates for return does not take into account the fact that these plaintiffs may not wish to return to a place that they know is inaccessible until after changes for compliance are made. Further, the testers are often suing establishments such as fast food restaurants and gas stations, and it is impractical to expect an individual to plan when he/she will next stop at a fast food restaurant or a gas station.

Even if *Lyons* and *Lujan* are applicable to ADA tester cases, the courts are coming to the wrong conclusion in denying standing. Courts addressing standing for ADA testers act as if there is a clear formula set out by *Lyons* and *Lujan* that the ADA plaintiffs are not fulfilling. However, those cases established no clear standard, gave no degree of likelihood, no specific number of times the plaintiff must visit the facility,<sup>246</sup> and never suggested that a plaintiff's litigation history was relevant to standing. Courts that use *Lyons* and *Lujan* as grounds to deny standing are interpreting the cases to stand for principles those decisions do not endorse and are applying the cases far too stringently.<sup>247</sup>

Additionally, the Supreme Court's rationale for denying standing for injunctive relief in *Lujan* and *Lyons* was that the plaintiff was not experiencing "continuing, present adverse effects."<sup>248</sup> However, a plaintiff harmed by a violation of the ADA can allege such present adverse effects because "a plaintiff who is threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA suffers 'imminent injury.'"<sup>249</sup> An ADA tester suffers from an injury that is both actual and imminent when he is currently

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compensation clause at least once a year, which the plaintiff claimed was discriminatory and sought injunctive relief to prevent the clause from being present in construction contracts).

<sup>244</sup> See *id.* at 211–12.

<sup>245</sup> *Id.*

<sup>246</sup> *D'Lil v. Best W. Encina Lodge & Suites*, 415 F. Supp. 2d 1048, 1052–53 (C.D. Cal. 2006) (arguing that there was no clear standard set out by the Supreme Court decisions, thus creating its own standard and denying standing to litigious plaintiff), *rev'd*, 538 F.3d 1031 (9th Cir. 2008) (finding standing).

<sup>247</sup> See Colker, *supra* note 10, at 396.

<sup>248</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (internal quotation marks omitted) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

<sup>249</sup> *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002).

deterred from patronizing the defendant's facility.<sup>250</sup> In fact, the injury continues until the defendant makes the necessary changes for compliance with Title III,<sup>251</sup> and "such discouragement constitutes an actual and existing injury from which any perceived absence of imminent future harm cannot detract."<sup>252</sup>

The intent behind the ADA was to grant individuals with disabilities accessibility to all aspects of life and to prevent the seclusion that has haunted the disabled. Continuous violations of Title III perpetuate the situation the ADA was meant to remedy: the plaintiffs are deterred from using the facilities because they are aware of the problems with accessibility. Further, in the context of the ADA, when a plaintiff says that he does not wish to return to the defendant's facility it is usually because he does not wish to be subjected to the harm again. How does it make sense for a court to deny standing just because a plaintiff has no specific intention to return, but only because he is being prevented from using the facility? Many plaintiffs that have experienced discrimination are so hurt and upset they do not want to travel to these places for a second dose of shame, humiliation, and discrimination.<sup>253</sup>

#### *F. Support for Tester Standing: ADA Testers are Patrons As Well*

ADA testers are different from testers used in other civil rights contexts because they have multiple reasons for entering a facility. An ADA tester wishes both to use the facility, as well as test the facility for compliance.<sup>254</sup> The ADA tester suffers injury both as an individual with a disability and a private attorney general seeking enforcement of Title III.<sup>255</sup> This dual intention strengthens an ADA tester's argument for standing. In fact, this significant difference eliminates one of the major criticisms of tester standing: the fact that the testers

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<sup>250</sup> *Norkunas v. Wynn Resorts Holdings, LLC*, No. 2:07-cv-00096-RLH-PAL, 2007 U.S. Dist. LEXIS 77355 (D. Nev. Oct. 9, 2007) (denying standing because plaintiffs presented no facts showing an intent to return to the defendant's establishment).

<sup>251</sup> *Disabled Patriots of Am., Inc. v. Port Hospitality, LLC*, No. 1:06CV2889, 2007 U.S. Dist. LEXIS 83035 (N.D. Ohio Nov. 8, 2007) (granting standing to tester plaintiff and the organization he represented).

<sup>252</sup> *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 229 (D.N.J. 2003).

<sup>253</sup> See, e.g., Curtis D. Edmonds, *Won't You Let Me Take You on a Sea Cruise: The Americans with Disabilities Act and Cruise Ships*, 28 TUL. MAR. L.J. 271, 275-76 (2004).

