APPENDIX

APPENDIX

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Langer v. Kiser

United States Court of Appeals for the Ninth Circuit

March 18, 2022, Argued and Submitted, San Francisco, California; January 23, 2023, Filed

No. 21-55183

Reporter

57 F.4th 1085 *; 2023 U.S. App. LEXIS 1637 **; 2023 WL 353215

CHRIS LANGER, Plaintiff-Appellant, v. MILAN KISER, in individual and representative capacity as trustee of the Milan and Diana Kiser Revocable Trust dated August 19, 2003; DIANA KISER, in individual and representative capacity as trustee of the Milan and Diana Kiser Revocable Trust dated August 19, 2003, Defendants-Appellees, and FRANK P. ROFAIL; DAVID MATTHEW TAYLOR; DOES, 1-10, Defendants.

Prior History: [**1] Appeal from the United States District Court for the Southern District of California. D.C. No. 3:18-cv-00195-BEN-AHG. Roger T. Benitez, District Judge, Presiding.

Langer v. Kiser, 516 F. Supp. 3d 1066, 2021 U.S. Dist. LEXIS 18872, 2021 WL 321972 (S.D. Cal., Feb. 1, 2021)

Counsel: Dennis J. Price II (argued), Center for Disability Access, San Diego, California; Russell C. Handy, Potter Handy LLP, San Francisco, California; for Plaintiff-Appellant.

Samy S. Henein (argued), Suppa Trucchi & Henein LLP, San Diego, California, for Defendants-Appellees.

Judges: Before: William A. Fletcher, Ronald M. Gould, and Daniel P. Collins, Circuit Judges. Opinion by Judge Gould; Dissent by Judge Collins.

SUMMARY*

Americans with Disabilities Act

The panel reversed the district court's judgment, after a bench trial, in favor of defendants Milan and Diana Kiser and vacated the district court's award of costs in an action brought by Chris Langer under Title III of the Americans with Disabilities Act.

Title III prohibits places of public accommodation from discriminating against people on the basis of disability, and the ADA Accessibility Guidelines require parking lots of a certain size to have van-accessible spaces with access aisles.

The Kisers rented their property to commercial tenants. Langer tried to visit two businesses on the property, the Gour Maine Lobster (the "Lobster

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*This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Shop") and the 1 Stop Smoke Shop. One of the Kisers' tenants, David Taylor, owned the Lobster Shop. Taylor's lease assigned him a space in the parking lot on the property for his personal use. Taylor placed a "Lobster Shop Parking Sign" near his assigned space. The Kisers asked Taylor to remove the sign, but he did not do so. Because the parking lot did not have a van-accessible parking **[**2]** space, Langer could not access either business when he visited the property.

First, the panel held that Langer had Article III standing to bring his claim for injunctive relief under Title III of the ADA. The panel held that, to establish standing, a plaintiff suing a place of public accommodation must show actual knowledge of an access barrier or ADA violation and must show a sufficient likelihood of injury in the future. The panel also held that so-called "serial litigants" can have tester standing to sue for Title III violations because a plaintiff's motive for going to a place of public accommodation is irrelevant to standing. Thus, the fact that Langer was a serial litigant had no place in the panel's standing analysis. His testimony at trial, however, was relevant to the standing inquiry because he was required to demonstrate an intent to return to the Lobster Shop or current deterrence from returning, and thus a likelihood of injury in the future.

The panel rejected the district court's adverse credibility determination regarding Langer's trial testimony because the court relied on his motivation for going to the Lobster Shop and his ADA litigation history. The panel held that Langer met his burden **[**3]** to establish standing because he demonstrated that he was currently deterred from patronizing the

Lobster Shop because of its inaccessibility and that he intended to return as a customer once the store provided accessible parking. The panel held that district courts cannot use the doctrine of standing to keep meritorious ADA cases out of federal courts simply because they are brought by serial litigants. Nor can district courts use improper adverse credibility determinations to circumvent this court's holding allowing tester standing for ADA plaintiffs. The panel held that courts must take a broad view of standing in civil rights cases, particularly in the ADA context where private enforcement is the primary method of securing compliance with the act's mandate.

The panel next held that the district court erred in ruling that Langer did not establish an ADA violation because the Lobster Shop's parking lot "was not a place of public accommodation." Title III of the ADA provides that "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 **[***4]** accommodation." Looking to the statutory text, as well as the regulations implementing the ADA, the panel held that the district court erred as a matter of law by analyzing whether the parking lot itself was a "place of public accommodation" rather than whether it was a "facilit[y] . . . of any place of public accommodation." The panel determined that the parking lot was a facility and was not itself a place of public accommodation. Thus, the question was whether the Kisers discriminated against Langer on the basis of his disability by not offering a van-accessible parking space in their parking lot.

The panel held that, to determine whether a facility is open to the public, and thus subject to the requirements of Title III, courts must rely upon the actual usage of the facility in question. Absent information about actual usage, considerations such as the nature of the entity and the facility, as well as the public's reasonable expectations regarding use of the facility, may further guide a court's analysis. Because actual usage was the key, the district court erred by giving controlling weight to the terms of the lease agreement between the Kisers and Taylor, to determine whether **[**5]** there was an ADA violation. The panel concluded that overwhelming evidence at trial, including Taylor's testimony, showed that the parking lot was, in fact, open to customers of the Lobster Shop. The panel therefore reversed the entry of judgment for the Kisers and remanded with instructions for the district court to enter judgment for Langer.

Finally, the panel held that the district court did not err in denying Langer's motion to strike a trespass counterclaim pursuant to California's anti-SLAPP statute, which allows for the pre-trial dismissal of certain actions "intended primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." The panel held that the fact that Langer waited until after trial to appeal the denial of his motion to strike did not deprive the court of appeals of jurisdiction, even though the denial of an anti-SLAPP motion is an immediately appealable collateral order. The panel held that Langer met his burden of a threshold showing that approaching the Kisers' property to assess ADA compliance was an act in furtherance of Langer's right to

petition under the First Amendment. The Kisers, however, established **[**6]** a reasonable probability of prevailing on the trespass claim. Accordingly, the district court did not err in denying Langer's anti-SLAPP motion. The district court, however, erred in ruling that Langer committed a trespass because the district court declined supplemental jurisdiction over the trespass claim and therefore lacked jurisdiction to rule on it. The panel therefore vacated the district court's legal holding regarding the trespass claim.

Dissenting, Judge Collins wrote that the district court properly found that Langer was not a credible witness in light of his less-than-trustworthy demeanor, the stark inconsistencies in his testimony and past statements, and the implausibility of some of his claims. Accordingly, the district court did not clearly err in its factual finding that, in light of that credibility determination, Langer did not have any intention of returning to and patronizing the Lobster Shop. Judge Collins wrote that Langer therefore lacked Article III standing to seek prospective injunctive relief, the only remedy available in a private suit under the ADA. Judge Collins would affirm the dismissal of Langer's ADA claim with prejudice, but only on the threshold ground that **[**7]** Langer failed to prove Article III standing. In addition, because the district court lacked jurisdiction over the only federal claim in the case, it did not abuse its discretion in declining to exercise supplemental jurisdiction over the remaining state law claims.

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Samy S. Henein (argued), Suppa Trucchi & Henein LLP, San Diego, California, for Defendants-Appellees.

Judges: Before: William A. Fletcher, Ronald M. Gould, and Daniel P. Collins, Circuit Judges. Opinion by Judge Gould; Dissent by Judge Collins.

Opinion by: GOULD

Opinion

[*1090] GOULD, Circuit Judge:

Chris Langer is a paraplegic man, disability advocate, and serial litigant. Langer cannot walk, so he uses a wheelchair to get around and drives a van that deploys a ramp from the passenger side. For Langer to park and exit his vehicle, a parking lot must have an accessible parking space with an adjacent access aisle. Title III of the Americans with Disabilities Act of 1990 ("ADA") prohibits places of public accommodation from discriminating against people on the basis of disability, 42 U.S.C. § 12182, and the ADA Accessibility **[**8]** Guidelines ("ADAAG") require parking lots of a certain size to have van-accessible spaces with access aisles. ADAAG § 208.1; 502.1 (2010) (codified at 28 C.F.R. pt. 36, subpart D and apps. B and D). When Langer comes across a place that he believes is not compliant with the ADA, he takes photos to document the condition of the premises and often sues. Langer is a "serial" ADA litigant, a fact featured prominently at trial, and he has filed close to 2,000 ADA lawsuits in the thirty-two years since Congress

enacted the ADA.

This appeal arises from one such lawsuit. The central question we must answer is whether a place of public accommodation violates the ADA by opening up its private parking lot to customers without making it accessible to customers with disabilities. Because the business owner in this case testified that he allowed customers to park in the parking lot, we must reverse the district court's judgment in favor of the defendant property owners, regardless of what the terms of their lease with the business owner specified. A business cannot offer parking to customers without disabilities while not offering that same benefit to customers with disabilities—that discrimination goes to the heart of the ADA. A second question raised **[**9]** by this appeal is whether a district court may rely on a plaintiff's litigation history to question his credibility and intent to return to a place of public accommodation. We hold that a district court may not reject an ADA litigant's stated intent to return to a location simply because the litigant is a serial litigant who brings numerous ADA cases.

I. BACKGROUND

Defendants Milan and Diana Kiser own a mixed-use real estate property near Langer's home in San Diego and rent it to **[*1091]** residential and commercial tenants. In September 2017, Langer tried to visit two businesses on the property: the Gour Maine Lobster (the "Lobster Shop") and the 1 Stop Smoke Shop (the "Smoke Shop").

One of the Kisers' tenants, David Taylor, owns the

Lobster Shop. The lease between the Kisers and Taylor assigned Taylor a space in the parking lot for his personal use. Taylor placed a sign near his assigned parking space with the words "lobster" and "parking" to "show customers where the store is, where to go, and where to park." At some point, Kiser noticed Taylor's "Lobster Shop Parking Sign" and asked Taylor to remove it, but Taylor did not do so.

Because the parking lot on the Kisers' property did not have a **[**10]** van-accessible parking space, Langer could not access either business when he visited the property. Langer sued the Kisers over the lack of accessible parking, bringing claims under Title III of the ADA and California's Unruh Civil Rights Act, Cal. Civ. Code §§ 51-53.[1] The Kisers filed a trespass counterclaim against Langer.

The district court held a one-day bench trial and at its conclusion entered judgment for the Kisers. The district court first held that Langer had standing to bring this action, although it did so "reluctantly," doubting that Langer had a "legitimate" intent to return. It concluded that Langer's testimony was unreliable because of his extensive litigation history as an ADA litigant. Reaching the merits of Langer's ADA claim, the district court entered judgment in favor of the Kisers, holding that the parking lot they owned was not a place of public accommodation. Despite contrary testimony from the Lobster Shop owner, Taylor,

[1] Langer sued the Kisers in their individual and trustee capacities. He also sued the respective business owners of the two stores, but the parties agreed to dismiss the business owners as defendants before trial.

that his customers parked in the parking lot, the district court instead relied upon the lease, which stated that the parking spot was for Taylor.[2] Relying on that term, the district court concluded that all members of the public were denied access to the parking lot, not only people with disabilities.

We have jurisdiction under 28 U.S.C. § 1291. We reverse the district court's holding that the parking lot was not a place of public accommodation, and we vacate the district court's costs award.

II. STANDING

We first examine standing because we have an independent duty to do so before turning to the merits. *Bernhardt v. County of L.A.*, 279 F.3d 862, 868 (2002). In this case, however, Langer's testimony at trial is relevant to whether he has standing, so our standing analysis proceeds in several steps. We first provide an overview of standing in the ADA Title III context. We next examine the district court's credibility determination against Langer. We then determine, on *de novo*

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[2] Paragraph 8 of the "Rental Agreement And/Or Lease" between Kiser and Taylor provides:

> When and if RESIDENT **[**11]** is assigned a parking space on OWNER's property, the parking space shall be used exclusively for parking of passenger automobiles and/or those approved vehicles listed on RESIDENT's 'Application to Rent/Lease' or attached hereto. RESIDENT is hereby assigned parking space ONE. Said Space shall not be used for the washing, painting, or repair of vehicles. No other parking space shall be used by RESIDENT or his guests.

review, whether Langer has standing.

[*1092] A.

Because Article III limits our jurisdiction to cases and controversies, the "irreducible constitutional minimum of standing" requires a plaintiff **[**12]** to have suffered an injury in fact, caused by the defendant's conduct, that can be redressed by a favorable result. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992)*. The elements of causation and redressability are not contested, so we need to evaluate only Langer's asserted injury in fact. To confer standing, an injury in fact must be concrete, particularized, and actual or imminent, not hypothetical. *Id.* Although a plaintiff must establish standing at each stage of the litigation, *id. at 561*, whether a plaintiff has standing depends upon the facts "as they exist when the complaint is filed," *id. at 569 n.4* (quoting *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218, 104 L.Ed. 2d 893 (1989)).

Private plaintiffs are limited to seeking injunctive relief under Title III of the ADA, so a plaintiff suing a place of public accommodation must show a sufficient likelihood of injury in the future to establish standing. *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004). Encountering ADA violations at a place of public accommodation in the past is not itself sufficient for standing, though it provides some evidence supporting the likelihood of future harm. *Id.*

Our understanding of what standing requires in the ADA Title III context has evolved over time. In

Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133 (9th Cir. 2002), we established what became known as the deterrent effect doctrine for ADA standing. There, a plaintiff brought an ADA action against a grocery store, **[**13]** but the district court dismissed it for lack of standing because the plaintiff had not attempted to enter the store during the statute of limitations period. *Id.* at 1135. We reversed, holding that to bring an ADA claim against a place of public accommodation, it is enough for a plaintiff to have actual knowledge of accessibility barriers there. *Id.* Quoting from Title III, we confirmed that a person with a disability need not engage in the "futile gesture" of trying to access a noncompliant place just to create an injury for standing. *Id.* Rather, to establish a cognizable future injury, all a plaintiff needs to do is be "currently deterred" from visiting the place of public accommodation because of the accessibility barriers. *Id.* at 1138.

We next examined standing in a pair of ADA cases where plaintiffs sued places of public accommodation far from their homes. In *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1040-41 (9th Cir. 2008), we held that the plaintiff had standing to sue a convenience store 500 miles from where he lived because he was "currently deterred" from visiting the store due to the barriers he encountered. We added that the ongoing uncertainty about whether the barriers remain is "itself an actual, concrete and particularized injury under the deterrence framework **[**14]** of standing articulated in *Pickern*." *Id. at 1043.* We held that the plaintiff had standing to challenge not just the barriers he personally encountered, but also other barriers related to his disability that he became aware of through discovery.

Id. at 1043-44.

We reached a similar conclusion in *D'Lil v. Best Western Encina Lodge & Suites, 538 F.3d 1031, 1034-39 (9th Cir. 2008)* and held that a plaintiff had standing to challenge ADA violations at a hotel she stayed at in Santa Barbara, far from her home in Sacramento. D'Lil worked as an accessibility consultant and traveled around California evaluating properties for ADA compliance. *Id. at 1034.* The district **[*1093]** court doubted that she had a "legitimate" intent to return because of her involvement in so many ADA lawsuits, and it dismissed her case for lack of standing. *Id. at 1035.* We reversed, clarifying that when the place of public accommodation is far from a plaintiff's home, a plaintiff can establish standing by demonstrating "an intent to return to the geographic area where the accommodation is located and a desire to visit the accommodation if it were made accessible. *Id. at 1037* (citing *Pickern, 293 F.3d at 1138*). Reviewing the record evidence, we concluded that her declaration and testimony "plainly evidence[d]" an intent to return. *Id. at 1039.* We also rejected the district court's adverse credibility finding **[**15]** against the plaintiff because it used her past ADA litigation to doubt her intent to return. *Id. at 1040.*

We further clarified our standing jurisprudence for claims brought under Title III of the ADA in *Chapman v. Pier 1 (U.S.) Imports Inc.*, 631 F.3d 939 (9th Cir. 2011) (en banc). In *Chapman*, a disabled plaintiff sued a retail store because of barriers encountered on past visits, as well as for barriers not personally encountered. *Id. at 943.* The plaintiff admitted that he was not deterred from visiting the store because of the

barriers, but he testified that he intended to return to the store and believed the barriers would impede his access. *Id.* We held that current deterrence is sufficient but not necessary for standing, and that plaintiffs with knowledge of an ADA violation at a place of public accommodation can establish a sufficient future injury for standing by either (1) showing that they are currently deterred from returning to the place of public accommodation because of a barrier, or (2) showing that they were previously deterred and intend to return to the non-compliant place of public accommodation. *Id. at 944*. We ultimately held that the plaintiff in *Chapman*, however, did not have standing because he did not describe with specificity the barriers he encountered. *Id. at 954*.

Most recently, we revisited **[**16]** the standing requirements for plaintiffs suing under Title III of the ADA in *Civil Rights Education and Enforcement Center v. Hospitality Properties Trust ("CREEC")*, 867 F.3d 1093 (9th Cir. 2017). There, plaintiffs brought a class action alleging that hotels across the country provided shuttle transportation to guests without disabilities but did not provide equivalent wheelchair-accessible transportation for guests who use wheelchairs. *Id.* at 1096-97. The named plaintiffs in *CREEC* had not actually visited any of the hotels and instead made calls to inquire about the availability of accessible transportation. *Id.* at 1097. We first held that a plaintiff need not visit the place of public accommodation or personally encounter a barrier in order to suffer an injury in fact. *Id.* at 1099-1101. That the plaintiffs had called the hotels and learned that they did not offer accessible transportation was

enough. *Id.* And we again affirmed that a plaintiff must allege "continuing, present adverse effects" but can do so through either the "deterrent effect doctrine" or by showing an intent to return "when the non-compliance is cured." *Id.* at 1099-1100.

We also held, for the first time, that a plaintiff suing under Title III of the ADA can establish standing through being a tester plaintiff. *Id. at 1101*. We concluded that a plaintiff's motivation for visiting a place of public accommodation is "irrelevant to the question **[**17]** of standing." *Id.* Drawing upon the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed. 2d 214 (1982), in which it recognized tester standing under the Fair Housing Act, we noted that Congress used the same "any **[*1094]** person" language in Title III of the ADA as it did in the Fair Housing Act. *Id.* at 1101-02. This broad language, allowing "any person" to bring a claim under Title III of the ADA, indicated to us that Title III did not contain a "bona fide" customer requirement for standing. *Id.; see also* 42 U.S.C. § 12188(a)(1).

So where does that leave us? We know that a plaintiff bringing a claim under Title III of the ADA must have actual knowledge of an access barrier or ADA violation. *Pickern*, 293 F.3d at 1135. But the plaintiff need not personally encounter the barrier or physically visit the place of public accommodation. *CREEC*, 867 F.3d at 1100. And we know that an ADA plaintiff has standing to sue for all barriers, even ones that surface later during discovery, as long as those barriers relate to the plaintiff's specific disability. *Doran*, 524 F.3d at 1047; *Chapman*, 631 F.3d at 950-

53. But because private plaintiffs are limited to injunctive relief under Title III, encountering an ADA violation in the past at a place of public accommodation is not enough. *Fortyune*, 364 F.3d at 1081. Instead, a plaintiff must establish a sufficient future injury by alleging that they are either currently deterred from visiting the place of public accommodation because of a barrier, or **[**18]** that they were previously deterred and that they intend to return to the place of public accommodation, where they are likely to reencounter the barrier. *Chapman*, 631 F.3d at 944. Finally, we know that so-called "professional plaintiffs," "paid testers," or "serial litigants" can have tester standing to sue for Title III violations because a plaintiff's motive for going to a place of public accommodation is irrelevant to standing. *See CREEC*, 867 F.3d at 1102.

