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Architectural Barriers Under the ADA: An Answer to the Judiciary's Struggle with Technical Non-Compliance

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ARCHITECTURAL BARRIERS UNDER THE ADA: AN ANSWER TO THE JUDICIARY'S STRUGGLE WITH TECHNICAL NON-COMPLIANCE

When most people see a wheelchair, they see confinement, restriction and depression. But a person with a mobility impairment[1] sees freedom, opportunity and hope.[2] Until recently, the American legal community failed to characterize people with disabilities as a distinct group worthy of protection and, as a result, disability-related discrimination went unchecked in our communities.[3] Finally, some Congresspersons sought to establish a federal law to enable persons with disabilities to be treated like those without disabilities. When Senator Lowell P. Weicker, Jr.[4] introduced the Americans with Disabilities Act of 1988 ("ADA of 1988") he quoted Dr. Henry Viscardi, a former member of the National Council on the Handicapped ("National Council"),[5] and stated:

> I do not choose to be a common man. It is my right to be uncommon—if I can. I seek opportunity—not security. I do not wish to be kept a citizen, humbled and dulled by having the state look after me. I want to take the calculated risk; to dream and to build, to fail and to succeed. I refuse to barter incentive for a dole. . . . It is my heritage to stand erect, proud and unafraid; to think and act for myself, enjoy the benefit of my creations and to face the world boldly and say, this I have done. For our disabled millions, for you and me, all this is what it means to be an American.[6]

Sandra Parrino, former chairperson for the National Council, stated:

> Martin Luther King had a dream. We have a vision. Dr. King dreamed of an America "where a person is judged not by the color of his skin, but by

1. Throughout this Comment the authors use examples of disabilities that relate to mobility impairments not as a way of narrowing the scope of this Comment's application but for ease of writing. Therefore, when the reader comes across words or phrases relating to mobility impairments, such is meant to encompass disabilities generally and not to apply to mobility impairments exclusively.

2. Kenneth E. Behring, *Help Someone Sit in the Sun*, BYU MAG., Fall 2002, at 3.

3. 42 U.S.C. § 12101(a) (2000).

4. Senator Weicker is the Senator who first introduced the ADA to the United States Senate. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 387 (1991) (citing 134 CONG. REC. S5106 (daily ed. Apr. 28, 1988)). For a more detailed discussion regarding his participation and his views regarding the Americans with Disabilities Act see *id.*

5. The National Council on the Handicapped is currently called the National Council on Disability. For general background and a history of the National Council see *infra* note 11.

6. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 392 (1991) (quoting 134 CONG. REC. S5110 (daily ed. Apr. 28, 1988)).

> the content of his character." [The] ADA's vision is of an America where persons are judged by their ability and not on the basis of their disabilities. . . .[7]

It was this spirit that led to the enactment of the Americans with Disabilities Act of 1990 ("ADA"). In a display of exuberance, the ADA has been called the "20th Century Emancipation Proclamation for all persons with disabilities."[8] This characterization is not far from the mark. Whereas the original emancipation proclamation, i.e., the Declaration of Independence, brought hope to a nation,[9] the ADA has brought hope to persons with disabilities, that they, like other Americans, may engage in the pursuit of happiness unfettered by arbitrary and senseless restrictions.

But the best of intentions and the loftiest of virtues mean little if not backed by the muscle of an enforcement mechanism. By and large, enforcement of the ADA, similar to other civil rights laws, depends heavily on private litigation.[10] In addition, the National Council on Disability[11] concluded:

> With a 20 percent increase in workload resulting from the enactment of ADA, the Equal Opportunity Commission ("EEOC") is slow in processing complaints. The Department of Justice ("DOJ") is not investigating all the complaints it receives and the Department of Transportation ("DOT") is unable to track the complaints it receives. . . .[12]

Thus, in this first decade following the passage of the ADA, the courts are inundated with ADA claims and have the responsibility for interpreting and construing ADA's text.[13] The text of the ADA, unfortunately, has a genuine need for judicial interpretation and construction due to ambiguities

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7. *Americans with Disabilities Act Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Comm. of Labor and Human Resources*, 100th Cong. 27 (1988) (statement of Sandra Parrino, former Chairperson of the National Council on the Handicapped), *quoted in* Carol J. Greenhouse, *Ethnography and Democracy: Texts and Contexts in the United States in the 1990s*, 13 YALE J.L. & HUMAN. 175, 193 (2001).

8. 136 CONG. REC. 17,369 (1990) (statement of Sen. Tom Harkin).

9. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

10. Cannon v. Univ. of Chicago, 441 U.S. 677, 688 n.6 (1979) (internal citations and emphasis omitted).

11. The National Council on Disability was created by statute on February 22, 1984. 29 U.S.C. § 780(a)(1)(A) (2000). The National Council consists of 15 members who are "appointed by the President, by and with the advice and consent of the Senate." *Id.* § 780(a)(1)(A). Members are to have some relationship with a person with disabilities. *Id.* § 780(a)(1)(C). The National Council's purpose is to "promote policies, programs, practices, and procedures that guarantee equal opportunity for all individuals with disabilities . . . and . . . empower individuals with disabilities to achieve economic self-sufficiency, independent living, and inclusion and integration into all aspects of society." *Id.* § 780(a)(2).

12. NATIONAL COUNCIL ON DISABILITY, ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21ST CENTURY. A DECADE OF PROGRESS IN DISABILITY POLICY SETTING AN AGENDA FOR THE FUTURE (July 26, 1996), *at* http://www.ncd.gov/newsroom/publications/achieving.html (last visited Dec. 1, 2002).

13. Interview with Russell C. Handy, Attorney at Law, Center for Disability Access, in San Diego, Cal. (Nov. 10, 2002) [hereinafter Handy interview].

in its structure and language.[14] Congress, in passing the ADA, created a remarkable recipe for disaster by passing a federal civil rights statute that addressed every single existing business in the nation, but failed to define one of the key terms.[15] This failure to define key terms is an example of the ambiguity that frustrates many practicing lawyers, judges and scholars.

With respect to existing facilities, the ADA defines discrimination as the "failure to remove architectural barriers . . . in existing facilities . . . where such removal is readily achievable. . . ."[16] This prohibition on discrimination has far-reaching effects. Specifically, it means that the ADA does not have a grandfather clause and the law applies not only to new construction, but to existing facilities as well.[17] Amazingly, however, despite the tremendous scope of this statute, neither Congress nor the DOJ[18] defined the term "architectural barrier."[19]

Thus, the courts are responsible for determining what constitutes an architectural barrier. Ironically, there is no binding precedent as neither the Supreme Court nor any circuit court has issued a published opinion defining the term.[20] The district courts' treatment of the issue, both in published and unpublished decisions, lacks uniformity.[21] The definitions urged by various litigants are even more varied.[22]

This Comment examines the various approaches used to define this ever-illusive term. First, because this issue is a matter of statutory construction, the authors discuss the history and background of Title III of the ADA and the nature of its statutory scheme. Second, this Comment outlines the various canons of statutory construction, namely plain language/textualism, legislative history and agency deference. This section then applies the above-mentioned canons of statutory construction and attempts to define architectural barriers under Title III of the ADA, utilizing approaches courts

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14. Matthew A. Stowe, *Interpreting "Place of Public Accommodation" Under Title III of the ADA*, 50 DUKE L.J. 297, 298 (2000).

15. *See generally* 42 U.S.C. § 12181 et seq. (2000).

16. 42 U.S.C § 12182 (b)(2)(A)(iv).

17. *Compare* 42 U.S.C. § 12183(a)(1), *and* 42 U.S.C. § 12183(a)(2), *with* 42 U.S.C. § 12182 (b)(2)(A)(iv).

18. The Department of Justice is the agency empowered to enforce the ADA. 42 U.S.C. § 12206(a)(1).

19. *See* 42 U.S.C § 12181; 28 C.F.R. § 36.104 (2002).

20. *See infra* note 101.

21. *Compare* Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1086 (D. Haw. 2000), *with* Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1367-68 (S.D. Fla. 2001), *with* Pascuiti v. New York Yankees, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999), *with* Order Denying Plaintiff's Motion for Summary Judgment; Denying Defendant's Motion for Summary Judgment at 7-8, Moreno v. Vineeraaj, Inc., (C.D. Cal. 2001) (No. 01-0363) (on file with author), *with* Pickern v. Best Western Timber Cove Lodge Marina Resort, No. CIV.S-00-1637 WBS/DA, 2002 WL 202442 at *2-3 (E.D. Cal. Jan. 18, 2002), *superceded in part by* 194 F. Supp. 2d 1182 (E.D. Cal. 2002), *with* D'Lil v. Stardust Vacation Club, No. CIV-S-00-1496DFL PAN, 2001 WL 1825832 at *5 (E.D. Cal. Dec. 21, 2001).