<sup>254</sup> See, e.g., *Molski v. Price*, 224 F.R.D. 479, 483-84 (C.D. Cal. 2004) (granting standing to a tester who had a dual motivation for both visiting and returning to the defendant's restaurant); *Clark*, 213 F.R.D. at 227-28 (granting standing to the individual plaintiff because he visited the restaurant with the dual purpose of testing and dining).

<sup>255</sup> See *Bruni v. Fine Furniture by Gordon's, Inc.*, No. 2:06-cv-456-FtM-29DNF, 2007 U.S. Dist. LEXIS 120, at \*2 (M.D. Fla. Jan. 3., 2007) (denying defendant's motion to dismiss and granting standing to an ADA tester who is in a wheelchair and confronted barriers to access at the defendant's place of business).

are manipulating the defendants. Employers and housing agents contend that FHA and Title VII testers did not intend to accept housing or employment in the first place.<sup>256</sup> Some defendants have gone so far as to argue that these testers are committing misrepresentation and entrapment.<sup>257</sup> At times Title VII testers will make up credentials for their interviews, creating issues of fraud<sup>258</sup> and forcing employers to spend valuable time and money on interviewing and evaluating people who have no interest whatsoever in the position.<sup>259</sup> Unlike FHA and Title VII testers who did not wish to get the home or the job, ADA testers are denied the opportunity to access a place that they wish to visit. They are denied the choice that people without disabilities have, the choice to drive down the street and stop at whatever restaurant you may want to eat at or whatever gas station has the cheapest gas. This right to choose is what the ADA is about.<sup>260</sup> Since the ADA testers wish to frequent these facilities, they are patrons as well as investigators. This fact eliminates one of the main arguments against tester standing and furthers the argument for granting standing to ADA testers.

*G. Support for Tester Standing: It Does Not Mean a Gloomy Future for Business Owners*

Opponents of ADA testers have consistently pointed to the pressures the statute places on small business owners and have reprimanded attorneys for taking advantage of these business owners. These opponents allege that many businesses lack knowledge of their non-compliance.<sup>261</sup> While this may seem like a valid argument, owners of public accommodations have been given eighteen years to comply with Title III. Congress specifically considered the interests of small business owners when drafting the ADA.<sup>262</sup> It provided assistance to small businesses by delaying the date of effect for new construction and offering tax breaks to those who spent time and money to comply with the ADA. Further, the ADA continues to provide incentives to businesses in addition to the limited available

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<sup>256</sup> Alex Young K. Oh, Note, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473, 475 (1993) (discussing the practice of using testers in the employment discrimination context and the ethical issues this practice presents).

<sup>257</sup> *Id.* at 482, 498.

<sup>258</sup> *Id.* at 482.

<sup>259</sup> Shannon E. Brown, Note, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1140 (1992).

<sup>260</sup> Colker, *supra* note 10, at 398.

<sup>261</sup> Milani, *supra* note 108, at 138.

<sup>262</sup> *Id.* at 114.

remedies.<sup>263</sup> Further, because Congress was concerned with the onerous burden that could be placed on small businesses,<sup>264</sup> the “readily achievable”<sup>265</sup> language of the statute limits the expenses required under the statute. The term “readily achievable” means “easily accomplishable and able to be carried out without much difficulty or expense.”<sup>266</sup> The statute directs courts to consider factors such as cost, financial resources of the entity, and the impact of the accommodation on the facility.<sup>267</sup> This language provides businesses with the opportunity to attempt to comply without excessive expense.<sup>268</sup>

The statute and its requirements are also widely known.<sup>269</sup> Disability advocates argue that “noncompliant business owners and operators simply choose not to comply, and then become angry when they are ‘caught.’”<sup>270</sup> While the statute has received much public attention and explanation, its requirements are still multifarious. In response to the complicated nature of compliance with the ADA the federal government offers numerous free assistance resources to help businesses fulfill the requirements of Title III.<sup>271</sup>

Arguments centering on protection of business owners are overlooking the purpose of the statute: allowing all people access to all aspects of life. Congress made an important decision that balanced the interests of business owners and the interests of protected individuals. This decision allows private enforcement of Title III. The burdens on business owners were necessary in order to provide equal access to people with disabilities.<sup>272</sup> Congress believed that the ADA required a private enforcement mechanism to serve as the driving force for compliance.<sup>273</sup> After many years, this private enforcement mechanism has been stifled, resulting in underenforcement of the

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<sup>263</sup> See Kelly, *supra* note 177, at 375–76 (“Congress made clear when it passed the ADA its desire to protect small businesses from too much legal liability for architectural barriers and discriminatory practices that barred individuals from access to services.”).