B.

Langer is one such serial litigant, having filed nearly 2,000 ADA lawsuits in federal and state courts. This fact has no place in our standing analysis. *CREEC*, 867 F.3d at 1102. Instead, we may only consider whether Langer has actual knowledge of a barrier or ADA violation at the Lobster Shop and whether he can establish a sufficient future injury for the injunctive relief he seeks.

Because Langer must demonstrate an intent to return to the Lobster Shop or current deterrence from returning to the Lobster Shop in order to establish a sufficient future injury, his testimony at trial is relevant to the standing inquiry. The district court expressed concerns about Langer's credibility

throughout its opinion and found his testimony to be unreliable. To the extent that these concerns amount to an adverse **[**19]** credibility determination, we reject it. Although we give "great deference to district court findings relating to credibility," we may "reject its ultimate determination" if the district court relied upon impermissible legal reasoning or inferences. *D'Lil*, 538 F.3d at 1035, 1039-40 (citation and alteration omitted); *see also Kirola v. City & Cnty. of San Francisco*, 860 F.3d 1164, 1182 (9th Cir. 2017) (rejecting a district court's credibility determination in the ADA context where it "was based on legal errors"). We reject the district court's "ultimate determination" regarding Langer's credibility because it relied on Langer's motivation for going to the Lobster Shop and his ADA litigation history, contrary to *D'Lil* and *CREEC*. For the following reasons, the district court's credibility determination cannot stand.

1.

First, the district court's credibility determination contravenes our holding in *D'Lil*. There, the district court dismissed **[*1095]** the plaintiff's action for lack of standing, expressing doubt that the plaintiff had a "legitimate" intent to return because of her involvement in so many previous ADA lawsuits. *Id. at 1035*. We rejected the district court's adverse credibility determination because it "focused on D'Lil's history of ADA litigation as a basis for questioning the sincerity of her intent **[**20]** to return." *Id. at 1040*. Warning that we "must be particularly cautious about affirming credibility determinations that rely on a plaintiff's past ADA litigation," we explained that because the ADA limits suits brought by private plaintiffs to

injunctive relief and does not allow suits for damages, most ADA lawsuits are brought by serial litigants. *Id. at 1040*. We commented that it may be "necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA." *Id.* at 1040 (quoting *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (citing Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 U.C.L.A. L. Rev. 1, 5 (2006))).

Here, as in *D'Lil*, the district court focused on Langer's past ADA litigation to impugn his credibility, expressing doubt that Langer would return to the Lobster Shop expressly *because of* the previous lawsuits he filed. The district court emphasized that Langer "has been a plaintiff in 1,498 federal lawsuits" over the last eighteen years and this "extensive litigation history" coupled with his inability to remember details about the businesses involved in those lawsuits weighed against the credibility of his stated intent to return to the **[****21]** Lobster Shop. But, as in *D'Lil*, the record does not contain information about whether the places of public accommodation in Langer's previous cases were made accessible. *Id. at 1040*. Nor does the record contain information about whether Langer actually returned to those places, and the defense did not ask him if he had. Instead, the defense only asked him whether he had alleged an intent to return in his previous complaints, which he had.

Langer's intent to visit unrelated places he previously sued "says little" about his intent to visit the

Lobster Shop, *D'Lil*, 538 F.3d at 1040, particularly in light of its proximity to his house, his professed taste for lobster, and that he returned to the premises since filing the lawsuit to assess its compliance with the ADA. His inability to recall details from other lawsuits without any opportunity to refresh his memory—for example, which specific items he picked up three years earlier from an auction house that he sued—does not shed light on his intent to return to the Lobster Shop. And Langer's work as an accessibility advocate, like the plaintiff in *D'Lil*, undermines the district court's "speculation about the plausibility" of his intent to return to the Lobster Shop. *Id.* His **[**22]** several return visits to the premises remove any doubt.

2.

Nor does the sheer number of Langer's previous lawsuits provide grounds for doubting his intent to return. In questioning Langer's credibility, the district court emphasized that Langer filed "six (6) other lawsuits" on the same day he filed this lawsuit. At trial, Langer's counsel confirmed that he filed six lawsuits on Langer's behalf in one day. But examining those complaints, which were entered into trial as exhibits, dispels any credibility concern. The complaints reveal that Langer visited one defendant (a bank) in September 2017, two defendants (a tree nursery and an auto body shop) in October 2017, two others (a marijuana dispensary **[*1096]** and an auction shop) in November 2017, and the final defendant (a shopping center) in December 2017. Langer's history and frequency of visiting places of public accommodation shows nothing more than Langer going about his ordinary course of

business and gives no reason to think that he would be unable to return to these establishments in the future. The district court was wrong to rely upon the number of complaints Langer's lawyer chose to file in one day on his behalf to question the reliability **[**23]** of Langer's testimony at trial.

3.

The district court also relied upon Langer's decision to forgo claims related to the Smoke Shop, the Lobster Shop's neighboring business, in questioning his intent to return to the Lobster Shop. This proves nothing. When Langer filed his complaint, the Kisers' property was home to two businesses: the Lobster Shop and the Smoke Shop. Langer initially challenged accessibility barriers at both establishments but stipulated at trial that he was foregoing claims against the Smoke Shop. His counsel explained that because Langer was only challenging the lack of accessible parking, and the Kisers owned the lot for both properties, it was redundant to pursue a separate claim challenging the lack of accessible parking at the Smoke Shop.

Despite appearing to accept this explanation at trial, the district court used Langer's decision against him in making its adverse credibility finding, reasoning that Langer's decision to forego the Smoke Shop claim "directly undercuts his credibility with respect to having a legitimate intent to return to the Property." The district court further noted that Langer "never alleged that he smoked, and as such, a *legitimate* intent **[**24]** to return to the Smoke Shop would be suspect" absent an expressed interest in smoking.

Consequently, the district court found it "[n]ot surprising[]" that Langer stipulated to foregoing these claims. The district court committed legal error by concluding that Langer's "professed intent to return" was not credible and finding "[t]o the contrary" that Langer's "purpose in visiting the Property was to identify potential ADA violations." This part of the district court's credibility analysis is riddled with impermissible reasoning in the wake of our decision in *CREEC* permitting tester standing for ADA claims. Being an ADA tester is, in fact, a legitimate reason to go to a business, *see* 867 F.3d at 1101-02, and the district court's insinuation otherwise is legally flawed. Visiting the property to identify potential ADA violations is consistent with having a credible intent to return; in other words, credibility is not mutually exclusive with being a tester. *See id.* For this reason, we expressly reject the "Harris Test" relied upon by this district court and others in the circuit that attempts to measure the legitimacy of a plaintiff's intent to return by considering factors such as the plaintiff's "past patronage **[**25]** of defendant's business." *Harris v. Del Taco, Inc.*, 396 F. Supp. 2d 1107, 1113 (C.D. Cal. 2005); *see also Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F. Supp. 2d 1208, 1216 (S.D. Cal. 2007). There is no past patronage or bona fide customer requirement to bring an ADA claim. *CREEC*, 867 F.3d at 1102. The Harris Test cannot coexist with *CREEC*, and we have not adopted it since it was first articulated over fifteen years ago. The district court's suggestion that the Ninth Circuit endorses this test is flat wrong.

Along the same line of reasoning, the district court

opined that if Langer "truly desired to make the premises handicap accessible for others as well as himself, he would not have foregone claims pertaining **[*1097]** to the Smoke Shop." Though it may be "desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA," *D'Lil*, 538 F.3d at 1040 (quoting *Molski*, 500 F.3d at 1062), ADA testers need not take every claim to trial in order for their intentions to be credible. Holding claims that ADA testers decide to forego against them (while also criticizing them for the amount of claims they have brought in the past) puts disability advocates in an impossible position and can have a chilling effect on accessibility litigation.

We reject the district court's credibility determination against Langer because it rests on impermissible legal **[**26]** reasoning, *D'Lil*, 538 F.3d at 1040, *Kirola*, 860 F.3d at 1185, and leaves us with a "definite and firm conviction" that the district court made a mistake, *United States v. Elliott*, 322 F.3d 710, 715 (9th Cir. 2003) (quoting *United States v. Maldonado*, 215 F.3d 1046, 1050 (9th Cir. 2000)).[3] The district

[3] We find *D'Lil* to be the most instructive case on credibility determinations in the ADA context and follow its procedure. There, we rejected outright the district court's credibility determination against the serial litigant and remanded so that the district court could consider the merits of the plaintiff's motion for attorney's fees, which it had not considered because it dismissed the motion based on lack of standing. 538 F.3d at 1040-41. Here, because the district court found that Langer has standing—a conclusion we agree with on *de novo* review—and reached the merits of Langer's ADA claim, we need not remand for the district court to consider the merits in the first instance after

court directly and repeatedly used Langer's extensive litigation history to question the sincerity of his intent to return in violation of *D'Lil*, and its supporting, ancillary findings rely upon flawed reasoning that we cannot, and should not, accept.

We do not read *D'Lil* as imposing an outright prohibition on making credibility determinations against serial litigants, and district courts ought not interpret our opinion today to endorse that view. A court may still make a credibility determination against a serial litigant, but there must be something other than the fact that the litigant files a lot of ADA cases to instill doubt in his testimony. For instance, if a plaintiff alleged that he broke his leg multiple times in one day from the same barrier at different locations, a court would be prudent to question his credibility. *Cf. Molski*, 500 F.3d at 1051-52. Or, if Langer had alleged personally encountering inaccessible parking at businesses in California, Hawaii, and Alaska on the same day, an adverse credibility determination would be well taken. But merely driving **[**27]** around, documenting ADA noncompliance, and filing multiple lawsuits is not in and of itself a basis for being found noncredible. Our precedent demands more.

C.

After rejecting the district court's credibility determination because it rests on legal error, we now consider whether Langer has standing, "a question of law that we review de novo." *D'Lil*, 538 F.3d at 1035. Despite its credibility determination, the district court

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rejecting its credibility determination.

repeatedly concluded that Langer had standing, summarizing that "while Plaintiff has Article III standing, the subject property . . . was not a place of public accommodation," and including in its legal conclusions that "Plaintiff has standing to pursue his ADA claims." The district court concluded that Langer "has standing on the basis that he encountered a barrier on the date of his visit," noting that Langer "stated he intended to return both in his complaint as well as at trial." Notwithstanding its multiple **[*1098]** statements that Langer had standing, the district court explained that it "arrive[d] at this conclusion reluctantly, and only . . . by following the Ninth Circuit's instructions to liberally construe standing in ADA cases." We hold that Langer has standing to bring this action.

[28] 1**.

We start with the facts as they existed when Langer filed his complaint. Langer personally encountered the lack of accessible parking when he visited the Lobster Shop in September 2017 and sufficiently described this barrier in his complaint, satisfying the actual knowledge requirement for standing. *See Chapman*, 631 F.3d at 954. As for deterrence or intent to return, Langer alleged in his complaint that he would like to return to the Lobster Shop "but will be deterred from visiting until the defendants cure the violations." He claimed that he "is and has been deterred from returning" to the Lobster Shop as a customer, but that he "will, nonetheless, return to the business to assess ongoing compliance with the ADA." Langer also affirmed that he "will return to patronize" the Lobster Shop "as a customer once the barriers are

removed."

At trial, Langer testified on direct examination that he went to the Lobster Shop in September 2017 for lobster, a food that he likes. He submitted into evidence the 52 photos he took during this visit, documenting the accessibility barriers that existed at the time he filed his complaint. On cross-examination, he testified that he has been back to the Lobster Shop premises four **[**29]** or five times since filing the lawsuit, and most recently he went there the night before trial. He lives ten minutes from the store.

While standing "ordinarily depends" on the facts that exist at the time the complaint is filed, *Lujan*, 504 U.S. at 569 n.4, Langer stated in his complaint that he intends to return to the Lobster Shop, and his repeated return visits support that fact. Because the defense attempted to impeach his stated intent to return at trial, we may properly consider his return visits as evidence of his intent to return. *See id.* at 561 ("[A]t the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.") (internal quotation marks omitted); *see also D'Lil*, 538 F.3d at 1038-39 (considering the plaintiff's testimony that she visited the area after filing the complaint as evidence of her intent to return, which was the "obvious and most reasonable inference" from her testimony).

That Langer returned four or five times in a three year period is convincing evidence that his professed intent to return is sincere and plausible. In fact, the Eleventh Circuit has held that a plaintiff's profession as an ADA tester makes it *more* likely that he would

suffer the injury in fact again in the future. **[**30]** *See Houston v. Marod Supermarkets, Inc.,* 733 F.3d 1323, 1340 (11th Cir. 2013) ("Given that ADA testing appears to be Houston's avocation or at least what he does on a daily basis, the likelihood of his return for another test [at the defendant's business] is considerably greater than the *Lujan* plaintiffs' return to far away countries . . . ."). ADA testing appears to be Langer's avocation, which he confirmed in his briefing to us and at oral argument. Oral Argument 4:40-4:50. He testified at trial that he carries a camera so that he can document ADA violations whenever he comes across them. The defense cross-examined Langer about the many ADA lawsuits he has filed, emphasizing that the number was nearly 2,000.

On redirect, Langer affirmed that he would "absolutely" return to the Lobster Shop if they were to "fix the parking and **[*1099]** have van-accessible parking" because he loves lobster and "purchase[s] lobster all the time." On recross, the defense attempted to show that Langer's intent to return to the Lobster Shop was not "genuine" because he also alleged an intent to return in the other ADA complaints he filed. But, as described previously, this reflects the type of reasoning we unmistakably rejected in *D'Lil* and *CREEC*, in which we instructed district courts **[**31]** not to question an ADA plaintiff's standing simply because they file numerous ADA lawsuits or are an ADA tester. *See also Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1069 (9th Cir. 2009) (Gould, J., concurring) ("[W]e accord standing to individuals who sue defendants that fail to provide access to the disabled in public accommodation as required by the Americans with Disabilities

Act[], even if we suspect that such plaintiffs are hunting for violations just to file lawsuits.").

2.

Though the district court found that Langer had standing, it did so reluctantly. Today we make clear that district courts cannot use the doctrine of standing to keep meritorious ADA cases out of federal courts simply because they are brought by serial litigants. Nor can district courts use improper adverse credibility determinations to circumvent our holding in *CREEC* allowing tester standing for ADA plaintiffs. Courts must "take a broad view" of standing in civil rights cases, particularly in the ADA context where private enforcement is "the primary method" of securing compliance with the act's mandate. *Doran*, 524 F.3d at 1039-40 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed. 2d 415 (1972); *see also* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 Minn. L. Rev. 2329, 2375 (2021) ("[A] system that relies on private attorneys general should respect and value the work done by those **[**32]** who take up the mantle . . . rather than expecting every disabled person to use whatever spare time and energy they have to litigate each trip to the movies.").

Here, Langer has met his burden to establish standing. He physically went to a store near his home, saw that there was a lack of accessible parking in violation of the ADA, and spent time taking 52 photos to document the violations. He has established that he is currently deterred from patronizing the Lobster Shop because of this inaccessibility, and that he

intends to return as a customer once the store provides accessible parking. He also intends to return, and *has* returned, to assess the Lobster Shop's ongoing compliance with the ADA because of his avocation as an ADA tester.

Langer, a serial ADA litigant, pulled into what he thought was the parking lot for customers of the Lobster Shop. He went there because he liked lobster, or to test for ADA compliance, or perhaps both. His motivation is not relevant. We only evaluate whether a plaintiff has an intent to return, and we hold that Langer does. We agree with the district court that Langer has standing to bring this claim against the defendants.[4]

[*1100] III. ADA CLAIM

Having discussed **[**33]** Langer's credibility and standing, we next address the merits of his ADA claim. Entering judgment for the defendants, the district court held that Langer did not establish an ADA violation because the Lobster Shop's parking lot "was not a place of public accommodation." After a bench trial, we review the district court's findings of fact for clear error and its legal conclusions *de novo. Lentini*

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[4] We also agree with the district court that the lawsuit is not moot. Although the defendants now keep the front gate to the lot closed, Milan Kiser admitted it might be on a "temporar[y]" basis. Gates can be reopened after lawsuits, and painted lines demarcating spaces can be painted over. We hold, like the district court, that this action is not moot under the voluntary cessation doctrine. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000).

v. Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004). A district court's interpretation, construction, and application of the ADA is reviewed *de novo. Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019). We reverse the district court because its judgment rests on legal error and its factual finding that the parking lot was not open to the public is clearly erroneous in light of the business owner's testimony.

A.

Congress enacted the ADA to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). The ADA recognized that discrimination against people with disabilities often comes not from "invidious animus, but rather of thoughtlessness and indifference." *Alexander v. Choate*, 469 U.S. 287, 295, 105 S.Ct. 712, 83 L.Ed. 2d 661 (1985). Title II of the Act applies to state and local governments and ensures that people with disabilities are not "excluded from . . . or denied the benefits of the services, programs, or **[**34]** activities of a public entity." 42 U.S.C § 12132. Title III, by contrast, applies to private entities that open themselves up to the public. *Id.* at § 12182.

Title III's general rule, and the basis for an action under Title III, is that "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." *Id.* The district court erred as a matter of law by analyzing whether the parking lot

itself was a "place of public accommodation" rather than whether it was a "facilit[y] . . . of any place of public accommodation." *Id.* In bringing this action, Langer did not contend that the Lobster Shop runs a public parking lot but rather that the Lobster Shop offered "facilities, privileges, advantages" in the form of parking to some of its customers but not to other customers, like Langer, who need a van-accessible parking space. The district court's analysis of the parking lot as a place of public accommodation misinterprets the ADA and its implementing regulations.

We start with the text of the statute, as we must. *Van Buren v. United States*, 141 S.Ct. 1648, 1654, 210 L.Ed. 2d 26 (2021). In the definitions section of Title III, Congress **[**35]** did not define "a place of public accommodation" but instead provided an illustrative list of twelve types of private entities that qualify as public accommodations. 42 U.S.C. § 12181(7). The Lobster Shop, as the district court correctly found, falls under § 12181(7)(E) which includes "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment."

Parking lots, however, are notably absent from § 12181(7)'s list. So, too, are similar terms like bathrooms, doors, ramps, and pathways. We have previously noted that the types of establishments included in the ADA's list of public accommodations have something in common:

> They are actual, physical places where goods or services are open to the public, and places where the public gets those goods or services. The principle of *noscitur a sociis* requires that the

> term, **[*1101]** "place of public accommodation," be interpreted within the context of the accompanying words[.]

Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000). Under traditional principles of statutory interpretation such as *expressio unius* and *noscitur a sociis*, we interpret the text of Title III to indicate that a parking lot is not itself a place of public accommodation but rather is a "facility" encompassed in the "goods, services, **[**36]** facilities, privileges, advantages, or accommodations" offered by a place of public accommodation. 42 U.S.C. § 12182(a). *See Yates v. United States*, 574 U.S. 528, 543-46, 135 S.Ct. 1074, 191 L.Ed. 2d 64 (2015).

The regulations implementing the ADA support our conclusion. Though the text of the ADA does not define facility, the ADA's regulations do define this term. A facility is "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock . . . roads, walks, passageways, *parking lots*, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104 (emphasis added). By explicitly including a parking lot within the definition of a facility, the implementing regulations demonstrate that the district court committed legal error by considering whether the Lobster Shop parking lot is itself a separate place of public accommodation rather than a facility of such place.