22. Handy interview, *supra* note 13.

have taken as examples. The second section also includes a critique of the approaches taken by the courts, focusing specifically on the clarity and consistency of the various approaches. Finally, this Comment recommends and defends what the authors determine is the superior definitional scheme. The authors propose a two-fold approach: (A) that defendants more rigorously attack plaintiffs' standing in ADA Title III cases; and (B) that courts adopt a rebuttable presumption with regard to what constitutes an ADA Title III barrier, allowing courts to determine the propriety of plaintiffs' claims consistent with the ADA's purpose.

I. ADA TITLE III HISTORY AND BACKGROUND

Places of public accommodation[23] have historically discriminated against persons with disabilities.[24] This discrimination is not necessarily an outright refusal to serve, nor to allow persons with disabilities in one's place of business. If the term "discriminate" is thought of only in the common vernacular, it can lead to a misunderstanding of its legal scope:

> Although the term "discrimination" evokes images of active discrimination, e.g., a person is expressly forbidden to enter the premises because of his or her disability, Congress also intended to eliminate more passive forms of discrimination, e.g., a person is physically unable to enter the premises because it lacks a wheel-chair accessible entrance.[25]

Indeed Congress sought not only to prohibit deliberate discrimination but also "to eliminate the effects of . . . benign neglect, apathy, and indifference."[26]

Although the ADA gives people with disabilities hope that public accommodations will comply with the law and remove physical barriers that

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23. 42 U.S.C. § 12181(7) delineates the categories of facilities covered under Title III:
- Places of lodging.
- Establishments serving food or drink.
- Places of exhibition or entertainment.
- Places of public gathering.
- Sales or rental establishments.
- Service establishments.
- Stations used for specified public transportation.
- Places of public display or collection.
- Places of recreation.
- Places of education.
- Social service center establishments.
- Places of exercise or recreation.

24. 42 U.S.C. § 12101(a)(3).

25. Indep. Living Res. v. Or. Arena Corp., 982 F. Supp 698, 706 n.1 (D. Or. 1997) (quoting H.R. REP. NO. 101-485(II) at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382 ("a primary purpose of the ADA is to 'bring individuals with disabilities into the economic and social mainstream of American life.'")), *supplemented by* 1 F. Supp. 2d 1124 (D. Or. 1998).

26. Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995) (internal quotations omitted).

impede access, many facilities have not done so. This failure to comply with the law has spawned numerous ADA Title III lawsuits.[27] For a plaintiff to establish a prima facie case under Title III of the ADA, (s)he must establish that: (1) (s)he is disabled; (2) the defendant is a place of public accommodation; and (3) (s)he was denied full and equal enjoyment provided by the public accommodation because of his or her disability.[28]

Finding a person disabled under Title III is generally met by proof of "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[29] Determining whether a defendant's business is a public accommodation is fairly straightforward because the plain language of the ADA delineates the various types of places of public accommodation.[30] The discrimination requirement is more troublesome, as it is difficult to determine whether the plaintiff has been denied full and equal enjoyment of the public accommodation. Yet, the language of the statute clearly states that it is discriminatory to fail to remove architectural barriers when it is readily possible for the defendant to do so.[31] Hence, the importance of a clear definition of architectural barriers is obvious.

The Americans with Disabilities Act of 1990 began as nothing more than a vague recommendation by the National Council.[32] The recommendation was eventually taken to its logical next step and introduced to Congress as a draft bill, the ADA of 1988.[33] As oftentimes happens with proposed legislation, the ADA of 1988 did not become law.[34] However, a re-worded bill with the same purpose was enacted into law and is known today as the ADA.[35]

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27. Handy Interview, *supra* note 13.

28. Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001).

29. 42 U.S.C. § 12102(2)(A) (2000). As this Comment does not explore the myriad of issues surrounding the definition of "disability" under the ADA, for a more thorough analysis of such see Richard C. Dunn, *Determining the Intended Beneficiaries of the ADA in the Aftermath of Sutton: Limiting the Application of the Disabling Corrections Corollary*, 43 WM. & MARY L. REV. 1265 (2002); and Rateb M. Khasawneh, *Sutton v. United Airlines, Inc.: Limiting the Protections Available to Disabled Individuals Under the ADA*, 29 CAP. U. L. REV. 761 (2002).

30. 42 U.S.C. §12181(7). For a more in-depth look at what constitutes a place of public accommodation, see generally Stowe, *supra* note 14 *and* Robert L. Burgdorf Jr., *"Equal Members of the Community": The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551 (1991).

31. 42 U.S.C. § 12182(b)(2)(A)(iv).

32. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 18 (1986).

33. NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE 24-39 (1988).

34. Weicker, *supra* note 6, at 392.

35. *Id.*

A. Toward Independence: The ADA's Humble Beginnings

The ADA began as a twinkle in the eye of the National Council.[36] In 1984, public law mandated that the National Council assess the state of affairs for the disabled and recommend legislative proposals that would increase incentives and eliminate disincentives to more fully integrate persons with disabilities into society.[37] The National Council reported its findings and its recommendations are included in their report entitled, *Toward Independence*.[38]

The National Council found pervasive discrimination against people with disabilities, including negative attitudes and a lack of physical accommodations.[39] To remedy the social and physical discrimination society imposed on people with disabilities, the National Council issued forty-five legislative recommended remedies to the pervasive disability-related discrimination problem.[40] Among those forty-five recommendations were five regarding equal opportunity laws.[41] The overarching recommendation regarding equal opportunity laws stated that "Congress should enact a *comprehensive law* requiring equal opportunity for individuals with disabilities, with broad coverage and setting *clear, consistent,* and *enforceable* standards prohibiting discrimination on the basis of handicap."[42]

The National Council also suggested the law "provide a *clear definition* and *standards* for applying the prohibitions of discrimination on the basis of handicap" and "delineate specific enforcement standards, procedures, and timelines for the implementation of equal opportunity requirements."[43] To assist in providing these standards the National Council recommended that the Architectural and Transportation Barriers Compliance Board[44] ("Access Board") be given the authority and responsibility to issue minimum guide-

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36. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 18 (1986).

37. Rehabilitation Amendments of 1984, Pub. L. No. 98-221 § 142(b), 98 Stat. 17 (1984).

38. *See generally* NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 1 (1986).

39. *Id.*

40. *See generally id.*

41. *Id.* at 11-13, 18-20.

42. *Id.* at 18 (emphasis added).

43. *Id.* at 19 (emphasis added).

44. The Architectural and Transportation Barriers Compliance Board ("Access Board") was created in 1973 by section 502 of the Rehabilitation Act. The Access Board, *A History of the Board, at* http://www.access-board.gov/about/boardhistory.htm (last visited Nov. 26, 2002). The Access Board was created in order to standardize compliance with the Architectural Barriers Act of 1968 ("ABA"). *Id.* The Access Board in response to its mandate "developed accessibility guidelines that were to serve as the basis for standards used to enforce the ABA." *Id.* These "standards" were later adopted by the "standard-setting agencies" and entitled Uniform Federal Accessibility Standards. *Id.* It is certain that these accessibility standards were instrumental in ensuring standardized compliance with the ABA.

lines regarding accessibility.[45] These guidelines are to set the standard for "removal of *architectural*, transportation, and communication *barriers* in facilities, vehicles, programs, and activities covered by the equal opportunity law for people with disabilities."[46]

B. The ADA of 1988: The Logical Next Step

To ensure the implementation of the National Council's recommendations Congress required the National Council to issue a progress report no later than January 30, 1988.[47] As a result of such monitoring, the National Council issued *On the Threshold of Independence*.[48]

On the Threshold of Independence took the recommendation of enacting a comprehensive disability rights law a step further and gave birth to a draft bill entitled "the ADA of 1988."[49] Senator Weicker introduced this draft bill via Senate Bill No. 2345 in the Senate[50] and Representative Coelho introduced a companion bill in the House via House of Representatives Bill No. 4498.[51]

Although the ADA of 1988 was never adopted into law some provisions of the law are notable. First, the ADA of 1988 established as discriminatory "the fail[ure] or refusal to remove; any architectural . . . barrier."[52] The ADA of 1988 did not have different barrier removal requirements for facilities that existed before the law came into existence and those subsequently built. Second, although the text of the ADA of 1988 is clear in its mandate to remove architectural barriers, the provision empowering the Access Board mandates it to issue minimum guidelines regarding architectural accessibility without mention of the term "barriers."[53]

C. The ADA: Finally a Law is Born

In 1989, the ADA was reintroduced into both the House via House of Representatives Bill No. 2273[54] and the Senate via Senate Bill No. 933.[55] Al-

45. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 21 (1986).

46. *Id.* (emphasis added).

47. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 502(b), 100 Stat. 1807 (1986).

48. *See generally* NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE (1988).

49. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE 27 (1986).

50. 134 CONG. REC. 9375 (1988).

51. *Id.* at 9605.

52. Americans with Disabilities Act of 1988, S. 2345, 100th Cong. § 5(a)(2)(B) (1988) *in* 134 CONG. REC. 9380 (1988).

53. Americans with Disabilities Act of 1988, S. 2345, 100th Cong. § 8(a) (1988) *in* 134 CONG. REC. 9381 (1988).

54. 135 CONG. REC. 8601 (1989).