<sup>264</sup> *Id.* at 365 (citing Colker, *supra* note 10, at 384).

<sup>265</sup> 42 U.S.C. § 12182(b)(2)(A)(iv)–(v) (2000).

<sup>266</sup> *Id.* § 12181(9).

<sup>267</sup> *Id.* § 12181(9)(A)–(D).

<sup>268</sup> Milani, *supra* note 108, at 114 (citing President George Bush, Statement upon signing S. 933, July 26, 1990, in 1990 U.S.C.A.N. 601–02).

<sup>269</sup> Bagenstos, *supra* note 6, at 18.

<sup>270</sup> Tammy L. McCabe, Comment, *California Disability Anti-Discrimination Law: Lighthouse in the Storm, or Hunt for Buried Treasure*, 36 MCGEORGE L. REV. 661, 681 (2005) (citing Mike Hoyem, *ADA Cases Catch Defendants by Surprise*, NEWS-PRESS (Fort Myers), Sept. 15, 2003, at 6A) (arguing that the damage remedies provided under California state law aid in the enforcement of Title III).

<sup>271</sup> Bagenstos, *supra* note 6, at 18–19.

<sup>272</sup> See Tucker, *supra* note 182, at 351–52.

<sup>273</sup> Milani, *supra* note 108, at 115 (citing S. REP. NO. 101-116, at 15 (1989)).

statute. Granting standing to ADA testers may help to solve the problem. Perhaps all the nation needs is one highly publicized case in which the defendant is forced to comply with the statute to encourage voluntary compliance by businesses. The truth is there is currently only a miniscule threat to businesses of a lawsuit under Title III, but if business owners know testers can walk into their facilities looking for violations, then they may start making choices to comply with the statute. One attorney commented that “there is only one true incentive built in to [Title III]’ . . . ‘the desire not to get sued and hav[e] to pay attorney’s fees.’”<sup>274</sup>

Tester standing may be the best option for protecting business owners from expense. With the critiques of numerous scholars in the field and the dim reality that things are not where Congress intended, there is pressure on Congress to revisit the statute.<sup>275</sup> If Congress is forced to revisit the ADA, its solution may be to add a damage remedy to Title III. As originally proposed, Title III did contain such a remedy,<sup>276</sup> but it was removed in an effort to protect businesses.<sup>277</sup> This compromise has been criticized by numerous scholars as the downfall of Title III<sup>278</sup> and therefore may be the first place Congress would turn to remedy the underenforcement of the statute. At the time the ADA was enacted, Attorney General Dick Thornburgh recognized that the damage remedy would have to be revisited, arguing that Congress may have been too cautious in the remedy compromise.<sup>279</sup> In fact, many of those who have studied Title III have suggested that Congress add a damage remedy for private suits as a means of solving the severe underenforcement of the provision.<sup>280</sup> If a damage remedy is added to Title III, then businesses will be subject to greater financial pressure. A damage remedy may also result in more abuse of the statute, allowing some plaintiffs to settle out of court and leave facilities inaccessible. Compared to this alternative, ADA tester standing is a relatively minor issue for businesses.

Further, many believe that as a result of accessibility public accommodations will receive increased business and revenue from

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<sup>274</sup> *Id.* at 141 (citing *The ADA Notification Act: Hearing on H.R. 3590 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Andrew D. Levy)).

<sup>275</sup> See, e.g., Colker, *supra* note 10, at 411 (“The Tenth Anniversary [in 2000] of the ADA provide[d] a good opportunity to assess the effectiveness of the ADA’s remedies.”).

<sup>276</sup> *Id.* at 383.

<sup>277</sup> Milani, *supra* note 108, at 115.

<sup>278</sup> See, e.g., Colker, *supra* note 10, at 377–78. See generally Bagenstos, *supra* note 6.

<sup>279</sup> Kelly, *supra* note 177, at 366 (citing Colker, *supra* note 10, at 384).

<sup>280</sup> See, e.g., *id.* at 390–91.

disabled clientele.<sup>281</sup> While there may be an initial expenditure, making facilities accessible will not be a total loss for businesses. The costs of complying with the statute are exaggerated as well. Those in the disabled population are consumers, and access to the public accommodations will result in increased commercial activity that will help rather than harm the business owners.<sup>282</sup>

The main argument against tester standing is the financial strain on small business owners.<sup>283</sup> The cases that have come into federal court, however, are for the most part against large business enterprises like hotel chains such as Ramada, cruise lines, and fast food chains such as McDonald's.<sup>284</sup> It is hard imagine that Ramada lacks the finances needed to put in a ramp or provide Braille on the elevators. In the end, it seems that these corporations, and also small businesses for that matter, are making a cost-benefit analysis and deciding that complying with the statute to avoid being sued is not worth the anticipated cost of compliance. This cost-benefit approach is also troubling because the analysis done by business owners is arguably skewed by prejudice and stereotypes against people with disabilities.<sup>285</sup> However, Congress has already done this analysis and decided accessibility is required.