Further, the specific Title III prohibition implicated by this appeal is § 12182(b)(2)(A)(iv), which provides that a place of public accommodation

discriminates on the basis of disability by "fail[ing] to remove architectural barriers" in "existing facilities" where removal is "readily achievable." The corresponding regulation lists "[c]reating designated accessible **[**37]** parking spaces" as one example of "readily achievable" steps to remove architectural barriers. 28 C.F.R. § 36.304(b)(18). The regulation also prioritizes the barriers that places of public accommodation should remove, designating as the first priority "provid[ing] access to a place of public accommodation from public sidewalks, parking, or public transportation," which includes "providing accessible parking spaces." § 36.304(c)(1). The district court needed to look no further than the text of Title III and its implementing regulations to discern that the Lobster Shop parking lot constitutes a facility of a place of public accommodation rather than a free-standing place of public accommodation.

B.

After determining that the parking lot at issue is a facility and not itself a place of public accommodation, the next question is whether the Kisers discriminated against Langer on the basis of his disability by not offering a van-accessible parking space in their parking lot. This requires examining whether the parking lot facility was open to the public.

We find guidance in two of our prior decisions. In *Doran*, we affirmed the district court's grant of summary judgment to a convenience store where the plaintiff claimed that the **[**38]** store violated the ADA by excluding him from an employees-only restroom. 524 F.3d at 1048. While excluding people with

disabilities from the "retail portion" of the store would be illegal discrimination under Title III, we decided the same cannot be said for the "portion that is closed to the public," including the employees-only restroom. *Id. Doran* provides instructive value to answering the question at issue in this case, but its value is limited by a significant factual difference. Unlike here, the plaintiff in *Doran* had not alleged that the store was allowing customers without disabilities to use the employees-only **[*1102]** restroom but not customers with disabilities. Instead, he alleged that the store violated the ADA *per se* by refusing to open its employees-only restroom for use by disabled people. *See Doran v. 7 Eleven*, No. SACV 04-1125 JVS (ANx), 2005 U.S. Dist. LEXIS 45940, 2005 WL 5957487, at *6 (C.D. Cal. Aug. 19, 2005).

Another case in which we have examined the public-versus-private distinction under Title III is *Jankey v. Twentieth Century Fox Film Corp.*, 212 F.3d 1159 (9th Cir. 2000). There, a disabled plaintiff sued a film studio under the ADA because three facilities on the private studio lot—an event space, a shop, and an ATM—contained accessibility barriers. *Id.* at 1160-61. The film company restricted its studio lot to employees and authorized guests, but the plaintiff presented evidence that he **[**39]** visited the lot without a guest pass several times and was waved through by security. *See Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998). We affirmed summary judgment in favor of the defendant, agreeing with the district court that because the facilities at the studio lot were "not in fact open to the public," Title III did not require those facilities to be

accessible. 212 F.3d at 1161. We rested our holding on the text of 42 U.S.C. § 12187, which states that Title III of the ADA "shall not apply to private clubs or establishments exempted from coverage under Title II of the Civil Rights Act." Because Title II of the Civil Rights Act exempts any "private club or other establishment *not in fact open to the public*," 42 U.S.C. § 2000a(e) (emphasis added), we reasoned that any private entity or facility "not in fact open to the public," is also exempt from Title III of the ADA. *See* 212 F.3d at 1161.

A helpful principle that can be drawn from our decisions in *Doran* and *Jankey* is that when facilities within a place of public accommodation are closed to the public, those facilities do not need to comply with Title III of the ADA. This does not mean, however, that places of public accommodation can circumvent the commands of Title III simply by claiming a facility is "private" or hanging up an employees-only **[**40]** sign when a person using a wheelchair enters the building.

We have not previously delineated the bounds of when a facility is, in fact, open or closed to the public, but do so here. We hold that courts must rely upon the actual usage of the facility in question to determine whether it is "in fact" open to the public. Absent information about actual usage, considerations such as the nature of the entity and the facility, as well as the public's reasonable expectations regarding use of the facility, may further guide a court's analysis.

C.

The actual usage of a facility controls because the ADA specifies that it does not apply to private entities exempt from Title II of the Civil Rights Act, and Title II of the Civil Rights Act exempts private establishments "not *in fact* open to the public." 42 U.S.C. § 2000a(e) (emphasis added). Whether a facility is "in fact" open to the public requires examining the actual, not the theoretical or intended, use of a facility. *See In fact*, Black's Law Dictionary (11th ed. 2019) ("Actual or real; resulting from the acts of parties rather than by operation of law."). Thus, actual usage has dispositive weight in evaluating whether a facility needs to be accessible to people **[**41]** with disabilities.

Because actual usage is the key, the district court erred by giving controlling weight to the terms of the lease agreement between the Kisers and Taylor, the Lobster Shop owner, to determine whether there was an ADA violation. For example, **[*1103]** the district court concluded that the lease agreement "did not permit Mr. Taylor or the Lobster Shop to have customers park in its designated parking space" and that the Lobster Shop "only had the authority to invite [Langer] into the areas which it had control under pursuant to the Lease Agreement." The district court stressed that the "Lobster Shop lacked the authority to invite customers into space that was not leased to it under the Lease Agreement." And in discussing whether Langer's presence on the property constituted a trespass, the district court found that "the intent of the Lease Agreement was that Mr. Taylor and his wife, and no one else, were to park in the designated parking spot . . . . indicat[ing] that the East Lot

was not a place of public accommodation."

These conclusions conflict with our precedent that property owners cannot contract away liability under the ADA. *See Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000). In *Botosan*, much like the posture of this case, **[**42]** a plaintiff sued property owners and their tenant, alleging noncompliance with the ADA due to a lack of accessible parking at the tenant's business. *Id.* at 829-30. The lease agreement between the landlord and tenant allocated responsibility to the tenant for maintenance of the property and compliance with laws. *Id.* at 830. We relied upon the text of the ADA, its legislative history, and its implementing regulations to hold that the defendant property owner could not contract away ADA liability. *Id.* at 832-34. We held that "contractual allocation of responsibility has no effect on the rights of third parties," *i.e.*, disabled individuals like Langer seeking access to places of public accommodations. *Id.* at 833. The landlord is a necessary party to an ADA suit "regardless of what the lease provides" because the landlord can later "seek indemnification from the tenant pursuant to their lease agreement." *Id.* at 834.

If the Kisers' liability was dictated by the terms of the lease, as the Kisers contend, this would violate *Botosan* and contravene the definition of what is "in fact" open to the public. Giving actual usage controlling weight, rather than terms of a lease inconsistent with usage, makes good sense because a person with a disability who attempts **[**43]** to park in a store's parking lot does not know the specific terms of the lease between the property owner and the business owner. The disabled person sees customers parking in

the lot, and naturally wants the equal access to which the disabled person is entitled under the ADA.

D.

Overwhelming evidence at trial showed that the parking lot was, in fact, open to customers of the Lobster Shop. Throughout the bench trial, the Lobster Shop owner, Taylor, testified that customers would park in the lot at issue. He testified that he understood the lease with the Kisers to mean that customers could park in the lot "if a space was available." He suggested that the Kisers gave Taylor four spots "two for [his] trucks and then two for parking." When asked if it was "common for customers" to park in the lot, he testified that "if there was a space available, they would park" there. As to the gate, Taylor testified that before Langer brought this lawsuit, the gate was "always open." Taylor agreed that a customer would not have been trespassing if he parked in the lot in September 2017 because customers had "a right to park there." He testified that it was his understanding upon signing the lease that **[**44]** he or his customers could park in the lot if space was available. Taylor's testimony establishes that customers were allowed to, and did, park in the lot. In fact, the district **[*1104]** court itself summarized that "Plaintiff solicited testimony from both Mr. Taylor and Mr. Kiser that despite Defendants' intent to keep the East Lot limited to tenant parking, Mr. Taylor had customers and family park in his designated parking spot."

The district court's finding that the parking lot was closed to all members of the public regardless of their disability status is directly contradicted by the

testimony of Taylor and Kiser that the district court itself cited. The district court's conclusion that the parking lot was not open to the public is also in tension with its holding that the case was not moot "because the Lobster Shop could offer parking to customers *again*."

The testimony at trial suggests not only that customers parked in the lot, but that Taylor himself encouraged customer parking. He explained that "he installed the Lobster Parking Sign in between parking stalls 1 and 2 to show customers where the store is, where to go, and where to park." And even after Kiser noticed the "Lobster Parking **[**45]** Sign" and asked Taylor to remove it, Taylor did not. Langer also provided a photo from his investigator showing lobsters painted on the ground in front of parking space #1 "that, per the shop owner, 'let[] customers know, 'Follow these lobsters into the building from parking stall 1.'" The actual practice of customers routinely and indiscriminately using the parking lot for Lobster Shop parking is strong evidence that the facility was, in fact, open to the public.[5]

Properly viewed as a facility of the Lobster Shop, the defendants' parking lot was open to the public and within Title III's reach. We reverse the entry of judgment for the defendants and remand with instructions for the district court to enter judgment for Langer.

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[5] Because the actual practice was not disputed, we need not discuss ancillary considerations such as the commercial nature of the Lobster Shop or the reasonable expectations of customers.

IV. TRESPASS CLAIM

After Langer filed his ADA claim against the Kisers, they filed a counterclaim against him for trespassing on their property. Langer contends the Kisers filed the trespass counterclaim in retaliation for him exercising his *First Amendment* right to petition the government and sue for equal access under the ADA. Langer filed a motion to strike the trespass counterclaim as a strategic lawsuit against public participation ("SLAPP"). California has an anti-SLAPP statute **[**46]** allowing for the pre-trial dismissal of certain actions that "masquerade as ordinary lawsuits," but are intended "primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," Cal. Civ. Proc. Code § 425.16(a). The district court denied the motion to strike, and Langer appeals this decision.

A.

Although Langer did not appeal the district court's interlocutory order denying the motion to strike the trespass claim, we still have jurisdiction to reach this issue. The denial of an anti-SLAPP motion is an immediately appealable final decision pursuant to the collateral order doctrine. *See Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003), *superseded in part by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766-67 (9th Cir. 2017); *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013). That Langer waited until after trial to appeal the district **[*1105]** court's denial of his motion to strike does not deprive us of jurisdiction. Appeals of interlocutory orders are "permissive, not

mandatory." *Baldwin v. Redwood City*, 540 F.2d 1360, 1364 (9th Cir. 1976). "We have never held that failure to appeal an interlocutory order barred raising the decided issue after entry of a final judgment." *In re Frontier Properties, Inc.*, 979 F.2d 1358, 1364 (9th Cir. 1992). We have jurisdiction to review the district court's denial of Langer's motion to strike the trespass counterclaim.

Similarly, because "the purpose of an anti-SLAPP motion **[**47]** is to determine whether the defendant is being forced to defend against a meritless claim" that seeks to intimidate or harass him, "the anti-SLAPP issue therefore exists separately from the merits of the [underlying] claim itself." *Batzel*, 333 F.3d at 1025. Thus, even though the district court ultimately declined to exercise supplemental jurisdiction over the trespass counterclaim, we may still review its pretrial decision to decline to strike the trespass claim as a SLAPP.

B.

In ruling on an anti-SLAPP motion, courts are to use a two-step process. First, a court must decide whether the defendant of the potential SLAPP (here, Langer), made "a threshold showing" that the cause of action in the challenged SLAPP arises from an act in furtherance of *First Amendment* "right of petition or free speech . . . in connection with a public issue." *Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010) (quoting *Equilon Enters., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507, 52 P.3d 685, 694 (2002)). Second, if the defendant satisfies that threshold showing, the burden shifts to the

plaintiff bringing the SLAPP claim (here, the Kisers) to show a "reasonable probability" of prevailing on the merits of the underlying claim. *Batzel*, 333 F.3d at 1024. This requires showing that "the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." **[**48]** *Hilton*, 599 F.3d at 903.

Langer met his burden for the first step. Approaching the Kisers' property to assess ADA compliance was an act in furtherance of Langer's right to petition under the *First Amendment*. The threshold showing encompasses "not merely actual exercises of free speech rights," such as the ADA action Langer later filed, but also "conduct that furthers such rights," such as entering the property and documenting ADA noncompliance. *Hilton*, 599 F.3d at 903; see also Cal. Civ. Proc. Code § 425.16(e)(4) (defining an act in furtherance of a person's right to petition to include "any conduct in furtherance of the constitutional right of petition . . . in connection with . . . a public issue or an issue of public interest"). California's anti-SLAPP statute is to be "construed broadly." *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010) (quoting Cal. Civ. Proc. Code § 425.16(a)).

As to the second step, the district court held that the Kisers established a "reasonable probability" of prevailing on their trespass claim. The potential SLAPP claim should be dismissed only if "no reasonable jury could find for" the party bringing the action. *Makaeff*, 715 F.3d at 261 (quoting *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th Cir. 2001)). For a trespass claim in California, a plaintiff must prove,

among other elements, a "lack of permission for the entry or acts in excess of permission." *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245, 225 Cal. Rptr. 3d 305, 317 (Ct. App. 2017). The bench trial revealed, however, that customers had **[**49]** permission from the **[*1106]** Lobster Shop owner to park in the lot. But the district court did not have the benefit of these facts arising from trial at the time it ruled on Langer's motion to strike the trespass counterclaim. The Kisers raised "sufficient factual questions" at the pretrial stage to prevent us from concluding that "no reasonable jury could find for" them on the trespass claim. *Makaeff*, 715 F.3d at 261.

While the circumstances of this case, and the unusual parking situation at the Lobster Shop, do not permit us to hold that the district court erred in denying the pretrial motion to strike the trespass counterclaim, our holding on this issue should not be interpreted as encouragement of landlords filing trespass claims against ADA complainants. State-law trespass claims may not be wielded as a weapon to silence accessibility advocates.

C.

Though we hold that the district court did not err in denying Langer's motion to strike the trespass counterclaim, this is not the end of our discussion of this claim. The district court determined in its "Conclusions of Law" section that "Plaintiff's presence within the East Lot constituted a trespass." That legal conclusion is a decision on the merits to the trespass **[**50]** counterclaim. But the district court "decline[d] supplemental jurisdiction over Defendants'

counterclaim for trespass," and so had no jurisdiction to issue a ruling on it. District courts may not issue holdings for claims on which they decline jurisdiction, so we vacate the district court's legal holding regarding the trespass claim.

V. CONCLUSION

The parking lot was a facility of the Lobster Shop, which is a place of public accommodation. The parking lot should have been accessible to Langer. We reverse the district court's judgment and remand with instructions to enter judgment for Langer. If the ADA is to live up to its promise of being a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), we must interpret it to require businesses to make facilities that are open to some customers accessible to those that are disabled. And we must not allow district courts to question the "legitimacy" of an ADA plaintiff's intent to return to a place of public accommodation simply because the plaintiff is an ADA tester or serial litigant.

The judgment of the district court is **REVERSED**. The district court's award of costs is **VACATED**.

Dissent by: COLLINS **[****51]**

Dissent

COLLINS, Circuit Judge, dissenting:

After a bench trial in this Americans with Disabilities Act ("ADA") lawsuit, the district court found that Plaintiff-Appellee Chris Langer was not a credible

witness in light of his less-than-trustworthy demeanor, the stark inconsistencies in his testimony and past statements, and the implausibility of some of his claims. In light of that credibility determination, the court specifically found that Langer did *not* have any intention of returning to and patronizing the property at issue here—namely, the "Gour Maine Lobster" shop, a store operated by a tenant of Defendants-Appellants Milan and Diana Kiser. This factual finding is not clearly erroneous, and it means that Langer lacked Article III standing to seek prospective injunctive relief. Because such relief is the only remedy available in a private suit under the ADA, Langer's ADA claim should have been dismissed for lack of Article III standing. Although the district court failed to recognize that its findings meant that Langer lacked Article III standing, it nonetheless proceeded to reject Langer's ADA claim on the merits. I **[*1107]** would affirm the dismissal of Langer's ADA claim with prejudice, but only on the threshold ground that Langer failed to prove Article III standing. **[**52]** Because the majority finds standing and reverses the dismissal of Langer's ADA claim on the merits, I respectfully dissent.

I

A

Langer is a disabled man who requires the use of a wheelchair for mobility. He is an avowed ADA "tester" plaintiff who seeks to enforce that statute by routinely bringing private actions against businesses that fail to comply with the Act's strict requirements. Over the last 18 years, Langer has filed roughly 2,000

lawsuits against various businesses, including this action and six others that Langer filed on the same day. More than 1,000 of Langer's ADA suits were filed between 2008 and 2020 in the Los Angeles-based Central District of California, even though Langer lived in the San Diego area the entire time.

The current suit is based on Langer's attempt to visit the Gour Maine Lobster shop in San Diego on September 19, 2017. Langer testified that the purpose of his visit was "for lobster," which he described as a food that he likes. The Gour Maine Lobster shop is located on Barnett Avenue, which is a major street in that part of San Diego. The shop's storefront is prominently marked overhead with a large sign stating "Live Maine Lobster," and the store's street-facing **[**53]** window also contains lettering stating "Gael's Wallpaper." As Langer drove past the shop, which was on his left, he saw a banner on the fence of an adjacent parking lot that said "Live Maine Lobster, Goods, Wallpaper." However, on either side of the entrance to the lot were signs stating "No Public Parking." Langer proceeded past the shop to an intersection where he could make a U-turn, and he then headed back towards the shop and turned into the adjacent parking lot.

Inside the lot, Langer saw a sign that said "Wallpaper", "Live Lobster", and "Parking," and that sign had an arrow above it pointing to a designated parking space. Three spaces over from that designated space was a marked handicapped space, but it "lacked an 'access aisle' to the right of the space." The lack of such a dedicated aisle posed an obstacle for Langer, who uses a special mobility van with an extendable

ramp that deploys from the passenger side. Because the ramp must extend eight feet from the vehicle, Langer can park only in handicap-accessible parking spaces with a dedicated access aisle to the right. Langer could not safely park in a handicapped space that lacks a dedicated access aisle even if the adjacent **[**54]** space on the right happens to be vacant, because if that space is taken by another vehicle while he is shopping, he would then be unable to re-enter his van.

Seeing that there was no spot in which he could park, Langer did not attempt to enter the lobster shop. Instead, using a camera that he carries with him for documenting ADA violations and for other purposes, Langer proceeded to take 53 photographs of the shop and the parking lot, and he then left.

Langer has driven by the lobster shop on several occasions, but he has not stopped there again since his first visit. Langer drove by the store the night before trial, and he saw that the gate into the adjacent parking lot was now closed. Langer testified that, because he likes lobster and "purchase[s] lobster all the time," he would return to the Gour Maine Lobster shop if it were made ADA compliant.

B

In January 2018, Langer sued the Kisers, alleging that the parking lot violated **[*1108]** Title III of the ADA. Specifically, he alleged that the failure to provide an access aisle adjacent to the handicap-accessible parking space constituted a violation of the ADA. For his claims under the ADA, Langer sought only

injunctive relief, attorney fees, **[**55]** and costs. Langer also asserted a pendent claim under California law, and the Kisers filed a counterclaim against Langer for state law trespass.

After a bench trial, the district court found that Langer had failed to show a violation of the ADA and dismissed his ADA claim with prejudice. En route to that result, the court also made findings as to Langer's credibility and his standing under Article III.