55. 135 CONG. REC. 8505 (1989).

though the wording and structure of the ADA was substantially different from the ADA of 1988, it shared the same general purpose.[56] That purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[57] In order to appropriately explain some of the differences between the two laws, a brief sketch of the ADA is appropriate.

The ADA is divided into five sections, known as Titles. Title I specifically addresses discrimination in private sector employment.[58] Title II focuses on providing people with disabilities access to public programs and activities,[59] while Title III focuses on access to public accommodations.[60] Title IV presents guidelines to ensure that people with disabilities enjoy full and equal access to telecommunications.[61] Finally, Title V addresses a number of miscellaneous provisions.[62] This Comment focuses on Title III—access to public accommodations.

Within Title III, a number of provisions delineate the parameters of disability-related discrimination.[63] Among the many forms of disability-related discrimination is architectural discrimination, or in other words, the failure to make public accommodations physically accessible to persons who are disabled.[64] To provide instruction regarding structural accessibility, Congress directed the Access Board to establish minimum guidelines to ensure architectural accessibility to buildings and facilities.[65] In addition, Congress granted the DOJ power to assist entities covered under Title III in understanding their statutory responsibility.[66]

The Access Board promulgated guidelines entitled the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").[67] The ADAAG is not legally binding itself for ADA Title III purposes, but the DOJ adopted those guidelines and renamed them the *Standards for Accessible Design*.[68] These

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56. *Id.*

57. 42 U.S.C. § 12101(b)(1) (2000).

58. American with Disabilities Act of 1990, Pub. L. No. 101-336, § 108, 104 Stat. 327 (1990).

59. *Id.* §§ 201-246.

60. *Id.* §§ 301-310.

61. *Id.* §§ 401-402.

62. *Id.* §§ 501-514.

63. 42 U.S.C. §§ 12182, 12183(a)(1),(2) (2000).

64. 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12183(a).

65. 42 U.S.C. § 12204(a)-(b).

66. 42 U.S.C. § 12206(a)(1).

67. 28 C.F.R. pt. 36, app. A (2002)

68. Indep. Living Res. v. Or. Arena Corp., 1 F. Supp. 2d 1124, 1130 n.2 (citing 56 Fed. Reg. 35605 (July 26, 1991)); 28 C.F.R. § 36.406(a) (2002). Although *Standards for Accessible Design* is the official name for the legally binding regulations regarding architectural accessibility requirements, many mistakenly refer to them as the ADAAG, which is not legally binding. To avoid confusion, the remainder of this Comment refers to the *Standards for Accessible Design* as the Accessibility Standards.

standards ("Accessibility Standards") "which are codified at 28 CFR Part 36, App. A [] constitute legally binding regulation[s]."[69]

The Accessibility Standards provide specific guidelines regarding the structural accessibility of public accommodations.[70] For example, the Accessibility Standards explain the required minimum number of accessible parking spaces at a public accommodation,[71] the width of a van accessible parking stall access isle,[72] and even the specific slope of a curb ramp.[73] The Code of Federal Regulations specifically states that these technical architectural requirements apply only to newly constructed and altered facilities,[74] thereby excluding their application to facilities already in existence.

The practical application of the Accessibility Standards raises a significant difference between the ADA of 1988 and the ADA. The ADA, unlike its 1988 counterpart, divides the ADA Title III structural requirements into three categories: (1) new construction; (2) alterations; and (3) existing facilities.[75] Within these categories business owners have different responsibilities.

New Construction. A newly constructed public accommodation is one that is built after January 26, 1993.[76] Title III requires that all newly constructed facilities be "readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter."[77] The Accessibility Standards mandate that all new construction meet specified requirements.[78] It is well-settled law that any deviation from the Accessibility Standards in new construction constitutes ADA Title III discrimination, such that facilities not constructed up to standard are not readily accessible.[79]

Alterations. Alterations made by places of public accommodation after January 26, 1992 must be "readily accessible to and useable by individuals with disabilities" to "the maximum extent feasible."[80] The law simply re-

69. *Indep. Living Res.*, 1 F. Supp. 2d at 1130 n.2.

70. 28 C.F.R. pt. 36, app. A, at 1.

71. *Id.* at 4.1.2(5).

72. *Id.* at 4.1.2(5)(b).

73. *Id.* at 4.7.2.

74. *Id.* at 1.

75. *Compare* Americans with Disabilities Act of 1988, S. 2345, 100th Cong. § 5(a)(2)(B) (1988) *in* 134 CONG. REC. 9380 (1988) *with* 42 U.S.C. § 12182(b)(2)(A)(iv) (2000) *and* 42 U.S.C. § 12183(a)(1), (2) (2000).

76. 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.401(a).

77. 42 U.S.C. § 12183(a)(1).

78. 28 C.F.R. pt. 36, app. A, 4.1.1(1).

79. *Cf.* United States v. Nat'l Amusements, Inc., 180 F. Supp. 2d 251, 258 (D. Mass. 2001) (recognizing that compliance with the Accessibility Standards is sufficient to satisfy Title III's new construction requirements) (citing *Indep. Living Res.*, 982 F. Supp. at 746, *supplemented by* 1 F. Supp. 2d 1124 (D. Or. 1998)).

80. 42 U.S.C. § 12183(a)(2); 28 C.F.R. 36.402.

quires that if a physical facility is modified, altered or expanded, it must ensure that the area of modification or alteration or expansion comply with current Accessibility Standards.[81] In addition, funds must be set aside, if necessary, to create accessible paths of travel of the altered area and accessible bathrooms, telephones, and drinking fountains serving the altered area.[82] Once again, the Accessibility Standards adopted by the DOJ determine what is readily accessible and any deviation therefrom constitutes discrimination under this provision of the ADA.[83]

Existing Facility. An existing facility is any public accommodation not required to comply with the ADA's new construction or alteration standards. Since this category encompasses a majority of businesses in the United States, the legal standard regarding architectural discrimination by existing facilities is drastically different. For existing facilities, there is no readily accessible requirement, but the statute mandates "the remov[al] [of] architectural barriers . . . where such removal is readily achievable."[84] Barrier removal is readily achievable if it is easily accomplished and can be carried out without much difficulty or expense.[85] "Determining whether the removal [of any particular barrier] is readily achievable is a case-by-case judgment."[86] The factors the courts are to consider are: (1) the nature and cost of the removal; (2) the overall financial resources of the owner; (3) the number of persons employed at the site; (4) or any other impact of the action on the operation of the site.[87] The DOJ, in its implementing regulations, gives many examples of measures that are likely readily achievable.[88]

President George Bush, upon signing the ADA into law, recognized that the readily achievable standard "[gave] the business community the flexibility to meet the requirements of the [ADA] without incurring undue costs."[89] The readily achievable standard limits a public accommodation's obligation to remove barriers.[90] In addition, this lower standard only requires compliance that can be achieved through minimal investment, thereby providing businesses with a potential financial upswing from increased returns from

81. 42 U.S.C. § 12183(a)(2).

82. *Id.*

83. *Cf.* United States v. Nat'l Amusements, Inc., 180 F. Supp. 2d 251, 258 (D. Mass. 2001) (recognizing that compliance with the Accessibility Standards is sufficient to satisfy Title III's alteration requirements) (citing *Indep. Living Res.*, 982 F. Supp. at 746, *supplemented by* 1 F. Supp. 2d 1124 (D. Or. 1998)).

84. 42 U.S.C. § 12182(b)(2)(A)(iv).

85. 42 U.S.C. § 12181(9); 28 C.F.R. § 36.104.

86. Michael J. Norton, *The ADA: A Trap for the Unwary Building Owner*, 23 COLO. LAW 1293, 1294 (June 1994).

87. 42 U.S.C. § 12181(9); 28 C.F.R. § 36.104.

88. 28 C.F.R. § 36.304(b) (2002).

89. *See* Statement by President George Bush Upon Signing S. 933, 26 WEEKLY COMP. PRES. DOC. 1165 (July 26, 1990), *reprinted in* BERNARD D. REAMS, JR. ET AL., DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990 PUBLIC LAW 101-336, Doc. No. 9 (1992).

90. 28 C.F.R. pt. 36, app. B, § 36.104 (2002)

disabled persons now able to patronize the facilities.[91] Thus, providing accessible places of public accommodation is not just a benefit for persons with disabilities, but also a benefit for businesses.

Although the readily achievable standard is flexible, it is important to note that the rights of persons with disabilities are not compromised because the removal of architectural barriers under the readily achievable standard is a continuing duty.[92] Consequently, people with disabilities can look forward to fully and equally enjoying all places of public accommodation.