While ADA testers are sometimes called "outside agitators" and blamed for alleged attorney misconduct in filing what courts have called frivolous lawsuits,<sup>286</sup> ADA testers and their attorneys are not the monsters they are made out to be. First of all, these suits are brought by the same attorneys over and over again not because the attorneys are exploitative, but due to the lack of sufficient incentives for other attorneys to bring these cases.<sup>287</sup> The details of a Title III lawsuit are complex and extremely contextual, so there is a high fixed cost for lawyers to familiarize themselves with the rules.<sup>288</sup> Further, it is wrong to say that attorneys should not be seeking fees for their

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<sup>281</sup> Colker, *supra* note 10, at 395 ("A restaurant that can serve customers who use wheelchairs will also attain increased business, not only from individuals with disabilities, but also from the friends and family of the individuals with disabilities.").

<sup>282</sup> *Id.*

<sup>283</sup> Larry E. Craig, *The Americans with Disabilities Act: Prologue, Promise, Product, and Performance*, 35 IDAHO L. REV. 205, 222–23 (1999) (detailing cost data associated with ADA compliance); Becker, *supra* note 105, at 96–98.

<sup>284</sup> See, e.g., *Norkunas v. Wynn Resorts Holdings, LLC*, No. 2:07-cv-00096-RLH-PAL, 2007 U.S. Dist. LEXIS 77355 (D. Nev. Oct. 9, 2007); *Wilson v. Costco Wholesale Corp.*, 426 F. Supp. 2d 1115 (S.D. Cal. 2006); *D'Lil v. Best W. Encina Lodge & Suites*, 415 F. Supp. 2d 1048 (C.D. Cal. 2006), *rev'd*, 538 F.3d 1031 (9th Cir. 2008); *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D.N.J. 2003).

<sup>285</sup> Bagenstos, *supra* note 6, at 8.

<sup>286</sup> *Id.* at 25–26.

<sup>287</sup> *Id.* at 13–14.

<sup>288</sup> *Id.* at 13.

work on these tester cases. These businesses have violated the ADA for over eighteen years, and the lawyer is an advocate for accessibility.<sup>289</sup> Many of the attorneys represent non-profit organizations whose sole purpose is to make America more accessible for people with disabilities,<sup>290</sup> with improving access as their primary motivation for filing lawsuits.<sup>291</sup> An attorney in Southern California stated that, as a result of the numerous lawsuits he and his client had filed, 1,100 additional parking spots for people with disabilities and hundreds of ramps and rails were added to the defendants' facilities.<sup>292</sup> As these violations continue, one writer has raised an interesting question: "What difference does it make whether one person with a disability files 300 lawsuits or whether 300 different people with disabilities file one suit apiece?"<sup>293</sup> Also, Congress intended that this fee shifting would serve as an incentive for the plaintiffs to bring the suits, and that is exactly what has happened.<sup>294</sup> In addition, a business can moot a Title III lawsuit by making the necessary changes for compliance, and therefore preventing an attorney from recovering fees or a plaintiff from recovering state statutory damages or injunctive relief under Title III.<sup>295</sup>

#### *H. Support for Tester Standing: Wrongful Judiciary Focus*

The case law shows that courts apparently see ADA violation claims as comparatively unimportant and instead focus on how many cases are filed by the tester. But judges should not deny standing to ADA testers based on concern about the burden on their docket. As others have already noted, "[i]t is easy to see why ADA accessibility cases might seem unimportant," especially due to the technical requirements of the statute, which force a court to deal with issues

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<sup>289</sup> *Id.* at 18.

<sup>290</sup> *See, e.g.*, *Disabled Patriots of Am., Inc. v. Chagrin Retail, LLC*, No. 1:07 CV 2363, 2007 U.S. Dist. LEXIS 91584, at \*1-2 (N.D. Ohio Dec. 13, 2007) (attorney represented a member of a non-profit organization that employed testers to seek out ADA violations); *Norkunas v. Wynn Resorts Holdings, LLC*, No. 2:07-cv-00096-RLH-PAL, 2007 U.S. Dist. LEXIS 77355, at \*2 (D. Nev. Oct. 9, 2007) (attorney represented Disabled Rights Action Committee, a non-profit organization, and two of its members); *Disability Advocates and Counseling Group, Inc. v. 4SK, Inc.*, No. 6:04-cv-327-Orl-31JGG, 2005 U.S. Dist. LEXIS 44389, at \*1-2 (M.D. Fla. Apr. 6, 2005) (attorney represented a non-profit corporation with disabled members); *Milani, supra* note 108, at 134.