The district court found that Langer's testimony was "not credible," and that it was "rehearsed," and "unreliable." Based on this adverse credibility determination, the district court made a specific finding that, at the time Langer filed this suit, Langer in fact "did not intend to return" to the Gour Maine Lobster shop "to purchase lobster." Relatedly, the court concluded that Langer's "purpose" in originally visiting the property had been "to identify potential ADA violations, not to actually purchase lobster."

The court based its adverse credibility finding both on Langer's demeanor while testifying and on the substance of what he claimed. The court observed that Langer's direct testimony "was delivered in a rote fashion" and "without noticeable reflection." When Langer was cross-examined, the **[**56]** court noted, his counsel "appeared to be visibly coaching" him, and Langer "peppered his testimony with professions of uncertainty, lack of knowledge, or an inability to recall." As to the substance of Langer's testimony, the court noted that it was flatly contradictory as to critical points. For example, when asked about the "Live

Lobster" parking sign with an arrow, Langer testified that he was "not sure" whether he saw it from the street before entering the lot, but then a few minutes later he stated that he saw it as he was "driving down the street." When confronted with this inconsistency, Langer first tried to explain it as a misunderstanding, claiming that counsel had been "talking about as [Langer] was entering the lot," and Langer was "talking about when [he] was in the car." Perhaps sensing that this explanation made no sense, Langer stopped himself in mid-sentence and then shifted to a different explanation, claiming that "it may have been after [he] drove by again" that he saw the sign from the street. An additional "consideration with respect to [Langer's] credibility," according to the district court, was the fact that he had given contradictory dates for the timing of **[**57]** his visit to the lobster shop. At trial, Langer testified that the visit occurred on September 19, 2017, but in his declaration under penalty of perjury in support of his summary judgment motion, Langer averred that the date was February 27, 2017.

The district court also concluded that Langer's "professed intent to return" to the lobster shop was undermined by evidence concerning his prior similar statements about "whether he intended to return" to the nearly 2,000 businesses he had previously sued for ADA violations. For example, when asked about the other businesses at issue in the six other suits he filed on the same day as this case, Langer was largely "unfamiliar with those suits as well as the businesses involved." The court also pointed to Langer's 2018 deposition testimony in this case, in which Langer testified that, for the nearly 1,000 cases he had by

then filed in federal court, he "intend[ed] to patronize all of those 950 different businesses that [he] sued after they corrected their violations." These included **[*1109]** more than 600 businesses in the Los Angeles-based Central District of California, even though Langer lived in San Diego and had never lived in the Los Angeles area. **[**58]** The court also noted that Langer's blanket testimony about intending to return to every business he sued contradicted his statements in another suit pending before the same district judge. In that case, Langer was re-suing the same defendants as in a prior state court case, and he sought to avoid the preclusive effect of that earlier suit by claiming that, at the time that state suit was brought, he "had no intention of returning" to *that* store and so that state case did not address his "standing to seek ADA injunctive relief." The court concluded that the contradictory and opportunistic nature of the latter claim further undermined Langer's credibility.

In questioning Langer's professed intention to return to the Gour Maine Lobster shop, the district court also pointed to additional evidence concerning Langer's lobster-purchasing habits and his visit to this particular property. At trial, Langer testified that he had recently bought a "big lot" of lobster from Costco, which was delivered directly to him. The district court concluded that, given the complete absence of evidence about "whether the Lobster Shop has better prices than Costco," it was "doubtful" that Langer "would frequently **[**59]** travel to [Gour Maine Lobster] to purchase lobster, as he testified." The court also noted that Langer's complaint in this case originally claimed that he visited the property in question because he wanted to patronize both the lobster shop

and a "Smoke Shop" that shared the same parking lot. Langer, however, "never alleged that he smoked," and he abandoned any claims "relating to the Smoke Shop" before trial, thereby "undercutting" the credibility of his original claim that he had intended to return to the Smoke Shop.

Despite specifically finding that Langer did *not* intend to return to Gour Maine to purchase lobster if it became ADA compliant, the district court nonetheless "reluctantly" found that Langer had standing to assert an ADA claim for prospective injunctive relief. The court found such standing "on the basis that [Langer] encountered a barrier on the date of his[] visit" to the lobster shop. Although, in the district court's view, standing required an "intent to return in the 'imminent future' (rather than some day) but for the barriers described," the court concluded that it was bound to "follow[] the Ninth Circuit's instructions to liberally construe standing in ADA cases." **[**60]**

The court also noted that its conclusion on standing did not "change the outcome," because the court concluded that Langer's ADA claim failed on the merits anyway. Specifically, the court held that, given the signage in and around the parking lot, the "parking was for tenants only." As a result, the court held both that the lot was "not a place of public accommodation" subject to the ADA and Langer "was not denied equal access." Having rejected Langer's ADA claim on the merits, the district court declined to exercise supplemental jurisdiction over Langer's pendent state law claim and the Kisers' pending state law counterclaim for trespass.

II

The district court did not clearly err in rejecting, as not credible, Langer's testimony that he intended to patronize the Gour Maine lobster shop if its parking lot were made ADA compliant. But contrary to what the district court seemed to think, that finding is fatal to Langer's Article III standing.

A

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has **[*1110]** suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged **[**61]** action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000) (citation omitted); *see also Central Sierra Env't Res. Ctr. v. Stanislaus Nat'l Forest*, 30 F.4th 929, 937 (9th Cir. 2022). These core standing requirements reflect an "irreducible constitutional minimum" that must be satisfied in every case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992).

It is well settled that "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 198 L.Ed. 2d 64, 581 U.S. 433, 439 (2017) (citation omitted). Here, Langer's only federal claim is based on Title III of the ADA, which

prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). Title III creates a private right of action on behalf of "any person who is being subjected to discrimination on the basis of disability," *id.* § 12188(a)(1), but the remedies available are limited to those "set forth in § 204 of the Civil Rights Act of 1964, namely, 'preventive relief, including . . . a permanent or temporary injunction.'" *Arroyo v. Rosas*, 19 F.4th 1202, 1205 (9th Cir. 2021) (quoting 42 U.S.C. § 2000a-3(a)); *see also* 42 U.S.C. § 12188(a)(1). Accordingly, Langer had the burden at trial to establish that he has standing to **[**62]** seek *prospective* relief with respect to the parking lot adjacent to the Gour Maine Lobster shop.

To satisfy that burden, Langer had to show that, at the time the suit was filed, he had an *ongoing or future* injury-in-fact that was traceable to the parking lot's alleged lack of compliance with the ADA and that would be redressed by *prospective* injunctive relief. Instances of *past* discrimination—such as allegedly occurred during Langer's September 2017 visit to the parking lot—are not sufficient, without more, to establish standing to obtain prospective injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102-03, 103 S.Ct. 1660, 75 L.Ed. 2d 675 (1983); *Civil Rights Educ. & Enforcement Ctr. v. Hospitality Props. Tr. (CREEC)*, 867 F.3d 1093, 1098 (9th Cir. 2017). To establish the requisite ongoing or future injury, Langer had to show either that (1) he "intend[ed] to

return to a *noncompliant* place of public accommodation where he will likely suffer repeated injury"; or (2) he was "currently deterred from patronizing [the] public accommodation due to [the] defendant's failure to comply with the ADA," and "he 'would shop at the [facility] *if it were accessible*.'" *Chapman v. Pier I Imports (U.S.) Inc.*, 631 F.3d 939, 948, 950 (9th Cir. 2011) (en banc) (emphasis added) (citation omitted). Langer does not rely on the first theory, but only on the second.

In *CREEC*, we noted that this "deterrence" theory of standing for prospective injunctive relief rests **[**63]** critically on the premise that the facility at issue is one "to which [the plaintiff] desires access." *867 F.3d at 1098* (citation omitted). That makes sense, because if the facility is one that the plaintiff has no interest in patronizing anyway, there is no sense in which the then-present ADA violations could be said to "deter" the plaintiff from going and also no sense in which the correction of those facilities **[*1111]** would inure to the concrete and particularized benefit of that plaintiff. Accordingly, in finding the allegations of standing to be adequate as to the hotels at issue in *CREEC*, we emphasized that the plaintiffs there averred that "they will visit the hotels when the non-compliance is cured" and that the existing ADA violations therefore "prevented them from staying at the hotels." *Id.* at 1099. Indeed, we specifically held that, "[w]ithout such averments, they would lack standing." *Id.* That is, persons "who do not in fact intend to use the facility" if it were made ADA compliant *lack* Article III standing. *See id.*

We have reiterated this critical aspect of the

deterrence theory of standing on many occasions. For example, in *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008), we underscored that, when an ADA plaintiff rests his standing arguments on the theory that **[**64]** he is "deter[red] from patronizing" the defendant's facility, the plaintiff must plead and prove "his intention to return in the future once the barriers to his full and equal enjoyment of the goods and services offered there have been removed." *Id.* at 1041. And in *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031 (9th Cir. 2008), we specifically held that, in order for the out-of-town plaintiff there to invoke a deterrence theory of ADA standing against the defendant hotel, she "must demonstrate her intent to return to the Santa Barbara area and, upon her return, *her desire to stay* at the Best Western Encina if it is made accessible." *Id.* at 1037 (emphasis added).

Accordingly, to establish his standing to sue for prospective relief under the ADA, Langer had to prove by a preponderance of evidence at trial that, at the time he filed suit, he actually intended to patronize the Gour Maine Lobster store if the parking lot adjacent to it were made ADA compliant. *See Lujan*, 504 U.S. at 561 (holding that the elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint.").

B

After the bench trial in this case, the district

court **[**65]** expressly concluded that Langer "did *not* intend to return" (emphasis added) to the Gour Maine Lobster shop "to purchase lobster" if the store became ADA compliant. Because Langer thus failed to prove that he would patronize the Gour Maine Lobster shop if the challenged barriers were removed, he thereby failed to establish a critical requirement of the deterrence theory of standing upon which his ADA claim was based. His ADA claim therefore should have been dismissed for lack of Article III standing without addressing the merits of his ADA claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed. 2d 210 (1998).

In nonetheless finding that Langer had standing, the district court relied on several premises that are all legally erroneous. First, the court reasoned that Langer had standing "on the basis that he encountered a barrier on the date of his[] visit" in September 2017. That reasoning is directly contrary to settled law confirming that a past injury, without more, is *not* sufficient to establish standing to seek prospective injunctive relief. *See Lyons*, 461 U.S. at 102-03; *CREEC*, 867 F.3d at 1098. Second, the court concluded that it was bound by our "instructions to liberally construe standing in ADA cases." But no amount of liberal construction can provide a basis for disregarding the **[**66]** "irreducible **[*1112]** constitutional minimum" requirements of standing at issue here. *Lujan*, 504 U.S. at 560. Third, the court concluded that it should err on the side of finding standing because it concluded that Plaintiff loses on the merits anyway. That reasoning rests on a variant of the doctrine of "hypothetical jurisdiction" that was squarely rejected

in *Steel Co.* *See* 523 U.S. at 101-02. In short, the district court erred in failing to recognize that its factual findings were fatal to Langer's standing.

C

The majority nonetheless concludes that Langer has standing, but its grounds differ from those given by the district court. First, the majority holds that the "district court's credibility determination cannot stand," and the majority therefore rejects that court's relevant factual findings. *See* Opin. at 16. Second, the majority concludes that, under what it considers to be the correct view of the facts and the law, Langer "has met his burden to establish standing." *See* Opin. at 25. The majority's conclusions are wrong.

1

We review the district court's factual findings after a bench trial only for clear error, and we must give "due regard to the trial court's opportunity to judge the witnesses' credibility." *See* Fed. R. Civ. P. 52(a)(6). Here, the district **[**67]** court's factual finding that Langer did not intend to patronize the Gour Maine Lobster shop in the future is unassailable, and it is the majority's reasons for setting it aside that are clearly erroneous.

As explained earlier, the district court gave multiple reasons for concluding that Langer was not credible when he claimed that he would patronize the Gour Maine Lobster shop if it were made ADA compliant. Unlike us, the district court observed the live testimony, and it noted that Langer's demeanor and delivery was "rote" and "rehearsed" and that his attorney

was "visibly coaching" him on the stand. The district court also pointed out that Langer's testimony was at times internally inconsistent and contrary to his prior sworn testimony or statements. The court concluded that the credibility of Langer's professed future interest in buying lobster from this particular shop was further undermined by the fact that (1) Langer's supposed reason for initially visiting this particular property was the dubious claim that Langer also wanted to patronize an adjacent smoke shop; and (2) Langer conceded that lobster was readily available for delivery from Costco and he had recently bought a "big **[**68]** lot" there. Finally, noting that Langer had brought nearly 2,000 ADA lawsuits, more than half of which were filed in another federal district, the court found it doubtful that Langer really intended to patronize this enormous number of businesses. Considering all of these circumstances, the district court concluded that Langer was not credible when he claimed that he was interested in patronizing Gour Maine Lobster if it became ADA compliant.

All of the points identified by the district court are proper considerations in weighing Langer's testimony, and there is no clear error in the court's conclusions. Indeed, the district court's detailed findings concerning Langer's demeanor and the multiple clear contradictions in his testimony, *see supra* at 43-44, are alone sufficient to support the district court's adverse credibility determination. *See, e.g., Valenzuela v. Michel*, 736 F.3d 1173, 1177 (9th Cir. 2013) (finding no clear error in adverse credibility determination in light of contradictions and coaching); *Nicacio v. INS*, 797 F.2d 700, 705 (9th Cir. 1986) **[*1113]** (noting that failure to recall details is a proper consideration in

evaluating credibility).

Although the majority explicitly "reject[s]" the district court's "adverse credibility determination," *see* Opin. at 15, the majority ignores **[**69]** much of that court's reasoning and fails even to address the court's findings concerning Langer's demeanor and multiple inconsistent statements. Instead, the majority's conclusion rests primarily on the view that the district court committed *legal* error by relying on evidence concerning Langer's extensive litigation history. Such history, the majority categorically declares, "has no place in our standing analysis." *See* Opin. at 15. The majority claims that our decision in *D'Lil* supposedly established this evidentiary privilege against consideration of an ADA plaintiff's litigation history, *see* Opin. at 16, but that is wrong.

D'Lil merely states that, because using "past litigation" to assess credibility in ADA cases raises the potential for discouraging the vigorous private enforcement that Congress clearly intended, any such consideration of litigation history "warrants our most careful scrutiny." 538 F.3d at 1040. But while we must therefore "be particularly cautious about affirming credibility determinations that rely on a plaintiff's past ADA litigation," *id.*, that does not mean that the *underlying factual assertions* made by a plaintiff in prior litigation are somehow off limits simply because **[**70]** they were made in litigation and not in some other forum. Just as the inclusion of an underlying fact in an attorney-client communication does not somehow make that underlying fact privileged, *see Upjohn Co. v. United States*, 449 U.S. 383, 395-96, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981), so too the

underlying factual assertions reflected in Langer's nearly 2,000 ADA suits are not in any sense privileged and are properly considered for whatever relevance or logical significance they may have. Here, there is no dispute that Langer's prior ADA suits reflected an underlying factual contention that he actually had the subjective intention to patronize each and every one of those stores if it were made ADA compliant. That underlying fact—just like any other relevant fact—was properly considered by the district court in assessing Langer's credibility.

Our opinion in *D'Lil* confirms that consideration of litigation history is not governed by a categorical rule, but instead turns upon the specific facts of a given case. In *D'Lil*, we concluded that the record did not support the district court's view that it was "implausible that a plaintiff with approximately sixty prior ADA suits sincerely 'intends to return to nearly every place she sues.'" 538 F.3d at 1040. The notion that D'Lil actually intended **[**71]** to patronize that relatively modest number of facilities was hardly implausible given the undisputed record "evidence of D'Lil's extensive and frequent travel throughout the state." *Id.* Moreover, D'Lil had presented undisputed evidence establishing "specific reasons" why she was likely to return to Santa Barbara and to the defendant hotel. *Id. D'Lil* thus did nothing more than make a case-specific assessment that the underlying facts about the plaintiff's other ADA suits did not provide a basis, in that case, for questioning her otherwise amply established intention to return to Santa Barbara and to patronize the defendant's hotel if it were made ADA compliant. *D'Lil* did not establish, as the majority would have it, an evidentiary privilege that

precludes—as having "no place in our standing analysis"—any consideration of the implausibility of a litigant's assertion that he or she actually intends to patronize *thousands* of stores. *See* Opin. at 15; *see also* Opin. at 21 (holding that "there must be something other than the fact that the litigant **[*1114]** files a lot of ADA cases to instill doubt in his testimony").

The majority alternatively suggests that, even under a case-specific assessment of **[**72]** the trial record, the facts concerning Langer's litigation history do not in fact undermine his credibility. *See* Opin. at 18-21. According to the majority, Langer's declared intention to patronize each and every one of nearly 2,000 businesses (more than half of which were in the Los Angeles area) "says little" about the credibility of his declared intention to patronize the Gour Maine Lobster shop, particularly in light of Langer's "professed taste for lobster," the proximity of the store to his home, and the multiple times Langer said that he drove by the business. *See* Opin. at 17.

But in reaching these conclusions, the majority simply ignores the "significantly deferential" standard of review, under which we review the district court's factual findings only for clear error. *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 623, 113 S.Ct. 2264, 124 L.Ed. 2d 539 (1993). It is for the district court to assess credibility and to choose among competing reasonable inferences, and that court properly did so. The court provided specific reasons for concluding that Langer did not come across as a credible witness, and it also explained why his professed subjective interest in patronizing the Gour Maine Lobster

store seemed doubtful. And as to Langer's litigation history specifically, **[**73]** the court properly concluded that—in contrast to the merely 60 facilities at issue in *D'Lil*—it was implausible to think that Langer intended to actually patronize the nearly 2,000 businesses that he had sued. Because "the district court's account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse it even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985). The majority flagrantly violates that standard by reweighing the evidence for itself and drawing debatable inferences that are more to its liking.

Accordingly, there is no clear error in the district court's decision to discredit Langer's claim that he intended to patronize the Gour Maine Lobster shop if it were ADA compliant.

2

The majority alternatively concludes that the district court committed legal error by focusing on whether Langer intended to return to the Gour Maine Lobster store *as a patron*. Under the majority's reasoning, even if the district court did not clearly err in finding that Langer had no intention of patronizing the store in the future, that finding was insufficient to defeat Langer's standing. According **[**74]** to the majority, an intention to return *as an ADA tester* is sufficient to establish Langer's standing, even if he has no interest in patronizing the store. *See* Opin. at

19-20, 25-26. The majority's view is contrary to precedent and would eviscerate the strictures of Article III.

As explained earlier, Langer's theory of injury-in-fact is based on the deterrence theory of standing endorsed in our en banc opinion in *Chapman*. Under that theory, an ADA plaintiff has a sufficient *current* injury-in-fact if that plaintiff is "*currently deterred from patronizing* [the] public accommodation due to [the] defendant's failure to comply with the ADA," and "he 'would shop at the [facility] *if it were accessible*.'" *Chapman*, 631 F.3d at 950 (emphasis added) (citation omitted). This deterrence theory of standing is distinct from the alternative theory under which an **[*1115]** ADA plaintiff may establish a sufficiently imminent *future injury* based on a likelihood to visit the premises in the future *while it is still not ADA compliant*. *Id.* at 948. Under that latter theory, the ADA plaintiff would actually encounter the barriers and suffer the resulting injury-in-fact. But under the deterrence theory, the injury is *not* that the plaintiff will encounter the barriers. **[**75]** Rather, the injury-in-fact is that, due to the presence of barriers that the plaintiff wants to avoid and intends to avoid, the plaintiff is currently being deprived of an opportunity to patronize a facility that the plaintiff *otherwise would patronize* and that the plaintiff *intends to patronize if the barriers are removed*. As the district court correctly concluded, Langer failed to carry his burden of proof on that point.