II. STATUTORY CONSTRUCTION OF ARCHITECTURAL BARRIERS: WHAT ARE THEY?

Although Congress went to great lengths within Title III to define public accommodation[93] and readily achievable,[94] courts have nonetheless struggled to define these ambiguous legal terms,[95] and, therefore, ADA Title III claims are voluminous.[96] Architectural barriers, a key element in finding discrimination, was *not* statutorily defined and thus courts are left without congressional guidance in interpreting its meaning. Predictably, district courts have applied inconsistent standards in determining what constitutes an architectural barrier. Surprisingly, however, neither legal scholars nor the circuit courts[97] have attempted to delineate its definitional boundaries. The debate may be summed up as follows: What weight should be given to the Accessibility Standards to determine the existence of an architectural barrier? Should the Accessibility Standards be controlling, meaning that any physical characteristic within a public accommodation that is not in strict compliance with the Accessibility Standards is an architectural barrier? Or should the Accessibility Standards just be used as a piece of the puzzle to determine the existence of architectural barriers?

Since architectural barriers is a statutory term, the authors will analyze its definition through common canons of statutory construction, which proceeds as a practical science.[98] Practically speaking, there is a pecking order of sorts when construing a statute. First, one must look at the plain language of the statute to determine whether it is clear on its face. If the statutory text is ambiguous, the legislative history may be examined to clarify congressional intent. Finally, if Congress enables an agency to administer the stat-

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91. S. REP. NO. 101-116, at 66 (1989), *reprinted in* BERNARD D. REAMS, JR. ET AL., DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990 PUBLIC LAW 101-336, Doc. No. 2 (1992).

92. 28 C.F.R. pt. 36, app. B, § 36.304 (2002).

93. 42 U.S.C. § 12181(7) (2000).

94. *See* 42 U.S.C. § 12181(7),(9).

95. Stowe, *supra* note 14, at 298.

96. Handy interview, *supra* note 13.

97. *See infra* note 101.

98. EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES 284 (1940) (citing SEDGWICK, CONSTRUCTION OF STATUTES 192 (2d ed.) (citations omitted)).

ute, deference should be afforded to the agency's interpretation of statutory terms. The authors will employ each of these canons to ascertain the range of structural conditions that the term "architectural barriers" was intended to encompass.

Application of the aforementioned canons in the federal court system has presented two countervailing approaches. One approach suggests that deviation from the Accessibility Standards should be dispositive in the determination of an architectural barrier.[99] The alternative approach, adopted by a number of federal district courts, considers the Accessibility Standards to be valuable guidance, a factor that is relevant, but not determinative.[100] These two approaches, and their variations, will be examined in detail with reference to the canon of statutory construction to which they adhere.

In addition, in order to understand the practical implications of the various approaches the authors will provide a critique for each approach. Since Congress expressly stated that the purpose of the ADA was to, *inter alia*, "provide clear [and] . . . consistent . . . standards addressing discrimination against individuals with disabilities;"[101] the criteria for this critique will be *clarity* and *consistency*.

A. The Statute's Plain Language

The first avenue of statutory construction is the plain language of the statute.[102] In fact, the plain statutory language is often considered the most persuasive evidence of a statute's purpose or meaning.[103] In the instance of

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99. D'Lil v. Anaheim Hotel P'ship, No. 01-56547, 2002 WL 1759758, at *1 (9th Cir. July 30, 2002) (unpublished). In *D'Lil*, the Ninth Circuit held that a condition that did not comply with the Accessibility Standards constituted an architectural barrier. *Id.* The court was specifically concerned with whether the lack of a roll-in shower at a hotel constituted an architectural barrier. *Id.* In answering this question the court recognized the value in using the Accessibility Standards and ultimately stated:

> It is true that, as a general proposition, [the Accessibility Standards] appl[y] only to new construction and to buildings undergoing alterations. However, [the Accessibility Standards] requirement of roll-in showers in new buildings demonstrates that the lack of roll-in showers is both a barrier and the kind of barrier the ADA was intended to overcome. Otherwise, [the Accessibility Standards] would not require roll-in showers at all.

Id. Although not binding precedent, the only circuit court to weigh in on the matter recognized that the proper definition for architectural barriers is the bright-line rule that any condition that fails to meet the Accessibility Standards is an architectural barrier. *Id.*

100. Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001).

101. 42 U.S.C. § 12101(b)(2) (2000).

102. Heckler v. Turner, 470 U.S. 184, 193 (1985) ("In determining [what] Congress intended . . ., we look first, as always, to the language of the statute.") (citing North Dakota v. United States, 460 U.S. 300, 312 (1983)).

103. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.") (quoting United States v. American Truck-

clear, unambiguous statutory language, the plain meaning of the statute mandates the judiciary's decision/ruling.[104] Proponents argue that the statutory text is the most obvious and most objective way to interpret a statute, especially in light of the malleability of legislative intent.[105]

Those supporting "textualist" theories will commonly fall into one of two categories: (1) one who believes that a statute's language is presumed to be accorded its plain meaning, absent compelling legislative history to the contrary; or (2) one who believes that the meaning of the text is determined *solely* through text-based or text-linked sources.[106] The advantage of the former is that it combines guidance from the statutory text, but also incorporates the congressional intent in enacting the statute. The latter, some argue, is more consistent with the rule of law, since it maintains separation of the judicial and legislative powers.[107]

Unfortunately, the ADA's text does not provide much guidance in defining architectural barriers. However, a reasonable inference may be drawn with regard to the choice of terms Congress employed when identifying discrimination in newly constructed or altered facilities as opposed to existing facilities. When Congress defined accessibility with regard to newly constructed or altered places of public accommodation, it used the term readily accessible.[108] On the other hand, the provision that deals with existing facilities employs the term architectural barriers whose removal is readily achievable.[109] Had Congress desired to create uniformity, it could have utilized the same terminology made applicable to all three types of public accommodations. Moreover, the extent to which Congress defined the readily achievable term indicates its intent to hold owners and operators of existing facilities to a significantly lesser standard.[110] Thus, the plain language of the statute shows that Congress indeed wished to create a different standard for determining the accessibility of an existing facility as compared to new construction and alterations.

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ing Assns., Inc., 310 U.S. 534, 543 (1940)).

104. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

105. WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 223 (2000).

106. *Id.* at 224, 228.

107. *Id.* at 229.

108. 42 U.S.C § 12183 (2000).

109. 42 U.S.C. § 12182(b)(2)(A)(iv).

110. 42 U.S.C. § 12181(9).

B. Legislative History

Scholars and the legal practice have long recognized the importance of legislative history in statutory construction.

> It is established practice in American legal processes to consider relevant information concerning the historical background of enactment in making decisions about how a statute is to be construed and applied. This would especially be true where there is no case law directly on point, or the statutory language is inadequate or unclear. These extrinsic aids may show the circumstances under which the statute was passed, the mischief at which it was aimed and the object it was supposed to achieve. Although a court may make and pronounce findings about the purpose of a statute, or the mischief it was to remedy, without referring to its historical background, knowledge of circumstances and events which comprise the relevant background of a statute is a natural basis for making such findings.[111]

The power of legislative history is evident, as the plain meaning of a statute's text may be overcome by contradictory language or other strong evidence contained in the statute's legislative background.[112] Thus,

> [w]hen the statutory language is clear, and there is no reason to believe that it conflicts with the congressional purpose, then legislative history need not be delved into, unless it is brought to the court's attention that there is within the legislative history something so probative of the intent of Congress as to require a reevaluation of the meaning of the statutory language.[113]

Needless to say, the attempt to determine the legislature's intent is not flawless but it is nonetheless a valuable method of statutory construction. Tracking legislative history to determine the framers' intent regarding a particular issue in the statute may take many forms, specifically: (1) determining Congress' specific intent on the matter; (2) attempting to perform imaginative reconstruction; and (3) following the statute's general purpose, or in other words, purposivism.[114] This Comment will attempt to define architectural barriers using each mode of legislative history.

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111. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48.03 (6th ed., West Group 2000) (citations omitted).

112. Seidel v. Seidel, 752 F.2d 1382, 1385 (1985) (citing Tulalip Tribes of Wash. v. FERC, 732 F.2d 1451, 1455 (9th Cir. 1984) and Heppner v. Alyeska Pipeline Service Co., 665 F.2d 868, 873 (9th Cir. 1981)).

113. *Heppner*, 665 F.2d at 871.

114. WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 213-14 (2000).

1. Specific Intent

Looking to the drafter's specific intent is the most legitimate basis for statutory interpretation under the intentionalist theories.[115] But, to determine the drafter's specific intent regarding a particular provision of a statute is very difficult. In the case of the Title III of the ADA, Congress' specific intent regarding the definition of architectural barriers is unclear at best. The wealth of legislative information regarding debates and committee reports focusing on Title III's readily achievable standard addresses the concerns for the financial responsibilities of business owners in their barrier removal obligations, yet ironically, no mention is made as to what actually constitutes an architectural barrier. Therefore, the specific intent regarding Congress' definition of architectural barriers is realistically undefined.

2. Imaginative Reconstruction

The next method of legislative history is imaginative reconstruction. Imaginative reconstruction is when one tries to discover "what the lawmaker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy."[116] In the case of the ADA, although there is an awkward silence in the text of the legislative history regarding what constitutes an architectural barrier, courts have nonetheless used their imagination to reconstruct Congress' intent regarding architectural barriers. This approach may be referred to as the valuable guidance approach.[117]

The valuable guidance approach states that the Accessibility Standards may be one factor taken into consideration in determining whether an architectural barrier exists, but refuse to conclude that failure to strictly comply with the Accessibility Standards is an architectural barrier *per se*.[118] "Even though only new construction and alterations must comply with the [Accessibility] Standards, those [Accessibility] Standards nevertheless provide

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115. *Id.* at 214.