<sup>291</sup> *Milani, supra* note 108, at 134.

<sup>292</sup> *Id.* at 133.

<sup>293</sup> *Becker, supra* note 105, at 109 (quoting Email from Amy B. Vandeveld, Attorney (Mar. 8, 2005, 09:39 AM PST)).

<sup>294</sup> *See id.*

<sup>295</sup> *Bagenstos, supra* note 6, at 11 (citing Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537, 547 (2003)).



that it believes to be better suited for local building inspectors.<sup>296</sup> However, this does not change the fact that there is continual violation of a federal statute that was meant to be an “emancipation proclamation”<sup>297</sup> for the disabled population. Whether a class of litigation is burdensome is more likely than not a “normative assessment of the importance” of the lawsuit.<sup>298</sup> The judiciary is not supposed to assess the importance of a congressionally established right. Standing should not depend on whether a judge feels the suit is important, especially when there is reason to believe that those who are disabled are “a discrete and insular minority.”<sup>299</sup> Judges are making an inappropriate judgment “of the importance of that class.”<sup>300</sup> Further, the “economic function of standing does not depend on any particular philosophy about the nature of rights.”<sup>301</sup> Further, judges should not be deciding normative factual issues at the summary judgment stage of litigation; these are issues that need to be addressed after discovery and before the bench trial.<sup>302</sup> (The requests of defendants asking the courts to stop what the defendants deem vexatious litigation is also something that may need to be addressed by a change of law.) It is arguable whether there is a problem with the numerous suits a few plaintiffs have brought in federal courts, but if change is necessary it needs to come from Congress—courts should not redraft the ADA and ignore congressional intent.<sup>303</sup>

### CONCLUSION

No one can deny the importance of Title III for both individuals with disabilities and the nation as a whole. Title III is a broad, sweeping civil rights statute intended to remedy the seclusion faced by those with disabilities. It is one way people with disabilities can gain autonomy—an imperative American value. Title III was meant to be Congress’ solution to the pervasive problem of discrimination against people with disabilities by places of public accommodation.

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<sup>296</sup> Bagenstos, *supra* note 6, at 23–24.

<sup>297</sup> Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 19 (2000) (quoting 136 CONG. REC. S9689 (July 13, 1990) (statement of Sen. Harkin)) (discussing the narrow interpretation courts have taken when it comes to the employment titles of the ADA and the unfortunate results that have resulted from what the author calls a “judicial backlash”).

<sup>298</sup> *Id.* at 21.

<sup>299</sup> 42 U.S.C. § 12101(a)(7) (2000) (amended 2008).

<sup>300</sup> Bagenstos, *supra* note 6, at 21 (citing Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 457 (2004)).

<sup>301</sup> Kontorovich, *supra* note 20, at 1692.

<sup>302</sup> Colker, *supra* note 193, at 111–12.

<sup>303</sup> Milani, *supra* note 108, at 132 (quoting *Sharp v. Waterfront Rest.*, No. 99-CV-200 TW (AJB), 1999 WL 1095486, at \*6 n.1 (S.D. Cal. Aug. 2, 1999)).

The unfortunate reality is that Title III has fallen short of expectations. While the statute grants broad standing rights and Supreme Court precedent suggests an extensive interpretation of standing in civil rights contexts, courts have created a huge wall that numerous Title III plaintiffs cannot scale. Beyond the constitutional standing requirements, numerous courts are focusing on the plaintiff's motivation for bringing the lawsuit and denying standing based on an interpretation of the plaintiff's intentions. Motivation is not an element in the standing analysis created by the Supreme Court. However, the result in courts that concentrate on motivation is that meritorious cases are wrongfully dismissed and facilities remain inaccessible.

Tester standing is the solution to the severe underenforcement and continued willful violations of Title III. It is congruent with congressional intent and does not mean forcing public accommodations out of business. Further, granting tester standing does not require abandoning the Supreme Court's precedents set in *Lyons* and *Lujan*, because the rulings of these two cases have been misapplied and ADA tester cases are clearly distinguishable. In the end, tester standing is more than just the lawfully correct application of constitutional standing requirements. It is more than plaintiffs having their day in court. It means hope for people with disabilities.

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