The majority nonetheless concludes that the district court applied the wrong legal standard and that the requirements of *Chapman*'s deterrence theory of

ADA standing can be satisfied even in the absence of any desire or intention to *patronize* the property if the barriers were removed. According to the majority, the deterrence theory of standing can be satisfied merely by showing that the plaintiff intends to return to the *compliant* property for purposes of verifying, as an ADA "tester," that such compliance has been achieved. That is flatly wrong.

The whole premise of the deterrence theory of ADA standing is that the plaintiff's current desire to patronize the store, and intention to do so when the barriers are removed, gives rise to a current injury that would be redressed **[**76]** by the sort of prospective injunctive relief that is the ADA's sole remedy. *See Chapman*, 631 F.3d at 949-50. That is, under the deterrence theory, an ADA plaintiff who is being *deprived* of access to a *desired* store thereby suffers a concrete and particularized injury that is sufficient for Article III purposes. But in the absence of any such current or future desire to patronize the store, an ADA plaintiff cannot invoke the deterrence theory to establish a cognizable injury-in-fact. In such circumstances, the plaintiff's only "injury" is the unhappiness of knowing that some store he does not want to patronize is not obeying the law, and his only theory of redressability is that he would be gratified to see that store brought into compliance with the ADA. "But although a suitor may derive great comfort and joy from the fact . . . that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co.*, 523 U.S. at 107.

The majority is therefore wrong in contending that Langer sufficiently established his standing based on evidence "that he returned to the premises since filing the lawsuit to assess its compliance **[**77]** with the ADA." *See* Opin. at 17. As an initial matter, the majority misstates the record, because the only evidence is that Langer had "*gone by*" the store on "four or five" occasions, *not* that he actually stopped and personally encountered the property and its then-current condition. Indeed, that is why Langer rested solely on a deterrence theory of standing and not on *Chapman*'s alternative theory that he had "show[n] a likelihood of future injury" by proving that he "intend[ed] to return to a noncompliant accommodation and [was] therefore likely to reencounter a discriminatory architectural barrier." 631 F.3d at 950. But in the absence of proof of a future likelihood of personally encountering the barriers, and in the absence of a desire to patronize the business, an ADA plaintiff who merely drives by a store and observes its parking lot suffers no cognizable injury. Likewise, an ADA plaintiff who intends to visit such **[*1116]** a store, after the barriers are removed, solely in order to verify compliance with the ADA is asserting merely a generalized interest in enforcement of the law that is insufficient for Article III standing.

The majority nevertheless contends that its expansive theory of tester standing **[**78]** was adopted by this court in *CREEC*. *See* Opin. at 20. That is wrong. In the cited portion of *CREEC*, we addressed and rejected the *statutory* argument that the text of the ADA excluded "tester" plaintiffs. 867 F.3d at 1101-02. Nothing in that discussion suggests, much less holds, that an ADA plaintiff who has no desire to

patronize a business can establish *Article III standing* under a deterrence theory merely by claiming to be a "tester." On the contrary, elsewhere in *CREEC*, we noted that the named plaintiffs in that case *had* adequately alleged their intention to stay at the hotels "when the non-compliance is cured," and we said that, "[w]ithout such averments, *they would lack standing*" under a deterrence theory. *Id.* at 1099. *CREEC* thus merely held that nothing in the text of the ADA's private right of action excludes from its coverage a plaintiff whose desire to patronize a facility is motivated in whole or in part by a desire to assess compliance with the ADA. *Id.* at 1101. But that holding about the text of the ADA did not, and could not, purport to alter the "irreducible" constitutional requirements of Article III standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S.Ct. 1540, 194 L.Ed. 2d 635 (2016) ("[I]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a **[**79]** plaintiff who would not otherwise have standing." (citation omitted)). And nothing in *CREEC* purported to alter *Chapman*'s articulation of the requirements of the deterrence theory of ADA standing, which (unlike the majority's radical expansion of that theory) is consistent with those constitutional limits.

Under the majority's extraordinary theory, if an ADA plaintiff has an interest in examining a property in the future to confirm its compliance with the ADA, that plaintiff has standing to sue the owner to enforce such compliance, even if the plaintiff has no interest in patronizing the facility and will not personally encounter its barriers in the future. This is pure private attorney general standing of a sort that Article III

simply does not permit a plaintiff to invoke in federal court. *See, e.g., Lee v. American Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001).

It is particularly odd for the majority to rely on such a theory of standing here, because Langer himself insisted under oath that he was *not* relying on such a view. When asked at his deposition whether it was his "purpose in going to these businesses, to find ADA violations," Langer said "No" and instead agreed that he was "genuinely going to these businesses because [he] want[s] to patronize them **[**80]** all." Ironically, even the majority apparently thinks that Langer is not credible.

III

For the foregoing reasons, the district court did not clearly err in finding that Langer's testimony was not credible and that Langer had no intention of patronizing the Gour Maine Lobster store if it were made ADA compliant. That factual finding is fatal to Langer's theory of Article III standing, which rested on the contention that, at the time the suit was filed, he was deterred from visiting a store that he wanted to patronize and would patronize if it were made ADA compliant. Because the district court lacked jurisdiction over the only federal claim in the case, it did not abuse its discretion in declining to exercise supplemental jurisdiction over the remaining state law claims in the case. I **[*1117]** would therefore affirm the district court's judgment on these grounds. I respectfully dissent.

Langer v. Kiser

United States District Court for the Southern District of California

February 1, 2021, Decided; February 1, 2021, Filed

Case No.: 3:18-cv-00195-BEN-NLS

Reporter

516 F. Supp. 3d 1066 *; 2021 U.S. Dist. LEXIS 18872 **; 2021 WL 321972

CHRIS LANGER, Plaintiff, v. MILAN KISER, in individual and representative capacity as trustee of the Milan and Diana Kiser Revocable Trust dated August 19, 2003; DIANA KISER, in individual and representative capacity as trustee of the Milan and Diana Kiser Revocable Trust dated August 19, 2003, Defendants.

Subsequent History: Reversed by, in part, Vacated by, in part, Remanded by Langer v. Kiser, 2023 U.S. App. LEXIS 1637 (9th Cir. Cal., Jan. 23, 2023)

Prior History: Langer v. Kiser, 2018 U.S. Dist. LEXIS 197204, 2018 WL 6042787 (S.D. Cal., Nov. 17, 2018)

Counsel: [1]** For Chris Langer, Plaintiff: Isabel Rose Masanque, LEAD ATTORNEY, Potter Handy LLP, San Diego, CA; Bradley Alan Smith, Potter Handy, San Diego, CA; Christopher A. Seabock,

Potter Handy, LLP, San Diego, CA.

For Milan Kiser, in individual and representative capacity as trustee of the Milan and Diana Kiser Revocable Trust dated August 19, 2003, Diana Kiser, in individual and representative capacity as trustee of the Milan and Diana Kiser Revocable Trust dated August 19, 2003, Defendants, Counter Claimants: Samy S Henein, LEAD ATTORNEY, Suppa Trucchi and Henein, San Diego, CA.

For Chris Langer, Counter Defendant: Isabel Rose Masanque, LEAD ATTORNEY, Potter Handy LLP, San Diego, CA; Bradley Alan Smith, Potter Handy, San Diego, CA; Russell C Handy, LEAD ATTORNEY, Center for Disability Access, San Diego, CA.

Judges: HON. ROGER T. BENITEZ, United States District Judge.

Opinion by: ROGER T. BENITEZ

Opinion

[*1070] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL

I. INTRODUCTION

Plaintiff Chris Langer ("Plaintiff") brings this action under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et. seq.* (the "ADA"), and California's Unruh Civil Rights Act, Cal. Civ. Code, §§ 51-53 (the "UCRA"), against Defendants Milan and Diana Kiser, as individuals **[**2]** and in their representative capacities as trustees of the Milan and

Diana Kiser Revocable Trust dated August 19, 2003 (collectively, "Defendants") for discrimination by failing to provide full and **[*1071]** equal access to the parking lot they own that Plaintiff was unable to access due to his disabilities. Complaint, ECF No. 1 ("Compl."). Defendants counterclaimed for trespass. Answer and Counterclaim, ECF No. 20. Plaintiff tried his claims to the Court without a jury on September 30, 2020. Minute Order, ECF No. 84.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, these findings of fact, conclusions of law, and order constitute the Court's final decision with respect to the bench trial it conducted on Plaintiff's claims against Defendants and are based on the testimony at trial, exhibits admitted into evidence, arguments of counsel, and entire record in this case. The Court finds that while Plaintiff has Article III standing, the subject property (a private parking lot) was not a place of public accommodation, and the owners of the property did not discriminate against Plaintiff by failing to offer an ADA-complaint place to park his vehicle. These findings of fact and conclusions of law are outlined below.

II. FINDINGS OF FACT [**3]

A. Stipulations

At the beginning of trial, the parties stipulated that:

1. Defendants are the trustees of the Milan and Diana Kiser Revocable Trust, which owns the mixed-use real property located at 3002 Barnett Avenue,

San Diego, California 92110 (the "Property"), and owned the Property in this capacity in 2017. Trial Trans. ("Tr.") at 3:12-14, 96:4-8; *see also* Defendants' Opposition to Plaintiff's Motion for Summary Judgment, ECF No. 25 at 3:8-11.

2. Even though Plaintiff's complaint in this case made allegations of barriers to access against both the 1 Stop Smoke Shop (the "Smoke Shop") and Gour Maine Lobster shop/Wallpaper store (the "Lobster Shop"), Plaintiff is not pursuing any violations against the Smoke Shop and is limiting his case to proving there was no van accessible parking at the Lobster Shop. Tr. at 2:7-10.

3. Plaintiff took 52 photographs on September 19, 2017. Tr. at 27:18-19.

4. Plaintiff has filed close to 2,000 ADA cases. Tr. at 46:5-47:12.

B. Findings of Fact

After considering the testimony, evidence, and record, the Courts finds the following facts:

1. On September 19, 2017, the day that Plaintiff visited the Property:

a. Defendants owned the Property, which is a mixed-use **[**4]** property.

b. The Property includes an East Lot and West Lot, as defined below.

c. Defendants leased the Property to residential and commercial tenants.

d. Mr. Taylor leased space from Defendants for his business, the Lobster Shop, and his wife's business, Gael's Wallpaper, pursuant to a lease agreement.

e. Defendants did not offer parking in the East Lot to anyone other than their tenants as indicated by the (1) lack of signs advertising that vehicles driving by should enter and park inside the East Lot; (2) two signs on each side of the gate to the East Lot, stating that open public parking was prohibited; (3) numerous signs inside the East Lot, stating that parking was for tenants; and (4) numbers on each space, indicating each space was assigned.

f. Under the lease agreement between Defendants and Mr. Taylor, Mr. Taylor was allocated parking space number one, which was for his use and not the use of guests or customers.

g. Plaintiff saw the signs prohibiting public parking on the gate to the East Lot as he drove through the gate providing access to the East Lot.

[*1072] h. The arrow on the sign within the East Lot that said "Parking" above the word "Lobster" is pointing down and to the left and **[**5]** does not indicate that customers should park directly in front of the sign.

i. The East Lot had one designated handicap parking spot, which did not include a handicap access aisle to its right.

j. The Lobster Shop offered parking to its customers, and this one parking spot (parking space number one) was not a handicap parking space.

k. Plaintiff never parked in parking space number one or entered the Lobster Shop store front.

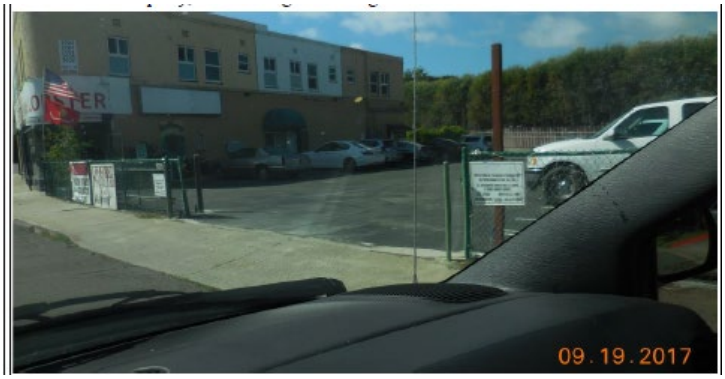
2. The East Lot now has one handicap spot, which includes a handicap access aisle to the right of the handicap spot.

3. The Lobster Shop no longer allows its parking space to be used by customers. Plaintiff's Post-Trial Brief, ECF No. 86 at 2:10-11; *see also* Tr. at 78:2-79:1.

C. Observations and Analysis

1. The Property

Defendants' Property has parking lots located on each side of the building. Tr. at 21:12-19. The lot on the west side (the "West Lot") is leased to an auto repair shop. Declaration of Milan Kiser in Support of Defendants' Opposition to Plaintiff's Motion for Summary Judgment ("Kiser Decl."), ECF No. 25-1 at 3:6-7; *see also* Exhibit 4 to Declaration of Russell Handy in Support of Plaintiff's Special Motion to Strike, ECF No. 21-5 at 1. The lot on the east **[***6]** side of the Property is for use by Defendants' residential tenants (the "East Lot"), and the owner of the Lobster Shop has one space for personal use. Tr. at 90:2-4, 96:22-25, 98:5-7; Kiser Decl. at 2:13-15. The East Lot is enclosed by a gate that, as shown below in the photograph taken by Plaintiff on the day he attempted to access the Property, had four signs on the gate.



See Trial Exhibit 10.

Two of the signs on each side of the gate at the entrance to the East Lot prohibit open public parking (the "No Public Parking Signs")[1], stating as follows:

> **[*1073]** OPEN PUBLIC PARKING PROHIBITED
>
> NO TRESPASSING PC 602 (M) (N)[2]
>
> ALL UNAUTHORIZED VEHICLES WILL BE

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[1] Title III of the ADA's prohibition against discrimination only applies to a person "who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a).

[2] California Penal Code, Section 602(m) provides that "every person who willfully commits a trespass . . . is guilty of a misdemeanor" and defines a trespass as "[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession." Subsection (n) defines a trespass as "[d]riving any vehicle . . . upon real property belonging to, or lawfully occupied by, another and known not to be open to the general public, without the consent of the owner, the owner's agent, or the person in lawful possession." Cal. Pen. Code, § 602(n).

TOWED AT VEHICLE OWNER'S EXPENSE

C.V. 22658A SDPD 619-531-2000

FOR INFORMATION STAR TOWING 858-573-8700.

See also Tr. at 41:17-23.

2. Plaintiff Chris Langer's Visit to the Property

Plaintiff is a paraplegic who has been disabled since 1983, is unable to walk, and requires a wheelchair device to ambulate. Tr. at 6:11-21; *see also* Declaration of Chris Langer in Support of Plaintiff's Motion for Summary Judgment, ECF No. 24-2 ("Langer MSJ Decl.") at 1:24. He has a disabled person parking placard and a specially equipped van with a ramp that deploys out of the **[**7]** passenger side. Tr. at 10:8-14; *see also* Compl. at 2:6-9.

Plaintiff is familiar with Defendants' Property. Tr. at 6:22-24. On September 19, 2017,[3] Plaintiff went to the Property for the purpose of purchasing lobster. *Id.* at 7:4-13; 20:16-19. He was traveling South on Rosecrans Street, made a left turn onto Lytton Street,

[3] At trial, Plaintiff testified that he visited the Property on September 19, 2017. Tr. at 7:4-13; 20:16-19. However, in Mr. Langer's declaration submitted in support of his Motion for Summary Judgment, which he signed under penalty of perjury, he stated, "On February 27, 2017, I went to the 1 Stop Smoke Shop . . . and Gour Maine Lobster." Langer MSJ Decl. at 1-2, ¶ 4. Yet, the complaint refers to Plaintiff visiting in September 2017. Compl. at 4, ¶ 14. This inconsistency in Plaintiff's testimony factored into the Court's consideration with respect to Plaintiff's credibility.

and headed towards the Lobster Shop, a business located on the Property. *Id.* at 24:7-15. In this direction of travel, he saw the Lobster Shop's sign on the exterior of the front gate, advertising for live lobster:

Plaintiff's Trial Exhibit 4-A (the "Live Maine Lobster Sign").

In order to enter the East Lot from this direction of travel, Plaintiff would have needed to make a left turn into the East Lot. *Id.* at 24:16-25:7. Because the East Lot cannot be accessed by making a left turn from his direction of travel, he continued down Lytton Street until it became Barnett Avenue, made a legal U-turn, and **[*1074]** approached the Lobster Shop from the other direction. *Id.* at 24:16-25:7. As Plaintiff drove in this direction, he would have passed a sign saying, "Park in the Alley" with lobsters on it before reaching the gate providing access to the East Lot. *See* Trial Exhibit 6M.

As an individual **[**8]** approaches the Lobster Shop in a vehicle, there are no signs on the exterior of the East Lot that indicate parking for the Lobster Shop is allowed inside the East Lot. Tr. at 32:14-23. Further, just before entering the East Lot by making a right turn into the lot, Plaintiff saw the open sliding gate, which had four signs on it, including the Live Maine Lobster Sign as well as the two No Public

Parking Signs, which were not obscured. *Id.* at 25:13-26:1. Nonetheless, he turned right into the East Lot and saw a sign inside the East Lot that said, "Live Lobster" with "Parking" and an arrow above it. *Id.* at 63:13-18; 65:22-25.

Plaintiff's Trial Exhibit 4P (the "Lobster Parking Sign"). Plaintiff testified that the arrow points to the parking spot directly in front of the Lobster Shop. Tr. at 72:14-18. However, he also testified that the arrow points to the left and down. *Id.* at 73:1-3. The Court finds that the arrow points to the left and does not indicate that someone should park in the spot directly in front of the sign.

Both of the No Public Parking Signs, which were on the same fence as the Live Maine Lobster Sign, were visible on each side of the gate as Plaintiff drove through the gate. **[**9]** Tr. at 19:14-20:3; 31:2425; 32:21-23, 41:17-23. However, Plaintiff saw the Live Maine Lobster Sign as well as the Lobster Parking Sign[4] inside the East Lot, and based on those two

[4] Plaintiff had conflicting testimony about whether he saw the Lobster Parking Sign from the street **before** he entered the

signs as well as the business being open to the public, believed he could park in the East Lot inside the fence even though there was nothing on the exterior signs that said parking was permitted inside the fence.[5] **[*1075]** *Id.* at 13:4-10, 18:7-19:13. Accordingly, Plaintiff entered the East Lot from the street by turning right into the front gate and testified that even though No Public Parking signs were visible as he was driving into the gate, he did not see them. *Id.* at 13:19-25, 19:14-2:3. Plaintiff testified that there was nothing on the store front itself that said parking was available in the adjacent lot. *Id.* at 19:6-9. He also stated that there were signs up against the fence inside the East Lot that said "something to the effect of tenant parking only." *Id.* at 20:16-21:2.