116. *Id.* at 218-19 (citing Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907)).

117. The authors use the "valuable guidance" approach to encapsulate the thread of similarity of the various district courts' opinions on the subject; that being the Accessibility Standards should be used as "valuable guidance." Pickern v. Best Western Timber Cove Lodge Marina Resort, No. CIV-S-00-1637 WBS/DA, 2002 WL 202442, at *2-3 (E.D. Cal. Jan. 18, 2002), *superceded in part by* 194 F. Supp. 2d 1128 (E.D. Cal. 2002); D'Lil v. Stardust Vacation Club, No. CIV-S-00-1496DFL PAN, 2001 WL 1825832, at *5 (E.D. Cal. Dec. 21, 2001); Plaintiff's Motion for Summary Judgment; Denying Defendant's Motion for Summary Judgment at 7-8, Moreno v. Vineeraaj, Inc., (C.D. Cal. 2001) (No. 01-0363) (on file with author); Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1367-68 (S.D. Fla. 2001); Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1086 (D. Haw. 2000); Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999).

118. *Pascuiti*, 87 F. Supp. 2d at 226; *Access Now, Inc.*, 161 F. Supp. 2d at 1367.

valuable guidance for determining whether an existing facility contains architectural barriers."[119] This view has been adopted by a number of courts who have determined that:

> Deviation from the [Accessibility Standards] is relevant but not determinative; it is one consideration from which the court may conclude that non-compliance impedes access. At trial, a defendant may be able to rebut this evidence by showing that despite the technical non-compliance, the challenged accommodation in fact allows disabled persons effective access.[120]

A reason for this soft standard is the courts' fear of holding businesses liable for technical non-compliance with the Accessibility Standards.[121] Courts have reasoned that "[i]n certain instances, injunctive relief may not be appropriate for violations of [Accessibility Standards] that are deemed to be *de minimis*. . . . Such *de minimis* violations do not materially impair the use of an area for its intended purpose, nor does it pose any apparent danger to persons with disabilities."[122]

In articulating this valuable guidance approach to defining architectural barriers, the courts appear to conflate the propriety of a plaintiff's claim with the existence of an architectural barrier. Specifically, the ADA creates a duty for business owners to remove architectural barriers commensurate with the business' financial wherewithal.[123] A logical inference from the statutory language is that an architectural barrier is not determined by who encounters the barrier because, if that were the case, business owners would be left with no guidance on how to prevent architectural discrimination and therefore discharge their duty under the ADA. Nonetheless, courts adopting the valuable guidance approach strain to point out that the plaintiff must show that the facility contained barriers that hindered his or her access.[124] In essence, the plaintiff has to prove that the alleged barrier *subjectively* hindered his or her full use and enjoyment of the facility. Thus, the courts conclude that the existence of an architectural barrier is a material issue of fact and must be determined by the jury on a case-by-case basis.[125]

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119. *Pascuiti*, 87 F. Supp. 2d at 226 (emphasis added).

120. *Access Now, Inc.*, 161 F. Supp. 2d at 1368.

121. Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1086 n.26 (D. Haw. 2000).

122. *Id.* (emphasis added).

123. 42 U.S.C. § 12182(b)(2)(A)(iv) (2000).

124. *Moreno*, at 8 (citing D'Lil v. Stardust Vacation Club, No. CIV-S-00-1496DFL PAN, 2001 WL 1825832, at *4-5 (E.D. Cal. Dec. 21, 2001)) (emphasis added).

125. *Moreno*, at 8. *See also Pickern*, 2002 WL 202442, at *3 ("the mere fact that motel bathrooms did not meet [Accessibility Standards] spatial requirements was insufficient to grant summary judgment for plaintiff"), *superceded in part by* 194 F. Supp. 2d 1128 (E.D. Cal. 2002).

3. Practical Significance

The valuable guidance approach is attractive because it does not hold an existing facility to the rigid requirements of the Accessibility Standards and appears to follow the congressional intent to lower the standard for existing facilities. However, this approach lacks both *clarity* and *consistency*. Under this approach, whether an existing facility contains barriers is determined not necessarily by what the regulatory agency has determined is readily accessible, but instead by who actually encounters the barrier and whether or not his or her access was truly impeded. Therefore, although courts that apply the valuable guidance approach appear to do so to protect defendants from being held liable for technical non-compliance, this approach leaves defendants unsure as to how to discharge their duty or, in other words, how to protect themselves from ADA Title III liability. In addition, the valuable guidance approach cuts both ways. Specifically, since plaintiffs may not use the Accessibility Standards as conclusive proof to establish the existence of a barrier, neither can defendants argue that compliance with the Accessibility Standards is *per se* proof that a particular condition is not a barrier. This lack of *clarity* hinders both potential plaintiffs and defendants.

Although this approach seems to be gaining favor among courts today, policy considerations raise concern about the lack of *consistency* in rulings that could result from such a position. By determining what constitutes a barrier on a case-by-case analysis, the valuable guidance approach allows for two exact conditions to exist in two different jurisdictions where one is a barrier while the other is not. A case-by-case determination of an architectural barrier is certain to provide inconsistent rulings among the courts.

C. Agency Deference

When the statute itself enables an agency to assist in the statute's administration,

> [the] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of [the agency].[126]

Thus, when Congress implicitly or explicitly leaves statutory gaps, it often empowers an administrative agency to formulate policies and regulations to fill those gaps.[127] Specifically, when Congress enacted the ADA, it left a

126. Chemical Mfg. Assn. v. Natural Res. Def. Council, Inc., 470 U.S. 116, 125 (1985) (citing Train v. Nat'l Res. Def. Council, Inc., 421 U.S. 60, 75, 87 (1975)).

127. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (internal quotations omitted).

mandate to the DOJ to assist entities in understanding their statutory responsibilities.[128] Therefore, the regulations promulgated by the DOJ are controlling unless the regulations are arbitrary, capricious or patently contrary to the statute.[129]

In response to the congressional mandate, the DOJ created the Accessibility Standards for newly constructed and altered facilities. The DOJ specifically required newly constructed facilities and alterations made to facilities to be in full compliance with the Accessibility Standards.[130] Conversely, no such prerequisite was made for existing facilities other than the express requirement that architectural barriers be removed if readily achievable.[131] Therefore, one may note that *inclusio unius est exclusio alterius* (inclusion of one thing is the exclusion of another). By specifically requiring newly constructed and altered facilities to comply with the Accessibility Standards, the DOJ was well aware of this standard and could have made it a universal requirement for existing facilities as well. Thus, it appears that use of the Accessibility Standards as the threshold for defining an architectural barrier in an existing facility is inconsistent with the apparent position taken by the DOJ, the agency empowered to regulate the ADA.

Undoubtedly, the rationale for this distinct standard was to minimize the financial burden on owners and operators of existing places of public accommodation. For example, the Accessibility Standards require that doorways in such facilities have a minimum clear opening of 32 inches.[132] Satisfaction of this requirement is easily accomplished in a building constructed after enactment of the ADA, as architects and contractors, aware of this requirement, will ensure that the doorways are of the appropriate width while the building is still in the planning stages. Conversely, the widening of a doorway in a place of public accommodation already in existence could require an enormous expense to a business owner who may not have the financial wherewithal to accommodate such a change. Thus, the significantly lower standard for existing facilities is clearly justified.

As this position is consistent with the valuable guidance approach, this section will not reiterate the above-mentioned critique.

However, this does not seem to be the only approach taken by the DOJ. Some note that it is unnecessary to deviate from the Accessibility Standards when defining architectural barriers because the readily achievable prerequisite lowers the standard for compliance as Congress desired.[133] "It is the 'readily achievable' requirement, defined as 'easily accomplishable and able to be carried out without much difficulty or expense,' that provides the lesser

128. 42 U.S.C. § 12206(a)(1) (2000).
129. *See Chevron U.S.A., Inc.*, 467 U.S. at 844.
130. 28 C.F.R. § 36.406 (2002).
131. 28 C.F.R. § 36.304.
132. 28 C.F.R. pt. 36, app. A, 4.13.5.
133. Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999).

standard for existing facilities under Title III."[134] Therefore, given the additional obligation of the barrier removal as being readily achievable, it is possible to define architectural barriers as any condition that deviates from the Accessibility Standards, and still be consistent with the intent to provide for different standards for existing facilities and new construction.

This position is advocated by at least one representative of the DOJ. In *Pascuiti v. New York Yankees*,[135] an Assistant U.S. Attorney ("AUSA") indicated its position with regard to the architectural barrier definition in a letter to the defendant:

> Under the ADA, existing facilities are obligated to bring their facilities as close to compliance with the Standards as is readily achievable. Therefore, we consider any element in a facility that does not meet or exceed the requirements set forth in the [Accessibility] Standards to be a barrier to access.[136]

If this statement is indeed DOJ's position, it should be afforded deference when determining what constitutes an architectural barrier under Title III. In fact, district courts have cited to this letter in their conclusion that the DOJ has adopted this position.[137] However, careful scrutiny of this AUSA's letter shows that the courts have incorrectly applied the law in equating the position of DOJ *counsel* with an official position by the DOJ.