Once Plaintiff pulled into the East Lot, he observed there was, in fact, a handicapped space, it lacked an "access aisle" to the right of the space, which is required for him to use the space. Tr. at 10:2-14; *see also* **[**10]** *id.* at 15:14-15. In order for Plaintiff to use a handicapped space, the space must have

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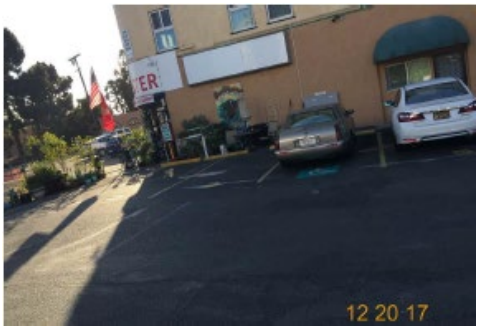
East Lot. *Compare* Tr. at 13:4-10 (testifying he saw the Lobster Parking sign on the day of his visit) *with id.* at 35:1-22 (testifying that he may not have sign the Lobster Parking Sign on his first pass, and that "[i]t may have been on the second pass, but that sign could clearly be seen from the street.").

[5] Plaintiff testified that he interpreted the words "OPEN PUBLIC PARKING PROHIBITED" on the No Public Parking Signs to mean that the general public could not park there, but customers of the businesses at the Property could. Tr. at 65:13-14. He stated that the "open" sign was lit up in the window of the Lobster Shop, and that the illuminated sign in addition to the Lobster Parking Sign led him to believe the Lobster Shop was open for business. *Id.* 65:22-66:25.

an access aisle to the right of the handicapped space so he can deploy the ramp in his van out the side, which allows him to safely exit and re-enter the vehicle. *Id.* at 10:2-14. Such ramps are generally eight feet wide. *Id.* at 15:8-10. Plaintiff testified that the location of the white car in Plaintiff's Trial Exhibit 5V is where the handicap aisle would usually be located. *Id.* at 11:17-20. Plaintiff's Trial Exhibit 5V, as depicted below, shows the available handicap stall Plaintiff encountered on the day of his visit:



Plaintiff's Exhibit 5V; *see also* Tr. at 11:14-15.

Plaintiff explained that when he is not in his vehicle, the van ramp is not deployed to block someone from parking next to his car. Tr. at 16:19-24. As a result, someone can park in the space to his right, and then, when he returns to his vehicle, his access to the vehicle is obstructed. *Id.* at 16:19-24. Consequently, if there is no access aisle, even if there is an open parking spot next to the disabled stall, Plaintiff cannot simply use the open parking space as an access aisle because if someone parked in that space while he was **[**11]** inside a **[*1076]** business, when he returned to his vehicle, the parked vehicle would prevent him from deploying the ramp in his van, which

would prevent him from entering his vehicle. *Id.* at 15:17-16:15. In order to re-enter his van, Plaintiff would need to locate the owner of the vehicle and ask him or her to move the vehicle. *Id.* at 16:14-15.

Once Plaintiff saw there was no handicap access aisle next to the handicap spot, he did not make any effort to contact anybody to see where available parking was. Tr. at 44:4-7. He also did not go inside the business. *Id.* at 17:7-10. However, he had a camera with him,[6] which he used to take pictures of the Property. Tr. at 44:23-25.

Plaintiff has not been back to the Lobster Shop since September 2017 and has never been inside the business. Tr. at 41:24-42:1. However, he drove by Defendants' Property the night before trial and noticed that the gate to the East Lot is closed now. *Id.* at 42:4-10.

On the day Plaintiff filed this lawsuit, he filed six additional lawsuits in the Southern District of California also alleging ADA violations.[7] Tr. at 50:3-51:25. These lawsuits pertained to the below six cases: (1) *Langer v. Yee*, Case No. 18-cv-00190-H-NLS; **[**12]**

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[6] He had the camera with him because he keeps one in his car at all times, which he uses for both personal recreational use as well as for lawsuits. *Id.* at 44:23-45:14. Whenever Plaintiff comes across a place he believes has ADA violations, he takes pictures to document the condition of the premises on that date and time. *Id.* at 67:4-18.

[7] At trial, the Court permitted Defendants to question Plaintiff about these lawsuits, finding them relevant to the issue of the legitimacy of his professed intent to return, which as discussed below, is relevant to standing in this case.

(2) *Langer v. Little*, Case No. 18-cv-00191-BEN-JMA; (3) *Langer v. Chula Vista Rentals, LLC*, Case No. 18-cv-00192-BEN-JLB; (4) *Langer v. Slat Salt, Inc.*, Case No. 18-cv-00193-BEN-MDD; (5) *Langer v. US Bank, N.A.*, Case No. 18-cv-00194-L-WVG; and (6) *Langer v. Lamp Farms, LLC*, Case No. 18-cv-00209-MMA-BGC. *Id.* at 49:1-59:5. As to the first lawsuit, *Langer v. Yee*, Plaintiff alleged in the complaint that he went to the May Center in 2017 and encountered barriers to access, but at trial, when asked about kind of business the May Center was, could not recall. *Id.* at 52:16-20. As to the second lawsuit, *Langer v. Little*, Plaintiff testified that one of the defendants, Cal Auctions, LLC, is an auction house he does business with by attending their auctions and buying products. Tr. at 57:1-12. However, at trial, he could not recall what items he was picking up in November 2017 when he alleges he visited that property. *Id.* at 57:21-24.

Plaintiff testified he would return to the Lobster Shop if it had handicapped parking because he likes lobster. Tr. at 68:6-10; 69:1-5. He stated he purchases lobster all the time and had just gotten a "big lot from Costco," which delivers so he does not have to **[**13]** go into the store. *Id.* at 68:12-14.

3. David Taylor

David Taylor ("Mr. Taylor") owns the Lobster Shop, which he has owned for twelve (12) years. Tr. at 74:16-77:3. However, he has only leased space at the Property from Defendants for four years. *Id.* at 75:5. On July 3, 2016, Mr. Taylor and his wife, Gael Taylor, moved their businesses to the Property and entered into a Rental Agreement and/or Lease with Mr. Kiser

(the "Lease Agreement"), which governs the terms of his tenancy. *Id.* at 75:5-9; 88:9-22; 96:15-18. Page 1, Section 8 of the Lease Agreement covers parking and assigns Mr. Taylor one space:

> **[*1077]** When and if RESIDENT is assigned a parking space on OWNER'S property, the parking space shall be used exclusively for parking of passenger automobiles and/or those approved vehicles listed on RESIDENT's 'Application to Rent/Lease' or attached hereto. RESIDENT is hereby assigned parking space ONE. Said Space shall not be used for the washing, painting, or repair of vehicles. No other parking space shall be used by RESIDENT or his guests.

Tr. 89:6-17; *see also* Trial Ex. 17 (strikethrough in original exhibit).

Paragraph 8 of the Lease Agreement says nothing about customer parking. Tr. at 90:2-4. Originally, **[**14]** Mr. Taylor understood that either he or his customers could park there if a space was available. *Id.* at 93:21-25. Mr. Taylor testified that the words "or his guests" was not scratched out after the signing of the Lease Agreement but rather was that way at the time he signed the Lease Agreement. *Id.* at 90:19-20.

Mr. Taylor testified that while his business is on Barnett Avenue, there is no street parking on Barnett Avenue. Tr. at 77:2-10. He stated that he installed the Lobster Parking Sign in between parking stalls 1 and 2 to show customers where the store is, where to go, and where to park. *Id.* at 76:3-18. According to him,

the arrow at the top of the sign that said "PARKING" was pointing down and to the left rather than to the street to indicate that people should park on the street. *Id.* at 77:14-24. Once Mr. Kiser saw the Lobster Parking Sign, he asked Mr. Taylor to remove it. *Id.* at 91:16-23. Mr. Taylor, however, did not remove the sign but rather changed it by removing the portion of the sign that said "Parking" from the top of the sign. *Id.*

Mr. Taylor testified that in 2017, the front gate to the East Lot was open all the time, and it was common for customers to pull into East **[**15]** Lot and park if there were available parking spots. Tr. at 78:23-79:8, 81:8-9. During that time, he stated he had two spots available for customers,[8] and they could use either the East Lot by parking in spot number one or twenty-two on the other side of the lot. *Id.* at 78:4-12; 79:9-11, 82:1-16. He testified that on the day Plaintiff took his photograph on September 19, 2017, a customer would not have been trespassing if he parked in parking space number one. *Id.* at 82:18-24.

At some point after the lawsuit was filed, Defendants installed a new gate and started locking that gate on a regular basis. Tr. at 80:20; 81:2-7. Once Defendants started locking the gate to the East Lot,

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[8] Even if non-tenants or customers occasionally parked in the East Lot, under the law, such "occasional use" of an otherwise private facility does not convert that facility into a public accommodation under the ADA. *Jankey v. Twentieth Century Fox Film Corp., 14 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998)*, *aff'd* 212 F.3d 1159 (9th Cir. 2000) (affirming that Title III only applies to establishments open to the public at large).

customers would have to enter from the back gate, where there is a sign that says employees, workers, tenants only. *Id.* at 81:17-22. Now, his customers cannot use the East Lot for parking. *Id.* at 77:25-79:1, 81:23-82: 14.

4. Milan Kiser

Mr. Kiser and his wife are the owners of the Property. Tr. 96:4-8; *see also* Defendants' Post-Trial Brief, ECF No. 91 ("Def. Brief") at 2:14-15. In 2016, when Mr. Kiser entered into the Lease Agreement with Mr. Taylor, he had a conversation with him discussing the terms of the **[**16]** Lease Agreement, and this conversation covered the issue of parking. *Id.* at 105:10-16. He explained to Mr. Taylor that the East Lot is not for the public, and Mr. Taylor responded to Mr. Kiser that they do business through the phone (insinuating that **[*1078]** they would not have much need for public parking). *Id.* at 105:19-23.

Under the Lease Agreement, Mr. Kiser assigned Mr. Taylor one parking space in the East Lot: space number one. Tr. at 96:22-97:2. Mr. Kiser stated that the East Lot has about twenty (20) parking spaces, and all of the spots are for residential tenants only. *Id.* at 97:3-13. Some tenants have one spot, while others have two spots; however, all of the parking spaces are occupied. *Id.* at 97:8-13.

Mr. Kiser testified that he never told Mr. Taylor that he could have his customers park in the East Lot. Tr. 97:22-24; 98:5-7. Occasionally, Mr. Taylor's wife or daughter would park there, and Mr. Kiser would not say anything because there was an available space, so

he would turn a blind eye to the issue because it was not impacting parking for other tenants. *Id.* at 97:24-98:7. However, this did not change the fact that the East Lot is for tenant use only. Tr. at 99:16-18. Because Mr. **[**17]** Kiser never authorized Mr. Taylor to put the Lobster Parking Sign up, he asked them to remove it as soon as he became aware of it. *Id.* at 100:17-23. He stated that by putting up that sign up or letting customers park in the East Lot, Mr. Taylor violated the Lease Agreement. *Id.* at 102:6-9.

With respect to the installation of a new gate and closing of the gate after the filing of this lawsuit, Mr. Kiser testified he installed a new gate after there was an accident in which someone drove into and destroyed half of the fence to the East Lot. Tr. at 109:3-15. Mr. Taylor approached Mr. Kiser about how dangerous the turn into the East Lot is when someone is approaching from the East, so Mr. Kiser decided to close that gate and received praise from his tenants, including Mr. Taylor, for doing so. *Id.* at 109:15-24.

5. Post-Suit Remediation of the Alleged Barriers

Although neither party addressed this issue at trial, the record indicates that since this lawsuit was filed, Defendants installed a handicap access aisle in the East Lot to the right of the handicap spot:

Declaration of Zion Sapien in Support of Plaintiff's Motion for Summary Judgment, ECF No. 24-7 ("Sapien Decl.") at 4[9] ; *but* ***[*1079]*** *compare* ***[**18]*** Tr. at

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[9] Although Mr. Zapien did not testify at trial, and the photograph of the remedied parking space was not discussed or identified for admission into evidence at trial, the Court, in its findings of fact and conclusions of law, must consider the entire record in this case. *See, e.g.*, Cox v. Ametek, Inc., No. 317CV00597GPCAGS, 2020 U.S. Dist. LEXIS 235651, 2020 WL 7353425, at *1 (S.D. Cal. Dec. 15, 2020) (Burns, J.) (considering in its findings of fact and conclusions of law "[t]he entire record in this proceeding, including but not limited to the briefing, declarations, and exhibits submitted in support of preliminary approval of the Settlement in its various iterations"); *Odyssey Reinsurance Co. v. Nagby*, No. 316CV03038BTMWVG, 2020 U.S. Dist. LEXIS 201950, 2020 WL 6336331, at *1 (S.D. Cal. Oct. 29, 2020) (Moskowitz, J.) (entering findings of fact and conclusions of law after considering the moving papers, arguments of counsel, and entire record in the case); *N.L.R.B. v. Serv. Employees Union Local 77, Serv. Employees Int'l Union, AFL-CIO*, No. 83-7193, 1986 WL 236051, at *3 (9th Cir. Nov. 25, 1986) (making findings of fact and conclusions of law, based upon the entire record, including a special master's report and the observations of witnesses); *In re Jaques, 615 B.R. 608, 614 (Bankr. D. Idaho 2020)* (considering the evidence admitted at trial, the parties' closing arguments, and taking judicial notice of the Court's files in the court's findings of fact and conclusions of law). Further,

126:8-9 (referring to whether the Property had changed, Milan Kiser testified, "It's the same thing, the way it was in 2017") *with* Tr. at 109:5-24 (referring to whether Mr. Kiser had changed the Property, Mr. Kiser testified that he installed a new gate at the Property after an accident, which he now keeps closed). This photograph was already submitted to the Court as evidence in support of Plaintiff's Motion for Summary Judgment and also relied upon by the Court in denying summary judgment. *See* Order, ECF No. 46 ("Plaintiff also provides photos taken by his investigators Evan Louis on December 20, 2017, and Zion Sapien on September 10, 2018, of Defendants' Property, all purporting to show that both parking lots lacked ADA complaint parking spaces") (citing ECF No. 24); *see also* Sapien Decl., ECF No. 24-6 at 2, ¶¶ 3-5 (declaring that "[o]n September 10, 2018, I conducted an investigation of the businesses," and "[i]n the Lobster Shop parking lot, there was one parking space reserved for persons for disabilities with an adjacent access aisle").

D. Analysis

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the Court may take judicial notice of its own records and files. *See, e.g.*, Fed. R. Evid. 201(b)(1)-(2) (providing that at any stage of a proceeding, courts may take judicial notice of (1) facts not subject to reasonable dispute and "generally known within the trial court's territorial jurisdiction" and (2) adjudicative facts, which "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *see also Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290, fn. 1 (9th Cir. 1996) (taking judicial notice of court records); *Enterprise Bank v. Magna Bank of Missouri*, 92 F.3d 743, 746 (8th Cir. 1996) (holding that the district court did not err by taking judicial notice of pleadings in earlier related proceedings).

The Court finds Plaintiff's testimony to be unreliable. **[**19]** Frequently, he could not recall important details, and his testimony was delivered in a rote fashion, as if it had been rehearsed. Further, Plaintiff's counsel appeared to be visibly coaching Plaintiff during cross-examination by opposing counsel. *See* Tr. at 53:20-24. On direct examination, Mr. Langer appeared confident in reciting the salient events giving rise to his claims, including his protested taste for lobster. *Id.* at 68:9-10. He testified without noticeable reflection, proceeding in a narrative fashion, without requiring questions to prompt him. *Id.* at 6-17. When cross-examined, however, Mr. Langer's confidence decreased, and he peppered his testimony with professions of uncertainty, lack of knowledge, or an inability to recall. *Id.* at 17-58. At times, Mr. Langer's testimony was entirely inconsistent. *Compare* Tr. at 24:5-6 ("I don't recall when I saw the sign [the Lobster Parking Sign]") and *id.* at 36:2-3 (same) *with id.* at 35:1-4 (answering "Yes," when asked "So . . . as you were driving down the street, you saw the **[*1080]** sign [the Lobster Parking Sign]?"). For example, Plaintiff testified he was unable to recall when he first saw the Live Lobster Sign. Tr. at 24:5-6. However, if he did not see it before **[**20]** entering the East Lot, his entire reason for entering the East Lot (e.g., seeing a sign advertising parking) falls apart.

The Court further finds that Plaintiff's decision to only pursue claims pertaining to the Lobster Shop, foregoing any claims as to the Smoke Shop, including those within the store, directly undercuts his credibility with respect to having a legitimate intent to return to the Property. *See, e.g.*, Tr. at 68:6-8 (answering "yes" when asked, "If they were to fix the parking and

have a van accessible parking would you go back"); Compl. at 5, ¶ 37 ("Plaintiff would like to return and patronize the 1 Stop Smoke Shop and Gour Maine Lobster but will be deterred from visiting until the defendants cure the violations"). Plaintiff's complaint originally took issue with the many barriers inside both the Smoke Shop and Lobster Shop, which were described due to the investigation of a private investigator given Plaintiff never entered the store. *See* Order, ECF No. 46; Compl. at 5, ¶¶ 31, 34 (pleading that the Lobster Shop lacked paths of travel that were not wide enough while the Smoke Shop lacked a lowered, 36-inch transaction counter). If Plaintiff truly desired to make the premises **[**21]** handicap accessible for others as well as himself, he would not have foregone claims pertaining to the Smoke Shop or the claims relating to the counter heights within both stores given he alleged an intent to return to both stores in his complaint and motion *in limine* prior to trial. Compl. at 6, ¶ 37; *see also* Motion *in Limine*, ECF No. 65-1 at 8:16-17 ("Mr. Langer maintains that he did in fact go to the Smoke Shop and Lobster Shop with the intent to shop").

For example, prior to trial, Plaintiff never alleged that he smoked, and as such, a legitimate intent to return to the Smoke Shop would be suspect absent testimony at trial regarding Plaintiff's interest in smoking.[10] Not surprisingly, at the beginning of trial,

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[10] During trial, Defendants' counsel also questioned Plaintiff regarding another lawsuit he filed against a marijuana dispensary, of which the Court took judicial notice at trial, but Plaintiff was unable to recall anything from personal knowledge regarding the lawsuit. *See* Tr. at 58:2-59:5; *see also* Trial Exhibit 38 at

Plaintiff stipulated to foregoing the claims relating to the Smoke Shop—directly undercutting his allegations in the complaint of having a legitimate intent to return there. *Compare* Tr. at 2:7-10 ("We're not going to pursue any remedies or violations regarding No. 1 Smoke Shop") *with* Compl. at 6, ¶ 37 ("Plaintiff would like to return and patronize the 1 Stop Smoke Shop and Gour Maine Lobster"). As to the Lobster Shop, Plaintiff testified he likes lobster. Tr. at 7:8-13. Yet, **[**22]** this testimony represents a prime example of the rehearsed nature of Plaintiff's testimony. He also testified he had driven by the premises four to five times, including the night prior to trial. *Compare* Tr. at 42:4-16 *with Harris v. Stonecrest Care Auto Center, LLC*, 472 F. Supp. 2d 1208, 1211, 1216 (S.D. Cal. 2007) (Burns, J.) (noting that courts must not consider post-filing visits to a defendant's business as establishing likelihood of return and declining to consider Plaintiff's post-filing visits to the defendant's Shell station or nearby attractions when examining whether Plaintiff was likely to return).

Plaintiff had the burden of proof at trial. On the one hand, when asked directly, "If they were to fix the parking and have a van accessible parking[,] would you go back?," Plaintiff responded, "Yes. Absolutely." **[*1081]** Tr. at 68:6-8. On the other hand, Plaintiff also testified that he "purchase[s] lobster all the time," *id.* at 68:12, and that he recently purchased a "big lot from Costco, and luckily they deliver," so he does not have to go into Costco, *id.* at 68:12-14. Absent

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3, ¶¶ 8-9 (alleging Plaintiff went to a dispensary in November 2017, which also lacked handicap accessible parking).

testimony regarding where Plaintiff lives[11] or whether the Lobster Shop has better prices than Costco, which delivers to him, the Court finds it doubtful that Plaintiff would frequently travel **[**23]** to the Property to purchase lobster, as he testified. This is bolstered by the fact Plaintiff has filed previous lawsuits in which he admits he never intended to return to the premises. *See*, *e.g.*, *Langer v. Lapiz Properties Group*, Case No. 3:20-cv-0664-BEN-MDD[12] (the

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[11] Neither party questioned Plaintiff regarding how close he lives to the Property or whether he is even a resident of San Diego County. However, Plaintiff's Motion for Summary Judgment stated that he lives about ten (10) minutes away from the Property. Langer MSJ Decl. at 3, ¶¶ 15-18 (declaring, under penalty of perjury, that he (1) lives "about 10 minutes away from the Smoke Shop and the Lobster Shop," (2) "would like the ability to safely and independently park and access the Businesses," and (3) plans to vists the business "on a regular basis whenever" he is in the area). To the extent the proximity of Plaintiff's home to the businesses weighs in favor of an intent to return, the lack of credibility of Plaintiff's alleged intent to return weighs equally against Plaintiff.

[12] In this case, also before this Court, the defendants moved to dismiss Plaintiff's case by arguing that *res judicata* bars his April 6, 2020 lawsuit because on May 29, 2013, Langer filed essentially the same lawsuit against the same defendants (in addition to a third defendant) in San Diego County Superior Court as Case No. 37-2013-00050784-CL-CR-CTL based on the same alleged violations of the ADA and UCRA with respect to the same property. *Lapiz* Case, ECF No. 10-1 at 2:4-8. In response, Plaintiff argued *res judicata* did not preclude his new lawsuit because his ADA claim could not have been brought in the prior lawsuit as "Langer had no intention of returning to the . . . store and, therefore, had no standing to seek ADA injunctive relief." *Lapiz* Case, ECF No. 11 at 2:16-3:2; *but see* Plaintiff's Motion *in Limine*, ECF No. 66-1 ("MIL"), Ex. A, 116:13-17 (Plaintiff testified during his deposition in this case that with respect to the at

"*Lapiz* Case"); *see also* Order, ECF No. 46 (taking judicial notice of the fact that Plaintiff admitted in the *Lapiz* Case that he did not intend to return to the premises). Plaintiff was also cross-examined regarding the fact that on the day he filed this lawsuit, he also filed six (6) other lawsuits. Yet, Plaintiff was unfamiliar with those suits as well as the businesses involved. *See* Tr. at 52:18-20, 57:21-24. During trial, this Court also took judicial notice of the fact that since May 1, 2002, or over the course of the past eighteen (18) years, Plaintiff has been a plaintiff in 1,498 federal lawsuits. Tr. at 46:5-47:7; *see also* Order on Plaintiff's Motion in Limine, ECF No. 90 at 7:1-2. This extensive litigation history coupled with Plaintiff's inability to recall details about the businesses involved and allegations made, including whether he intended to return to those businesses, weighs against Plaintiff with respect **[**24]** to the credibility of this professed intent to return. To the contrary, the Court finds that, at the time he filed suit, Mr. Langer did not intend to return to the Property (at least to purchase lobster). The Court finds that Plaintiff's purpose in visiting the Property was to identify potential ADA violations, not to actually purchase lobster or patronize the Smoke Shop.

More importantly, a notable issue at trial was whether Plaintiff's presence on the Property constituted a trespass because if it was, it means it was private property rather than a place of public

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least 950 cases he filed in the federal courts, he alleged he intended to return in all of them). Thus, Plaintiff's assertions in the *Lapiz* Case contradict his testimony in this case that he intends to return in all of his ADA lawsuits.

accommodation. Plaintiff's counsel conceded at trial **[*1082]** that if, in fact, no one is permitted to park in the East Lot, there is no ADA violation. Tr. at 114-115. The ADA requires that disabled persons have equal access to services as able-bodied persons. *Id.* at 115:2-6. In other words, if non-disabled persons cannot park somewhere, that disabled persons also cannot park there does not give rise to an ADA violation. *Id.* Plaintiff failed to present evidence showing that (1) Mr. Kiser knew Mr. Taylor had displayed the Lobster Parking Sign at the time Plaintiff visited the Property **[**25]** and did nothing about it (e.g., implicitly consenting to customers parking there) and (2) public parking was permitted in the East Lot. The Court further finds that given the words "and his guest(s)" was stricken from the Lease Agreement, the intent of the Lease Agreement was that Mr. Taylor and his wife, and no one else, were to park in the designated parking spot. The numbering of each parking space bolsters this finding by indicating that each space is designated for use by a specific tenant. These facts indicate that the East Lot was not a place of public accommodation. To the extent Plaintiff's complaint alleged other ADA violations inside the stores, Plaintiff presented no evidence at trial regarding those issues and limited his case-in-chief to the issues regarding the lack of a van accessible ramp in the East Lot. As such, Plaintiff failed to carry his burden of proof as to any other potential ADA violations, and the only allegations he attempted to prove up pertained to the East Lot, which was not a place of public accommodation.

III. CONCLUSIONS OF LAW

As outlined below, the Court makes the following conclusions of law:

1. On September 19, 2017, or the day of Plaintiff's visit: **[**26]**

a. Plaintiff qualified as a disabled individual under the ADA and UCRA.

b. The Lobster Shop store front was open to the public as a place of public accommodation.

c. The East Lot was not a place of public accommodation.

d. The Lease Agreement between Defendants and Mr. Taylor, who owns the Lobster Shop, did not permit Mr. Taylor or the Lobster Shop to have customers park in its designated parking space.

e. To the extent Plaintiff was an invitee of the Lobster Shop, the Lobster Shop only had the authority to invite him into the areas which it had control under pursuant to the Lease Agreement, or in other words, the store front of the Lobster Shop or arguably, parking space number one (even though inviting customers to park in this space violated the Lease Agreement).

f. Because Plaintiff never entered the Lobster Shop storefront or parked in parking space number one while he was in the East Lot, he never entered the area into which the Lobster Shop arguably invited him.

g. Plaintiff's presence within the East Lot constituted a trespass.

h. The Lobster Shop lacked the authority to invite customers into space that was not leased to it under the Lease Agreement (e.g., any space other than parking **[**27]** space number one).

2. Plaintiff has standing to pursue his ADA claims.

3. Plaintiff's sole alleged ADA violation pertaining to the lack of a handicap access aisle is not moot.

These conclusions of law are based on the Court's findings of fact as well as its analysis of the jurisdiction, standing, and merits of this matter, as set forth below.

A. ADA Disability Discrimination [13]

[*1083] "An individual alleging discrimination

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[13] The Ninth Circuit has reiterated that courts must assure themselves that the constitutional justiciability requirements, including but not limited to standing, must be satisfied before proceeding to the merits. *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (referring to standing as "a threshold matter central to our subject matter jurisdiction"); *see also D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1035 (9th Cir. 2008) (noting that district courts "are *required* sua sponte to examine jurisdictional issues such as standing") (original emphasis); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 837 (9th Cir. 2007) (noting that "if a plaintiff does not allege standing in its complaint, we have no jurisdiction to hear the case"). As outlined in further detail in Section III(C) below, the Court determines that it has jurisdiction over Plaintiff's ADA claim pursuant to Article III, as Plaintiff has standing for his ADA claim, which is ripe and not moot.

under Title III must show that: (1) he is disabled as that term is defined by the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; (3) the defendant employed a discriminatory policy or practice; and (4) the defendant discriminated against the plaintiff based upon the plaintiff's disability by (a) failing to make a requested reasonable modification that was (b) necessary to accommodate the plaintiff's disability." *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004).

In the present case, the Court finds that Plaintiff is disabled as that term is defined by the ADA. However, even though Defendants are a private entity that leases the Property, the portion of the space they lease at issue in this case (e.g., the East Lot) is not a place of public accommodation. **[**28]** Given that all members of the general public—not just Plaintiff (or any other disabled individuals)—were denied access to the East Lot, Defendants did not employ a discriminatory policy or practice. Consequently, Defendants did not discriminate against Plaintiff by (1) failing to make a requested reasonable accommodation that was (2) necessary to accommodate Plaintiff's disability. Thus, as outlined below, even if Plaintiff had standing, his allegations fail to establish a violation of the ADA because (1) he was not denied equal access and (2) the East Lot is not a place of public accommodation, whatsoever, as to whether the accommodation he seeks is readily achievable under the law.

1. *Plaintiff Was Not Denied Equal Access*.

Plaintiff's alleged violations of the ADA are

limited to the East Lot.[14] However, the evidence at trial confirms the East Lot had numerous signs stating that open parking was prohibited, and parking was for tenants only. Tr. at 21:1-2 (testifying that Plaintiff believes the signs in Exhibit 4B "say something to the effect of tenant parking only"); *see also id.* at 64:18-65:14 (testifying that he interpreted the sign saying "no open public parking" as meaning "customer **[**29]** parking only"). This is bolstered by (1) Mr. Kiser's testimony, Tr. at 97:22-24; (2) the Lease Agreement, which struck out the phrase "or his guest(s)" from the clause addressing parking, Trial Ex. 17; (3) the fact that the parking spaces are numbered, indicating assignment to various tenants, Trial Ex. 4E; and (4) the fact that the arrow on the Live Lobster Sign was pointed to the left as opposed to directly downwards, as one would expect if customers were meant to park in the spot in front of the sign, Trial Ex. 4P. As such, the East Lot was not a place of public accommodation. *See, e.g.*, *Jankey*, 14 F. **[*1084]** Supp. 2d at 1181-82 (holding a lot was not a public place of accommodation where the evidence showed only employees and guests with passes, rather than the general public, could gain access to the Commissary during ordinary business hours even though the plaintiff had occasionally gained entry without a pass).

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[14] As stated, Plaintiff's complaint initially included allegations about the counter heights in the Lobster Shop and Smoke Shop, Compl. at 5, ¶¶ 31-34, but no evidence was presented at trial regarding those issues. As such, Plaintiff did not carry his burden of proof by showing violations within either of the store fronts, and the Court limits Plaintiff's allegations to the East Lot.

"To maintain an action for damages . . . an individual must take the additional step of establishing that he or she was denied equal access on a particular occasion." *Boemio v. Love's Rest.*, 954 F. Supp. 204, 207 (S.D. Cal. 1997) (Battaglia, J.). Where all individuals, disabled or nondisabled, are prevented from accessing a facility, no violation of the ADA ensues. *See, **[**30]** e.g.*, *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) (holding that the district court appropriately prevented the plaintiff from proceeding under a reasonable accommodation theory where the plaintiff "presented nothing to suggest that the alleged rules or actions of the city affected the developmentally disabled any differently than they affected all other people"). Here, Plaintiff cannot prove he was denied equal access because Defendants prohibited all individuals who were not tenants, disabled or not disabled, from parking in the East Lot.

2. The East Lot is Not a Place of Public Accommodation.

Defendants argue that they "did not lease the parking lot to anyone for use as a place of public accommodation," and as a result, "are not liable for any ADA or Unruh Act violations because the parking lot was not a place of public accommodation." Def. Brief at 2:5-7. At trial, however, Plaintiff solicited testimony from both Mr. Taylor and Mr. Kiser that despite Defendants' intent to keep the East Lot limited to tenant parking, Mr. Taylor had customers and family park in his designated parking spot. Tr. at 79:2-14; 81:10-16; 97:20-98:4.

As stated, Title III of the ADA's prohibition against discrimination is limited to "any place of public **[**31]** accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a); *see also Botosan v. Paul McNally Realty*, 216 F.3d 827, 833 (9th Cir. 2000) ("The legislative history confirms that a landlord has an independent obligation to comply with the ADA that may not be eliminated by contract."). "The determination of whether a facility is a 'public accommodation' for purposes of coverage by the ADA turns on whether the facility is open 'indiscriminately to other members of the general public.'" *Montoya v. City of San Diego*, 434 F. Supp. 3d 830, 844 (S.D. Cal. 2020). Even if non-tenants or customers occasionally parked in the East Lot, as was testified to at trial, "occasional use of an exempt commercial or private facility by the general public is not sufficient to convert that facility into a public accommodation under the ADA." *Jankey*, 14 F. Supp. 2d at 1178 (noting that a private club maintaining a "'limited guest policy,' in which guests are not permitted 'unfettered use of facilities,' is not a public accommodation for purposes of the ADA, despite evidence of 'isolated incidents' in which the limited guest policy was not followed"). In "mixed-use" facilities, like Defendants' Property, "where only part of the facility is open to the public, the portion that is closed to the public is not a place of public **[**32]** accommodation and thus is not subject to Title III of the ADA." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1048 (9th Cir. 2008) (holding that the district court did not err by granting summary judgment to 7-Eleven on the plaintiff's claim that the defendant violated the ADA by excluding him from the

employee-only restroom).

[*1085] In this case, though the Lobster Shop itself qualifies as open to the public, the tenant-only parking lot is not.[15] *Compare* Tr. at 97:22-24 (testifying that the East Lot spaces were not intended for use by the customers of Mr. Kiser's tenants) *with Doran*, 524 F.3d at 1048 ("Though the retail portion of the North Harbor 7-Eleven is open to the public, the employees-only restroom is not.").

B. Federal Jurisdiction

Article III of the United States Constitution limits the subject-matter jurisdiction of federal courts to justiciable "cases" and "controversies." U.S. CONST., ART. III, § 2. The United States Supreme Court has held that for a case to meet the justiciability requirements for federal subject-matter jurisdiction jurisdiction, a plaintiff must show (1) standing; (2) that the case is ripe; (3) the case is not moot; and (4) the case does not involve a political question. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335, 126 S.Ct. 1854, 164 L.Ed. 2d 589 (2006). In this case, this Court has federal jurisdiction over Plaintiff's ADA claim pursuant to Article III, as Plaintiff has standing for his ADA

[15] To the extent Plaintiff attempts to argue that the East Lot is a place of public accommodation in that the Property itself is leased to tenants, and if a disabled individual, like Plaintiff, sought to lease from Defendants, that tenant might be inhibited in his or her ability to park in his or her allocated parking space due to the lack of an access aisle, this argument fails because Plaintiff would lack standing. He presented no evidence regarding an intent to lease space from Defendants, only evidence regarding his intent to patronize the Lobster Shop.

claim, **[**33]** which is ripe and not moot.

1. *Plaintiff Has Standing*.

Establishing standing in ADA cases seeking injunctive relief requires the plaintiff to plead (1) a concrete and particularized injury in fact that is both actual or imminent as opposed to conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's challenged conduct; (3) a likelihood that a favorable decision will redress that injury, and (4) a sufficient likelihood the plaintiff will be wronged in a similar way by showing a real and immediate threat of repeated injury. *Fortyune*, 364 F.3d at 1082.

In 2008, the Ninth Circuit reiterated that when determining whether a civil rights litigant has met these requirements, "the Supreme Court has instructed us to take a broad view of constitutional standing[,] especially where, as under the ADA, private enforcement suits are the primary method of obtaining compliance under the Act." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008) (reversing the district court's conclusion that the ADA plaintiff lacked standing) (citing *Doran*, 524 F.3d at 1039-40 (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed. 2d 415 (1972)*)*; *see also Bates v. United Parcel Serv.*, Inc., 511 F.3d 974, 986 (9th Cir. 2007) (concluding that the ADA plaintiff and another class member had satisfied standing requirements for injunctive relief, albeit noting those requirements differed in class actions). Additionally, **[**34]** "motivation is irrelevant to the question of standing under *Title III of the ADA*." *Civil*

Rights Educ. & Enf't Ctr. v. Hosp. Properties Tr., 867 F.3d 1093, 1102 (9th Cir. 2017) (holding that the plaintiffs' status as ADA testers did not deprive them of standing). "The actual or threatened injury required by Article III may exist solely by virtue of a statute that creates legal rights, the invasion of which creates standing." *Duffy v. Riveland*, 98 F.3d 447, 453 (9th Cir. 1996) (holding the plaintiff had standing under the ADA) (quoting *Greater Los Angeles Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1357-58 (9th Cir. 1987) **[*1086]** (holding that the plaintiffs, as deaf individuals injured directly by the alleged violations of the Rehabilitation Act, had standing to sue)).

Because the Court lacks jurisdiction to address the merits—such as whether the East Lot even qualifies as a place of public accommodation in the first place or whether Plaintiff was denied access—until it determines Plaintiff has standing, it concludes Plaintiff has standing[16] on the basis that he encountered a

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[16] The Court arrives at this conclusion reluctantly, and only does so by following the Ninth Circuit's instructions to liberally construe standing in ADA cases. However, a critical aspect of standing in ADA cases is the legitimacy of the plaintiff's intent to return to the business sued. *See, e.g.*, *Harris*, 472 F. Supp. 2d at 1215-16 (noting that "b]oth actual, injury, which includes deterrence and causation in its definition, and imminent injury, which includes threat of future harm, require, at the very least, that a plaintiff be likely to return to patronize the accommodation in question"). This requires proving not only knowledge of the barriers at the defendant's business but also intent to return in the "imminent future" (rather than some day) but for the barriers described. *Id. at 1216* (holding that the plaintiff lacked standing "because, as of the date of filing, Mr. Harris was not likely to return to the Shell station"). The Ninth Circuit has utilized a four-part test to analyze an ADA plaintiff's intent to

barrier on the date of hist visit.

2. *Plaintiff's Requested Injunctive Relief Is Ripe*.

Plaintiff failed to present any evidence at trial that the alleged violative condition still exists at the Property or could exist again in the future. For a case to meet Article III's justiciability requirements, it "must be 'ripe'[17]—not dependent **[**35]** on 'contingent

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return sufficient to establish a likelihood of future injury, which evaluates the (1) proximity of the place of the public accommodation to the plaintiff's residence, (2) plaintiff's past patronage of the defendant's business, (3) definitiveness of plaintiff's plans to return, and (4) plaintiff's frequency of travel near defendant. *Mandarin Touch II, 385 F.Supp.2d at 1045*. As noted in the Court's Analysis, at trial, Plaintiff failed to present any evidence on any of these issues. Thus, the Court seriously doubts Plaintiff had a legitimate intent to return sufficient to confer standing. However, the evidence relevant to the standing inquiry consists of "the facts as they existed at the time the plaintiff filed the complaint." *D'Lil, 538 F.3d at 1036*. Although the Court finds Plaintiff's testimony was both not credible and also rehearsed, he nonetheless stated he intended to return both in his complaint as well as at trial. Given the Court's ultimate conclusion that Plaintiff failed to carry his burden of proving a *prima facie* case of disability discrimination under the ADA, the Court's finding that Plaintiff has standing does not change the outcome of this case: Plaintiff does not prevail either way.