An agency's interpretation is not necessarily unworthy of deference simply because it is made the form of a legal brief.[138] However, the Supreme Court has generally declined to "give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position."[139] The Court's rationale rests on the ground that the administrative agency, not its counsel, is responsible for articulating and enforcing statutory command.[140] Furthermore, agency interpretations that are not subject to public notice and comment procedures, such as the letter to the defendants in *Pascutti*, are not afforded substantial deference.[141] Instead, the "interpretations contained in informal formats are entitled to respect, but only to the extent that those interpretations have the power to persuade."[142] Therefore, a letter by an AUSA should not be equated to an official position by the DOJ.

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134. *Id.* (internal citations omitted).

135. 87 F. Supp. 2d 221.

136. Letter from Robert W. Sadowski, Assistant United States Attorney, to John C. Lawn, Vice President and Chief of Operations, Yankees Baseball, and Marjorie A. Cadogan, General Counsel, City of New York Parks Department (Apr. 8, 1988) at 3 (on file with author).

137. *See, e.g.*, Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1086 (D. Haw. 2000).

138. Robert Wood Johnson Univ. Hosp. v. Thompson, 297 F.3d 273, 282 (3d Cir. 2002).

139. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988).

140. *Id.*

141. Southern Utah Wilderness Alliance v. Bureau of Land Mgmt., 147 F. Supp. 2d 1130, 1135 (C.D. Ut. 2001).

142. *Id.* (internal quotes omitted).

In addition, the DOJ's actions subsequent to the enactment of the ADA indicate that it did not intend for existing facilities to be held to the Accessibility Standards. The *ADA Title III Technical Assistance Manual* defines architectural barriers as "physical elements of a facility that impede access by people with disabilities,"[143] but says nothing to indicate that it believes any condition that is not compliant with the Accessibility Standards to be an architectural barrier. Even more convincing, the DOJ states in the *ADA Guide for Small Businesses* that "[i]n evaluating what barriers need to be removed, a business should look to the [Accessibility Standards] *as a guide*."[144] The authors made numerous attempts to contact DOJ officials to determine the their official position, but such contacts were fruitless, as the authors discovered a myriad of discrepancies.[145] Therefore, it is highly unlikely that one could conclusively state that the official position of the DOJ is that any noncompliance with the Accessibility Standards constitutes a barrier under Title III.

Moreover, the preamble to the DOJ's regulations states, "[i]n striking a balance between guaranteeing access to individuals with disabilities and recognizing the legitimate cost concerns of businesses and other private entities, the ADA establishes different standards for existing facilities and new construction."[146] Thus, this approach is wholly inconsistent with the ADA to define an architectural barrier at an existing place of public accommodation as being any condition that does not meet all the Accessibility Standard requirements.

1. Practical Significance

Although it is doubtful that the DOJ's official position is to hold existing facilities to the rigid Accessibility Standards, such a position is valuable from a policy standpoint because of the *clarity* this bright-line rule establishes for both courts and the parties. Business owners would benefit because they would know precisely what barriers must be removed from their premises in order to immunize themselves from liability. Similarly, disabled persons would know that they could not bring an action against a business that

143. U.S. DEP'T OF JUSTICE, ADA TITLE III TECHNICAL ASSISTANCE MANUAL III-4.4100 (1993), *at* http://www.usdoj.gov/crt/ada/taman3.html (last visited Dec. 2, 2002).

144. U.S. DEP'T OF JUSTICE, ADA GUIDE FOR SMALL BUSINESSES 3 (1999), *at* http://www.usdoj.gov/crt/ada/smbusgd.pdf (last visited Dec. 2, 2002) (emphasis added).

145. *Compare* Telephone Interview with Janet Blizard, Supervisory Attorney, Public Access Section, Department of Justice (Nov. 5, 2002) (stating that the Accessibility Standards can be looked to for guidance, but ultimately, the existence of an architectural barrier must be viewed on a case-by-case basis and must be a qualitative analysis with emphasis placed on the effect of the barrier on the plaintiff) *with* Telephone Interview with Robert Sadowski, Assistant U.S. Attorney, Department of Justice (Oct. 15, 2002) (stating that any non-conformity with the Accessibility Standards is a barrier to access).

146. 28 C.F.R. pt. 36, app. B, § 36.304 (2002).

was in compliance with the Accessibility Standards, *even if* the architectural barriers nonetheless impeded their access.

Furthermore, such a position would facilitate *consistency* in court rulings, at least with respect to the definition of architectural barriers. Specifically, an alleged van-accessible parking stall with a 72-inch access isle as opposed to the Accessibility Standard's required 96-inch access isle[147] would be an architectural barrier in New York, Tennessee, Wisconsin and California regardless of the person who encountered the condition. It is important to note that just because courts find a particular condition constitutes a barrier, that does not mean failure to remove such is discriminatory. The relief valve Congress provided to alleviate the burden on existing facilities was the readily achievable clause.[148] Hence, allowing courts to render consistent rulings would not increase the burden on business owners as they would only be required to remove the barriers if doing so is readily achievable for that particular business.[149]

Not only would this standard facilitate consistency in legal battles but it would also assist the DOJ in achieving its goal of voluntary compliance with the ADA.[150] By instituting a bright line standard owners of public accommodations are clear as to what constitutes a barrier and can better anticipate potential litigious conflicts and remove such barriers.[151]

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147. *Id.* pt. 36, app. A, 4.1.2(5)(b).

148. 42 U.S.C. § 12182(b)(2)(A)(iv) (2000).

149. *Id.*

150. U.S. DEP'T OF JUSTICE, *supra* note 143, at 2.

151. This approach is not as strict as it may appear at first impression. For example, section 2.2 of the Accessibility Standards provides that "[d]epartures from particular technical and scoping requirements of this guideline by the use of other designs and technologies are permitted where the alternative designs and technologies used will provide *substantially equivalent or greater access* to and usability of the facility." 28 C.F.R. pt. 36, app. A, 2.2 (emphasis added). This provision, as traditionally applied to new construction, gives architects the flexibility to design facilities that may not strictly comply with the Accessibility Standards but nonetheless provide equivalent facilitation. Telephone Interview with Beth Stewart, Deputy Council for the Access Board (Oct. 25, 2002). Indeed, when "[p]roperly read, the 'Equivalent Facilitation' provision does not allow facilities to deny access under certain circumstances, but instead allows facilities to bypass the technical requirements laid out in the [Accessibility] Standards when alternative designs will provide 'equivalent or greater access to and usability of the facility.'" Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront, 193 F.3d 730, 739 (3d Cir. 1999). Although this provision provides flexibility it does not prevent strict compliance, as many of the Accessibility Standards are not susceptible to equivalent facilitation. Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 727-28 (D. Or. 1997) *supplemented by* 1 F. Supp. 2d 1124 (D. Or. 1998).

For the same reasons mentioned above, this provision of the Accessibility Standards would provide flexibility in what business owners are required to remove as architectural barriers in existing facilities so long as there is equivalent facilitation. Thus, if an owner of an existing facility can show that, although a condition on his premises may technically violate the Accessibility Standards, it is not a barrier because it provides equivalent facilitation to the facility.

Similarly, section 3.2 of the Accessibility Standards provides that "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." 28 C.F.R. pt. 36, app. A, 3.2 (2002). "Construction tolerances may be defined as the permitted variations from

III. RECOMMENDATIONS—STANDING AND A REBUTTABLE PRESUMPTION

None of the aforementioned definitional approaches to what constitutes an architectural barrier strikes the delicate balance required to meet the ADA's goals, namely to provide a clear, consistent and enforceable standard of discrimination under Title III of the ADA. Nevertheless, the authors believe this balance can be attained through a two-pronged approach. First, courts should more rigorously apply the doctrine of standing, a doctrine infrequently utilized in ADA causes of action.[152] To understand how the doctrine of standing will help courts to ferret out illegitimate claims involving purely technical non-compliance the authors will undertake a brief explanation of standing under the ADA. Second, courts should apply a rebuttable presumption to the definition of architectural barriers. The presumption being that a physical condition that fails to meet the requirements of the Accessibility Standards constitutes an architectural barrier. The authors then suggest how defendants may rebut this presumption.