[17] The United States Supreme Court has "cast doubt on the prudential component of ripeness" as creating tension with "the principal that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 968 F.3d 738, 751, n. 9 (9th Cir. 2020), quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167, 134 S.Ct. 2334, 189 L.Ed. 2d 246 (2014). Because the Supreme Court "has not yet had occasion to 'resolve the continuing vitality of the prudential ripeness

future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 141 S.Ct. 530, 535, 208 L.Ed. 2d 365 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed. 2d 406 (1998)). This is because the role of federal courts "is neither to issue advisory opinions nor to declare rights in hypothetical cases, but to adjudicate live cases or controversies consistent with the powers granted the judiciary in Article III of the Constitution." *Skyline*, 968 F.3d at 746.

[*1087] "The constitutional component of ripeness often overlaps with the injury-in-fact prong of Article III standing." *Alaska Right to Life Political Action Comm. v. Feldman,* 504 F.3d 840, 849 (9th Cir. 2007). Courts have insinuated, but not explicitly held, that so long as a plaintiff shows a sufficient injury to establish Article III standing, any remaining prudential ripeness concerns should not render a plaintiff's claim nonjusticiable. *See, e.g.*, *Clark v. City of Seattle*, 899 F.3d 802, 809 (9th Cir. 2018) (declining to address "the continuing vitality of the prudential ripeness doctrine" because that the plaintiffs had failed to establish the constitutional component of ripeness). Thus, whether a court frames the justiciability question in terms of standing or ripeness makes no difference to the resolution of the case. *See, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (en banc) ("Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to our exercise of jurisdiction

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doctrine,'" this Court, like other courts, continues to apply it in spite of the uncertainty regarding its life expectancy. *Id.*

there exist a constitutional **[**36]** 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'") (quoting *Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945)).

In this case, Defendants never offered public parking in the East Lot, including when Plaintiff visited the Property, arguably rendering the injunction Plaintiff seeks unripe as Plaintiff has not been and is not denied equal access. Plaintiff, however, argues that the Lobster Shop could offer parking to its customers at any time after the conclusion of this lawsuit, and he would again be denied equal access to parking. Pltff. Brief. at 12:14-15. He continues that "[g]iven the transitory nature of this 'fix,' the only way to prevent recurrence is to issue an injunction requiring the defendants to provide accessible parking to the extent they provide customer parking." *Id.* at 12:16-18. Plaintiff contends "[s]uch an order will not require Defendants to provide any customer parking," but it will require that if parking is offered to customers, it will be ADA complaint. *Id.* at 12:18-19. Although the Court finds this argument tenuous as pertaining to a hypothetical future scenario (e.g., the opening of the East Lot to the public), it concludes the issue is ripe for review **[**37]** in light of authority holding that ripeness is satisfied where a plaintiff has standing. *Thomas*, 220 F.3d at 1138-39.

3. *Plaintiff's ADA Claim is not Moot.*

Defendants argue in their post-trial brief that Plaintiff's claims are moot because Plaintiff concedes the Lobster Shop "has ceased allowing its parking

spaces to be used by customers." Def. Brief at 2:9-11. Plaintiff responds that even though the Lobster Shop "has ceased offering parking to its customers, this act is not sufficient to moot Mr. Langer's ADA claims as it does not preclude the store from simply reopening its parking at the conclusion of this case." Pltff. Brief at 2:10-13, 11:2-4. He elaborates that "[h]ad the violation been the lack of a wheelchair ramp and had the defendants installed a permanent concrete wheelchair ramp, they would have an excellent argument for mootness" because "there is no chance of future violations." *Id.* at 11:13-15. However, Plaintiff contends that "[i]n the present case, the defendants' parking is in the same physical condition as when Mr. Langer encountered it." *Id.* at 11:16-17. This contradiction in Plaintiff's own testimony goes to Plaintiff's credibility. On the contrary, the Declaration of Zion Sapien in Support **[**38]** of Plaintiff's Motion for Summary Judgment,[18] showed a photograph taken of **[*1088]** Defendants' Property from September 10, 2018 at 4:16 p.m., in which Defendants had created a handicap access aisle to the right of the designated handicap spot in their parking lot. *See* Sapien Decl., ECF

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[18] In Paragraph 5 of his declaration, Mr. Sapien even states that on the date of his visit, "there was one parking space reserved for persons for disabilities with an adjacent access aisle." Sapien Decl., ECF No. 24-6 at 2, ¶ 5. While Mr. Sapien stated the access aisle did not have "NO PARKING" lettering, Plaintiff did not raise the lack of "NO PARKING" lettering at trial as an alleged ADA violation, only the absence of an access aisle, which according to Mr. Sapien, was remedied. *Id.* While neither party called Mr. Sapien as a witness at trial, the Court finds his testimony relevant as it is part of the record and contradicts testimony given at trial, shedding light on credibility.

No. 24-6 at 2, ¶¶ 3-5 (declaring that Exhibit 6 is a true and accurate copy of the photograph he took on September 10, 2018); *see also* ECF No. 24-7 at 3 (Exhibit 6 to Mr. Sapien's declaration).

"If the issues are no longer live or the parties lack a legally cognizable interest in the outcome, then there is no controversy and the case is moot." *Hillesheim v. O.J.'s Cafe, Inc.*, 968 F.3d 866, 868 (8th Cir. 2010) (noting that "[i]n the context of the ADA, 'permanent physical improvements ... are sufficient to eliminate a case or controversy if they provide the requested relief.'"); *but see Kohler v. Islands Restaurants, LP*, 956 F. Supp. 2d 1170, 1173 (S.D. Cal. 2013) (Whelan, J.) (denying motion for summary judgment where a genuine issue of fact remained as to whether the parking spaces had been fully remedied). However, "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000) ("[A] defendant's **[**39]** voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless the defendant meets the heavy burden of showing that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur."). Accordingly, "[v]oluntary cessation of an illegal course of conduct does not render moot a challenge to that course of conduct unless (1) there is no reasonable

expectation that the wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed. 2d 642 (1979); *DeFunis v. Odegaard*, 416 U.S. 312, 318, 94 S.Ct. 1704, 40 L.Ed. 2d 164 (1974) (per curiam)).

Here, because the Lobster Shop could offer parking to customers again, even in contravention of the private status of the East Lot, the controversy could arise again. Thus, the Court finds the issue is not moot, allowing the Court to proceed to the merits.

C. Supplemental Jurisdiction

Even where a plaintiff establishes standing such that the court's exercise of jurisdiction over federal claims is appropriate, the court retains discretion over whether to exercise supplemental jurisdiction over related state law claims pursuant to **[**40]** 28 U.S.C. § 1367(a). *See, e.g.*, *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 421 (9th Cir. 1991) ("Pendent jurisdiction [over state law claims] exists where there is a sufficiently substantial federal claim to confer federal jurisdiction, and a common nucleus of operative fact between the state and federal claims.") District courts may decline to exercise supplemental jurisdiction over related claims where (1) **[*1089]** the related "claim raises a novel or complex issue of State law," (2) "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," (3) "the district court has dismissed all claims over which it has original jurisdiction," or

(4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c). "The decision to retain jurisdiction over state law claims is within the district court's discretion, weighing factors such as economy, convenience, fairness, and comity." *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). Further, district courts do not need to "articulate why the circumstances of [the] case are exceptional" to dismiss state-law claims pursuant to 28 U.S.C. section 1367(c)(1)-(3). *San Pedro Hotel Co., Inc. v. City of L.A.*, 159 F.3d 470, 478-79 (9th Cir. 1998)).

Where a plaintiff brings related state law claims in federal court, as is the case here, courts must balance the efficiency of exercising supplemental jurisdiction **[**41]** over related state law claims caused by the preservation of judicial resources with the principles of comity and fairness. *See, e.g.*, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966) (noting that where "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals"). However, comity represents a valid reason for district courts to decline exercising supplemental jurisdiction where a case involves strong reasons to have state courts interpret state law or the plaintiff has engaged in forum shopping. *Org. for the Advancement of Minorities v. Brick Oven Rest.*, 406 F. Supp. 2d 1120, 1132 (S.D. Cal. 2005). As outlined below, the Court finds the principles of comity justify this court in declining supplemental

jurisdiction.

1. *Plaintiff's UCRA Claim*

Since the 2017 decision in *Schutza v. Cuddeback*, 262 F. Supp. 3d 1025, declining the exercise of supplemental jurisdiction over related state law claims in an ADA case, the tide has changed and over 931 cases have favorably cited the decision rejecting supplemental jurisdiction. *Langer v. Honey Baked Ham, Inc.*, No. 3:20-CV-1627-BEN-AGS, 2020 U.S. Dist. LEXIS 208388, 2020 WL 6545992, at *7 (S.D. Cal. Nov. 6, 2020). As a result, almost every district judge in the Southern District has declined to exercise **[**42]** supplemental jurisdiction over supplemental state law claims in similar cases alleging violations of the ADA and UCRA. *See id.* (collecting cases). Thus, courts within this district agree that they should decline supplemental jurisdiction where a plaintiff appears to be filing suit in federal court for the purpose of circumventing California state law.

As detailed below, in accordance with this district, this Court declines exercising supplemental jurisdiction over Plaintiff's UCRA claim because (1) state law issues predominate, (2) comity favors having the state court exercise jurisdiction over the state law claims, and (3) compelling interests favor discouraging forum-shopping.

First, in light of the remedies provided under the federal and state laws, the state law claims predominate. Plaintiff's claims arising under California's UCRA provide more expansive remedies than the claims brought under the ADA, and Plaintiff is

pursuing remedies under both laws. For example, California provides greater protection than the ADA by allowing recovery of money damages, *see Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136 (9th Cir. 2002), while "the only remedy available under the ADA is injunctive relief," **[*1090]** *see Feezor v. Tesstab Operations Group, Inc.*, 524 F. Supp. 2d 1222, 1224-25 (S.D. Cal. 2007) (Lorenz, J.); *Wander v. Kaus,* 304 F.3d 856, 858 (9th Cir. 2002). As a result, the UCRA substantially **[**43]** predominates over the ADA claim because the ADA claim "appears to be a second claim included to justify filing the complaint in this Court, rather than a necessary (let alone predominant) claim in this lawsuit." *Brooke v. Crestline Hotels & Resorts LLC., No. 20-cv-301-CAB-AGS, 2020 U.S. Dist. LEXIS 34001, at *3 (S.D. Cal. Feb. 25, 2020).*

Second, comity favors declining supplemental jurisdiction because the federal and state law claims may require different proof, and the state law claims are subject to a heightened pleading standard. "[I]n 1992, the California Legislature amended *California Civil Code Section 51 and added a provision t*hat a defendant violates the Unruh Act whenever it violates the ADA." *Feezor*, 524 F.Supp.2d at 1224-25 (citing CIV. CODE § 51(f). However, an important distinction between the federal and state law claims is that while a violation of the ADA does not require intentional discrimination, a claim under the UCRA may require such an intent. *Schutza v. McDonald's Corp*., 133 F. Supp. 3d 1241, 1247 (S.D. Cal. 2015) (Hayes, J.). Thus, intent to discriminate would only be relevant to the Plaintiff's UCRA discrimination claims and would require application of state law standards. *Lentini v.*

Cal. Ctr. for the Arts, Escondido, 370 F.3d 837, 846 (9th Cir. 2004). "When federal courts consider claims under state law, they are to apply federal procedural law and state substantive law." *O'Campo v. Chico Mall, LP*, 758 F.Supp.2d 976, 984-85 (E.D. Cal. 2010) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)). Here, given various issues of proof require application of **[**44]** state law, comity favors having a state court, familiar with such standards, resolve those issues.

Third, compelling interests of comity as well as discouraging forum shopping support this Court's decision to decline exercising supplemental jurisdiction over the UCRA claims. *See Gibbs*, 383 U.S. at 726 (holding that comity is a factor to be considered before exercising supplemental jurisdiction). "California has a strong interest in protecting its citizens and businesses from abusive litigation and also in preventing its own laws from being misused for unjust purposes." *Brooke v. Suites LP*, No. 3:20-CV-01217-H-AHG, 2020 U.S. Dist. LEXIS 194270, 2020 WL 6149963, at *5-6 (S.D. Cal. Oct. 19, 2020) (Huff, J.) (declining supplemental jurisdiction over the plaintiff's UCRA claim "because it substantially predominates over her federal claim under the ADA and exceptional circumstances favor dismissal, including the Court's interests in comity and discouraging forum-shopping"). By filing in federal court without complying with California's heightened pleading requirements[19] for claims

[19] "In 2012, California adopted heightened pleading requirements for disability discrimination lawsuits under the Unruh Act, including provisions requiring high-frequency litigants to verify and specify their allegations." *Cuddeback*, 262 F. Supp. 3d

under the UCRA, as would be required had Plaintiff filed suit in state court, Plaintiff **[*1091]** appears to be forum shopping. *See, e.g.*, *Cuddeback*, 262 F. Supp. 3d at 1027-32 (reasoning that "[a]s a high-frequency litigant primarily seeking relief under state law, **[**45]** the Court finds it would be improper to allow Plaintiff to use federal court as an end-around to California's pleading requirements" by exercising supplemental jurisdiction). *Id.* "It is unclear what advantage—other than avoiding state-imposed pleading requirements—Plaintiff gains by being in federal court since his sole remedy under the ADA is injunctive relief, which is also available under the Unruh Act." *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 467-68, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965) (providing that federal courts may take measures to discourage forum-shopping); *see also Brick Oven Rest.*, 406 F. Supp. 2d at 1132 ("Because a legitimate function of the

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at 1031-32 (citing Cal. Code Civ. Proc. § 425.50). Under this standard, "[e[xcept in complaints that allege physical injury or damage to property, a complaint filed by or on behalf of a high-frequency litigant" must state: (1) "[w]hether the complaint is filed by, or on behalf of, a high-frequency litigant"; (2) "the number of complaints . . . alleging a construction-related accessibility claim that the high-frequency litigant has filed during the 12 months prior to filing the complaint"; and (3) "the reason the individual was in the geographic area of the defendant's business." Cal. Code Civ. Proc. § 425.50(a)(4); see also Cal. Code Civ. Proc. § 425.55(b) (defining "high-frequency litigant" as either a plaintiff or attorney "who has filed 10 or more complaints alleging a construction-related accessibility violation within the 12-month period immediately preceding the filing of the current complaint alleging a construction-related accessibility violation"). "The purpose of these heightened pleading requirements is to deter baseless claims and vexatious litigation." *Cuddeback*, 262 F. Supp. 3d at 1031.

federal courts is to discourage forum shopping and California courts should interpret California law . . . compelling reasons exist to decline supplemental jurisdiction over plaintiff's state law claims.").

Here, Plaintiff's complaint failed to include allegations by Plaintiff and his counsel regarding their status as high-volume litigants that would have otherwise been required under California law. *See generally* Compl. Accordingly, the Court, questions the propriety of exercising supplemental jurisdiction over the state law claims where Plaintiff has failed to comply with California's heightened pleading requirements for high-volume **[**46]** litigants, like Plaintiff. Given Plaintiff could seek the more rewarding remedies (e.g., money damages) in state court as well as injunctive relief (the only relief available in federal court), filing in federal court seems to be strategic avoidance of the heightened-pleading requirements that would otherwise need to be met in state court. *See, e.g.*, *Schutza v. Alessio Leasing, Inc.*, No. 18CV2154-LAB (AGS), 2019 U.S. Dist. LEXIS 60152, 2019 WL 1546950, at *4 (S.D. Cal. Apr. 8, 2019) (Burns, J.) (noting that "there is no relief available to Schutza in federal court that could not be secured in state court").

Thus, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims brought under the UCRA and dismisses those claims *without prejudice* to Plaintiff re-filing them in state court. *See, e.g.*, *Molski v. Foster Freeze Paso Robles*, 267 F. App'x 631, 633 (9th Cir. 2008) (noting that if a court declines to exercise supplemental jurisdiction over state law claims, it must dismiss those claims without prejudice).

2. *Defendants' Counterclaim for Trespass*

In light of the Court's decision to decline supplemental jurisdiction over Plaintiff's UCRA claim, the Court likewise declines supplemental jurisdiction over Defendants' counterclaim for trespass. Defendants' counterclaim raises issues of state law that, although not novel **[**47]** or complex, differ in terms of the relief available and proof.[20]

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[20] "Trespass is an unlawful interference with possession of property." *Staples v. Hoefke*, 189 Cal. App. 3d 1397, 1406, 235 Cal. Rptr. 165 (1987). "The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm." *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245, 262, 225 Cal. Rptr. 3d 305 (2017), as modified (Nov. 6, 2017). Thus, for instance, while the ADA does not require proof of intent to discriminate, *McDonald's*, 133 F. Supp. 3d at 1247, trespass requires "intentional, reckless, or negligent entry onto a property," as well as proof of harm. *Ralphs*, 17 Cal. App. 5th at 262. That being said, in terms of liability for trespassing, only intent to enter the property, but not intent to trespass, is relevant: So long as an individual intends to enter the property, he or she will be held liable for trespassing even if he or she lacked knowledge of the fact that he or she was trespassing. *Richards v. Dep't of Bldg. Inspection of City & Cty. of San Francisco*, No. 20-CV-01242-JCS, 2020 U.S. Dist. LEXIS 121852, 2020 WL 3892859, at *6 (N.D. Cal. July 10, 2020). The facts of this case indicate: (1) Defendants owned the Property; (2) Plaintiff intentionally entered the East Lot; and (3) Defendants did not consent to this entry. Tr. at 8:21-22; 13:19-22, 19:14-20:3, 31:24-32:23, 41:17-23. However, because the Court has declined the exercise of supplemental jurisdiction, the Court makes no conclusion as to Plaintiff's liability for trespass.

[*1092] IV. CONCLUSION AND ORDER

Based upon the above findings of fact and conclusions of law, the Court orders that the Clerk of the Court enter judgment as follows:

1. Plaintiff failed to carry his burden of proof as to the ADA claim because the East Lot is not a place of public accommodation, and even if it was, Plaintiff was not denied equal access. Defendants are the prevailing party as to the ADA claim, and the Clerk of the Court shall enter judgment in their favor. *See, e.*g., Fed. R. Civ. P. 54(d)(1) (allowing courts to award costs to the prevailing party in a case); *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S.Ct. 1642, 1651, 194 L.Ed. 2d 707 (2016) (holding "that a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party'" and "has . . . fulfilled its primary objective whenever the plaintiff's challenge is rebuffed"); 42 U.S.C. § 12205 (providing that in an ADA action, "the court . . . in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses, and costs").

2. The Court declines the invitation to exercise supplemental jurisdiction over Plaintiff's UCRA state law claim and Defendants' **[**48]** counterclaim for trespass arising under California law. Accordingly, these claims are **DISMISSED *WITHOUT PREJUDICE***.

IT IS SO ORDERED.

DATED: February 1, 2021

/s/ Roger T. Benitez

HON. ROGER T. BENITEZ

United States District Judge

Langer v. Kiser

United States Court of Appeals
for the Ninth Circuit

Order, December 20, 2023, Filed

No. 21-55183

Reporter [not yet reported]

Before: W. FLETCHER, GOULD, and COLLINS, Circuit Judges.

Appellees' petition for rehearing *en banc* has been circulated to the full court and referred to this panel pursuant to Ninth Circuit General Orders 5.4(a) and (b). Judge Gould would deny Appellees' petition for rehearing *en banc*, Judge W. Fletcher would recommend denial, and Judge Collins would grant the petition.

The full court has been advised of Appellees' petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Appellees' petition for rehearing en banc, Docket No. 48, is DENIED on behalf of the full court.