A. Standing Under the ADA

Similar to all other federal cases, an ADA cause of action requires that a plaintiff have standing to sue.[153] In other words, the disabled person must suffer an injury in fact, which must be causally connected to the defendant's action, and that injury must be redressed by a judgment in the plaintiff's favor.[154] Because injunctive relief is the sole remedy under Title III of the ADA, the plaintiff must also show a real and immediate threat of future injury.[155] This requirement can be reduced to the plaintiff showing that (s)he had definite plans to return to the place of public accommodation, such as a frequently visited restaurant.[156]

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given dimensions, locations, or alignments, based on field, material, manufacturing, and workmanship conditions." Access Now, Inc. v. Ambulatory Surgery Ctr., No. 99109CIVSEITZ/GARBER, 2001 WL 617529 *3 (S.D. Fla. May 2, 2001). This section recognizes that *de minimis* tolerances must be made for basic installation or construction of facilities. Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1086 (D. Haw. 2000); Indep. Living Res. v. Or. Arena Corp., 1 F. Supp. 2d 1124, 1153 (D. Or. 1998). Thus, if a plaintiff argues that he was discriminated against because a ramp was too steep, as it failed to meet the width requirements of the Accessibility Standards; the defendant may be able to nonetheless demonstrate compliance with the Accessibility Standards by showing that the discrepancy is due to conventional building industry tolerances.

152. Amy F. Robertson, *Standing to Sue Under Title III of the ADA*, 27 COLO. LAW 51, 51 (Mar. 1998) (noting that standing is raised only rarely in Title III cases).

153. Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001).

154. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

155. Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1364 (S.D. Fla. 2001).

156. Bird v. Lewis & Clark Coll., 303 F.3d 1015, 1020 (9th Cir. 2002) (explaining that the plaintiff lacked standing to sue under Title III of the ADA because she did not "allege[ ] that she plan[ned] to return"); *Shotz*, 256 F.3d at 1081 (explaining that because plaintiffs neither attempted to return nor alleged a desire to do so in the future they lacked standing to

1. Actual Knowledge and Futile Gestures

As a preliminary matter, it is important to understand that Congress did not intend to limit a plaintiff's right to sue for only those barriers (s)he actually and physically encountered.[157] Instead, the ADA allows plaintiffs to seek an injunction for those barriers not encountered, but only "if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions."[158] Furthermore, the barrier must be within the class of barriers that affect that person's disability. For example, in *Parr v. L & L Drive-Inn Restaurant*,[159] the court allowed the plaintiff to prevail and enjoin the defendant for architectural barriers related to his specific disability because the plaintiff had both encountered certain barriers personally, and had an actual knowledge of the existence of other violations throughout the facility.[160] Moreover, courts have extended standing to cover all areas with barriers that a plaintiff might encounter in a given facility.[161] "To hold otherwise would be piecemeal compliance. To compel a building's ADA compliance, numerous disabled plaintiffs, each injured by a different barrier, would have to seek injunctive relief as to the particular barrier encountered until all barriers had been removed. This not only would be inefficient, but impractical."[162]

However, other courts have cautioned against a broad reading of the standing doctrine in ADA cases.[163] These courts are careful to point out that a plaintiff is not entitled to seek relief from violations of the ADA about which they lack actual knowledge.[164]

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bring an ADA Title III cause of action); Hoepfl v. Barlow, 906 F. Supp. 317, 320 (E.D. Va. 1995) (stating that "because [the plaintiff] now resides in a different state, it is highly unlikely that she will ever again be in a position where any discrimination by [the defendant] against disabled individuals will affect her personally" and therefore the plaintiff lacked standing).

157. 42 U.S.C. § 12188(a)(1) (2000).

158. *Id.*

159. 96 F. Supp. 2d 1065

160. *Parr* v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1081-82 (D. Haw. 2000). *See also* Steger v. Franco, 228 F.3d 889, 894 (8th Cir. 2000) (explaining that a disabled person need not encounter all existing barriers to obtain effective relief so long as the plaintiff encountered some barrier to access when visiting the facility).

161. Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 762 (D. Or. 1997) *supplemented by* 1 F. Supp. 2d 1124 (D. Or. 1998).

162. Pickern v. Best Western Timber Cove Lodge Marina Resort, No. CIV.S-00-1637 WBS/DA, 2002 WL 202442 *4 (E.D. Cal. Jan. 18, 2002) (citing *Indep. Living Res.*, 982 F. Supp. at 762) *superceded in part by* Pickern v. Best Western Timber Cove Lodge Marina Resort, 194 F. Supp. 2d 1128 (E.D. Cal. 2002).

163. Access Now, Inc. v. S. Fla. Stadium Corp., 161 F. Supp. 2d 1357, 1365 (S.D. Fla. 2001). *See also* Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996).

164. Access Now, Inc., 161 F. Supp. 2d at 1365 ("Courts in this Circuit addressing the issue have consistently refused to grant injunctive relief absent evidence that the plaintiff actually suffered —and will again suffer —discrimination in violation of Title III.").

Courts nonetheless agree that plaintiffs do not have standing to sue for barriers that are unrelated to the plaintiff's disability.[165] For example, a blind person would not be able to recover for architectural barriers that would only be a barrier to a person who is unable to ambulate and is required to be in a wheelchair.

> Although Congress may, by legislation, expand standing to the fullest extent permitted by Article III, . . . in no event, . . . may Congress abrogate the Article III minima: A plaintiff must always have suffered "a distinct and palpable injury to himself," . . . that is likely to be redressed if the requested relief is granted.[166]

To allow plaintiffs to sue for non-related barriers would call into question the injury in fact requirement, since the disabled person did not suffer discrimination as a result of the barrier. To put it nicely, "[a] disabled person cannot vindicate the rights of disabled persons generally."[167]

2. Standing—An Answer to Technical Non-Compliance

Courts' reluctance to require existing facilities to strictly comply with the Accessibility Standards is a result of the courts' concern of leaving business owners open for potential claims for technical non-compliance.[168]

One solution to the ever-present contest between cries of technical non-compliance and the importance of clear guidelines is found within traditional Article III standing requirements. Perhaps due to the expansive reading of standing in ADA cases, defendants and courts alike appear reluctant to contest a disabled person's standing in an ADA Title III action.[169] Nevertheless, the doctrine of standing provides authority for the dismissal of lawsuits where technical non-compliance has not caused a disabled person to suffer an actual injury, while avoiding the pitfalls of the valuable guidance standard.

Congress explicitly stated that the failure to remove an architectural barrier, for which it is readily achievable to remove, is a specific act of discrimination under the ADA.[170] However, the statutory mandate that the failure to remove an architectural barrier constitutes discrimination does not

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165. Parr v. L & L Drive-Inn Rest., 96 F. Supp. 2d 1065, 1082 (D. Haw. 2000).

166. *Id.* at 1082 (internal citations and quotations omitted).

167. *Id.* at 1083 (citing Delil v. El Torito Rests., Inc., No. C 94-3900 CAL, 1997 WL 714866, at *5 (N.D. Cal. June 24, 1997)). *See also* Vandermolen v. Roosevelt, No. 1:97CV 200, 1997 WL 853505 (W.D. Mich. Oct. 28, 1997) (finding that plaintiff suffering from physical and psychological maladies did not have standing to sue for accessibility claims relating to wheelchair disabled, deaf, and blind persons).

168. *See* Indep. Living Res. v. Or. Arena Corp., 1 F. Supp. 2d 1124, 1153 (D. Or. 1998); Pascuiti v. N.Y. Yankees, 87 F. Supp. 2d 221, 226 (S.D.N.Y. 1999).

169. Amy F. Robertson, *Standing to Sue Under Title III of the ADA*, 27 COLO. LAW 51, 51 (Mar. 1998) (noting that standing is raised only rarely in Title III cases).

170. 42 U.S.C. § 12182(b)(2)(A)(iv) (2000).

give *any* disabled person the right to bring a federal cause of action, since the "[c]ongressional creation of a right does not eliminate the constitutional requirement of standing to assert that right in court."[171] Thus, "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated . . . [Congress] cannot confer standing by statute alone."[172]

Accordingly, it is imperative for a plaintiff claiming a cause of action under Title III of the ADA to show that (s)he has been legitimately aggrieved in order to have standing. In addition, since the only remedy available under the ADA is injunctive relief, a plaintiff alleging ADA violations must demonstrate a "real and immediate threat" of repeated *future* harm to satisfy the injury in fact prong of the standing test.[173] Simply put, a plaintiff must show that (s)he is likely to be served by the defendant in the future and that the defendant is apt to discriminate against him/her at that time.[174] Thus, when a plaintiff alleged pervasive and continuing ADA violations at a restaurant, but could not demonstrate that she was likely to go back to the restaurant and experience discrimination in the future, such plaintiff did not have standing to sue.[175] Rigorous application of this standing requirement will certainly discourage "professional plaintiffs" who file actions claiming ADA violations in many places of public accommodation at which it is highly unlikely that such persons will visit in the future.

Some innovative defendants have found an escape in the ADA's standing requirement of a real and immediate threat of future harm by performing an immediate fix of all conditions that are not in accordance with the Accessibility Standards.[176] For example, assume that a plaintiff brought a lawsuit against a restaurant alleging discrimination because the restaurant only has steps at its entrance, which are a barrier to wheelchair users. If the restaurant were to immediately install a ramp in compliance with the Accessibility Standards, the defendant could bring a motion to dismiss, on grounds that the installation of the ramp has eliminated the possibility that the plaintiff will again encounter this barrier. Since the restaurant is now compliant, there is no real and immediate threat of future harm, and therefore the plaintiff

171. Hoepfl v. Barlow, 906 F. Supp. 317, 322 (E.D. Vir. 1995).

172. Doe v. Nat'l Board of Medical Exam'rs, 199 F.3d 146, 153 (3d Cir. 1999).

173. Aikins v. St. Helena Hospital, No. C 93-3933 FMS, 1994 WL 794759, at *3 (N.D. Cal. Apr. 4, 1994).

174. *Id.*

175. DeLil v. El Torito Rests., No. C 94-3900-CAL, 1997 WL 714866, at *5 (N.D. Cal. June 24, 1997); *cf.* Aikins, 1994 WL 794759, at *3 (denying defendant's motion to dismiss because plaintiff frequently visits a location near the defendant's hospital and the court "consider[ed] it reasonably possible that she might need to seek services from the hospital.").

176. *See, e.g.,* Memorandum of Points and Authorities in Support of Home Depot U.S.A., Inc.'s Motion for Summary Judgment or in the Alternative Motion for Summary Adjudication at 8, DiPrima v. Home Depot U.S.A., Inc., No. 02CV-1448 RSWL (CWx) (C.D. Cal. 2002) ("There is no injunctive relief that the Court can order because Home Depot is in conformance with Plaintiff's requested injunctive relief.").

lacks standing to bring a claim for injunctive relief, Title III's only available remedy.[177]

B. Rebuttable Presumption

In addition to a more rigorous application of standing, the authors also advocate an approach alluded to in *Access Now, Inc. v. South Florida Stadium Corp.*[178] that strikes the delicate balance in satisfying the countervailing policies of providing a clear and consistent standard for existing facilities to follow, but allows owners and operators of public accommodations an opportunity to avoid liability for technical non-compliance. The recommended approach is a presumption that non-compliance with the Accessibility Standards is an architectural barrier. But, recognizing that the "ADA is a civil rights law, not a building code,"[179] defendants may rebut this presumption by proving that while not strictly compliant with the Accessibility Standards, the alleged barrier did not discriminate against the plaintiff because his or her full and equal enjoyment of the facility was not impaired.[180]

As the burden of proof is initially upon the plaintiff, this presumption allows plaintiffs to meet his/her burden by demonstrating that because the defendant's facility is not compliant with the Accessibility Standards, it contains architectural barriers. This presumption is also beneficial for defendants as owners of existing facilities can consult with the Accessibility Standards to determine which, if any, of the conditions present are in violation of those standards and are therefore architectural barriers within the meaning of Title III. Hence, owners and operators of places of public accommodations can prevent lawsuits by simply following the Accessibility Standards. In this way, the presumption that all violations of the Accessibility Standards in existing places of public accommodation are architectural barriers creates a clear and consistent standard that meets Congress' mandate.[181]

However, the greatest advantage of this presumption is that it can be rebutted by evidence presented by the defendant showing that, although a facility did not comply with the Accessibility Standards, an architectural barrier did not exist because the plaintiff's full and equal enjoyment[182] of the

177. *See* 42 U.S.C. § 12188(a) (2000).

178. 161 F. Supp. 2d 1357, 1368 (S.D. Fla. 2001) (recognizing that "[d]eviation from the standards is relevant but not determinative; it is one consideration from which the court may conclude that noncompliance impedes access. At trial, a defendant may be able to rebut this evidence by showing that despite the technical noncompliance, the challenged accommodation in fact allows disabled persons effective access.").

179. Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 745 (D. Or. 1997) *supplemented by* 1 F. Supp. 2d 1124 (D. Or. 1998) (explaining the DOJ's position in the case).

180. 42 U.S.C. § 12182(a) (1994) (Title III's general prohibition on discrimination).

181. *See id.* § 12101(b)(2).

182. *Id.* § 12182(a).

facility was not impaired.[183] For example, if a restaurant's alleged van accessible handicapped parking space has an access aisle that is 95 inches wide, it has technically violated the Accessibility Standards, which require a 96-inch wide access aisle.[184] A defendant has a legitimate concern that a "professional plaintiff" might measure the parking space and then bring a lawsuit against the restaurant, alleging that the one-inch deviation from the Accessibility Standards was an architectural barrier. However, the defendant may rebut the presumption by proving, by a preponderance of evidence, that the plaintiff's full and equal enjoyment of the facility was not impaired by the 1-inch deviation. If the violation did not impede or hamper the disabled person's full and equal enjoyment of the facility, the defendant has successfully rebutted the presumption and there is no architectural barrier. On the other hand, if the 1-inch discrepancy did impair the disabled person's full and equal enjoyment, this technical non-compliance is no longer *de minimis*, since the plaintiff suffered a loss of equal use and enjoyment of the facility as a result of the violation.

It is important to note that full and equal enjoyment, and not mere accessibility, is the desired goal of Title III of the ADA.[185] Therefore, the defendant cannot meet its burden of proving full and equal enjoyment by simply demonstrating that access is available in some manner, but must recognize the *qualitative* nature of access.[186] When confronting issues of racial equality decades ago, this country recognized that one's civil rights transcended simply being able to ride a bus, but went to the fullness and equality of the accommodations. Similarly, equality is not achieved for a person with a mobility impairment just because he/she is able to gain access to a facility "with additional time, patience, and jockeying of the wheelchair."[187] Therefore, when determining full and equal enjoyment of a facility under the ADA, courts must consider not only whether the plaintiff may in some manner achieve access, but also the equality of access.[188]

The ability to rebut the presumption that failure to comply with the Accessibility Standards constitutes an architectural barrier provides the defendant an "escape" from the strict requirements of the Accessibility Standards, and satisfies the courts' previously-noted concerns that existing facilities

183. *See* Order Denying Plaintiff's Motion for Summary Judgment; Denying Defendant's Motion for Summary Judgment at 8-9, Moreno v. Vineeraaj, Inc., (C.D. Cal. 2001) (No. 01-0363) (on file with author) (holding that because the defendant points to contradictory expert "evidence that the counter height and seating access do not hinder use or enjoyment of the facility."); D'Lil v. Stardust Vacation Club, No. CIV-S-00-1496DFL PAN, 2001 WL 1825832 *4-5 (E.D. Cal. Dec. 21 2001) (recognizing that plaintiff must prove that the facility "contained actual barriers that hindered her access.").

184. 28 C.F.R. pt. 36, app. A, 4.6.3 (2002).

185. *See* 42 U.S.C. § 12182(a).

186. Boemio v. Love's Rest., 954 F. Supp. 204, 208 (S.D. Cal. 1997) (explaining equal access under California's Unruh Civil Rights law).

187. *Id.*

188. *Id.*

need to be held to a lesser standard than those applied to new construction and altered facilities. Thus, the rebuttable presumption provides a *clear* and *consistent* standard for the courts to follow, but on an individual basis, allows the defendant to evade the rigid requirements of the Accessibility Standard if the defendant can prove that the violation did not, in fact, impair the plaintiff's full and equal enjoyment of the facility.

IV. CONCLUSION

Despite only being in existence for over a decade, the ADA has gained vociferous critics because of its ambiguous language. In particular, courts have struggled and continue to struggle to define the term "architectural barriers." Both business owners and the disabled community are disadvantaged by the various approaches adopted by the courts because of the lack of a clear standard that results from vague terminology. Thus, the authors propose that defendants more rigorously challenge plaintiff's standing in ADA Title III cases (with courts applying a friendly eye toward legitimate challenges), and that courts adopt a rebuttable presumption that the physical characteristics of governed businesses that do not meet or exceed the technical requirements of the Accessibility Standards constitute architectural barriers within the meaning of the ADA. Linking the presumption of inaccessibility to the Accessibility Standards effectively promotes genuinely accessible facilities. On the other hand, permitting business owners to rebut this presumption, where appropriate, provides flexibility and fairness when the alleged violation of the law is a mere technicality.

Perhaps more importantly, application of this rebuttable presumption is in accordance with the ADA's general purpose to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards."[189] To the extent that courts commit to tying barrier removal obligations to the plainly read Accessibility Standards the business community will more easily ascertain its responsibilities under this Act and more quickly come into compliance with the provisions set forth therein. This will open the doors of our Nation's businesses, providing increased opportunity for the disabled community and unlocking a source of patronage for those very businesses that currently are inaccessible to customers with disabilities.[190]

Finally, as the authors' proposal not only provides flexibility to business owners but calls for the consistent application of the plainly worded but rigorous Accessible Standards, it will promote the laudable vision of the ADA, as stated by Senator Harkin: "The American with Disabilities Act is a land-

189. 42 U.S.C. § 12101(b)(1), (2) (2000).

190. S. REP. NO. 101-116, at 66 (1989), *reprinted in* BERNARD D. REAMS, JR. ET AL., DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990 PUBLIC LAW 101-336, Doc. No. 2 (1992).

mark statement of human rights, which will, at long last, keep the promise of 'liberty and justice for all' to the nation's last large oppressed minority."[191]

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191. 135 CONG. REC. 8505 (1989).

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