No. 18-15242

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN DIABETES ASSOCIATION,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE ARMY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 5:16-cv-04051-LHK
Hon. Lucy H. Koh

BRIEF OF DISABILITY RIGHTS ORGANIZATIONS AS AMICI CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The following Amici submitting this brief do not have a parent corporation and no publicly held corporation holds 10% or more of an ownership interest in them:

American Civil Liberties Union

Autistic Self Advocacy Network

Child Care Law Center

Council of Parent Attorneys and Advocates

Disability Rights Education & Defense Fund

Epilepsy Foundation of America

Judge David L. Bazelon Center for Mental Health Law

National Association of the Deaf

National Disability Rights Network

National Federation of the Blind

The Arc of the United States

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INTEREST OF AMICI

Amici curiae are organizations dedicated to individuals with disabilities. They rely on legal challenges as one method of advocating for the rights of persons with disabilities. When warranted, amici seek to engage courts, through lawsuits, to enforce the statutory schemes that protect those rights. Access to courts to remedy injuries is of course crucial for amici and their constituents as they engage with this mission.

The district court's opinion imposes additional requirements for standing that are not imposed by Article III of the Constitution or interpretive case law. These unprecedented requirements would improperly restrict the ability of amici and related organizations to access courts and protect their constituents' rights under federal law. Amici respectfully submit this friend-of-the-court brief to highlight the importance of proper application of standing and mootness principles in the area of disability rights. Amici highlight the background and purpose of the Rehabilitation Act and, in particular, Congress's intent to provide broad protection for the rights of persons with disabilities. This brief discusses the importance of private enforcement actions in civil rights suits, especially those brought by organizations. Amici then address some of the particular injuries suffered by the American Diabetes Association directly and by its constituents, focusing on the

real-world effects of the Army's policy and controlling precedent that shows these to be Article III injuries.

Each amicus organization's specific statement of interest follows. All parties have consented to the filing of this brief.[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more the one million members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. The ACLU's Disability Rights Program works to ensure people with disabilities are valued, integrated members of the community, and fights to prevent people with disabilities from being needlessly segregated into institutions such as nursing homes, psychiatric hospitals, and jails.

The **Autistic Self Advocacy Network** ("ASAN") is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to healthcare and long-term supports in integrated community settings; and educating the public about the access needs of autistic

[1] No party's counsel authored this brief in part or in whole. No party, no party's counsel, and no person contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities to participate fully in community life and enjoy the same rights as others without disabilities.

The **Child Care Law Center** protects and advances the legal rights of children, families, and child care providers in California. The Center works to make high quality, affordable child care available to children, families, and communities. The Center pays special attention to the needs of children with disabilities to access inclusive child care programs. It works to ensure that children with disability-related medical needs can stay in their existing childcare and that parents can keep working to provide for their families' wellbeing. The most frequent call for help received by the Center is from parents whose children need to receive diabetes-related monitoring and treatment while at day care, including administration of insulin.

The **Council of Parent Attorneys and Advocates** ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators. COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard their civil rights under federal laws.

COPAA has previously filed briefs as amicus curiae in the United States Supreme Court and many cases in the United States Courts of Appeals.

The **Disability Rights Education & Defense Fund** ("DREDF") is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy, and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections necessary to vindicate their right to be free from discrimination.

The **Epilepsy Foundation of America** is a non-profit charitable corporation founded in 1968 to advance the interests of the more than 3.4 million Americans with epilepsy through research, community services, public education, and advocacy. The term "epilepsy," which means a tendency to have chronic seizures, evokes stereotyped images and fears, and affects persons with this neurological disorder in all aspects of life. Since its inception, the Epilepsy Foundation has stood against the stigma and estrangement associated with epilepsy and has supported the development of laws which protect individuals from unfair discrimination and exclusion because of the condition. It has also promoted the legal rights of people adversely affected by unreasonable discrimination based

upon epilepsy or seizure disorders, including serving periodically as an organizational plaintiff to help change unfair laws and practices. The Foundation and its representatives were closely involved in the development and implementation of the rights and remedies described in the Rehabilitation Act of 1973, as amended, and in the Americans with Disabilities Act of 1990.

The **Judge David L. Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advance the rights of individuals with mental disabilities. The Bazelon Center advocates for laws and policies that provide people with mental illness or intellectual disability the opportunities and resources they need to participate fully in their communities. Its litigation and policy advocacy is based on the guarantees of non-discrimination and reasonable accommodation contained in the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and other civil rights statutes. The proper interpretation and application of these laws is central to the Bazelon Center's mission and its work.

The **National Association of the Deaf** ("NAD"), founded in 1880, is the oldest civil rights organization in the United States, and is the nation's premier organization of, by, and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in the U.S. The NAD endeavors to achieve equality for its constituents through systemic changes in all aspects of

society including education, employment, and ensuring equal and full access to programs and services.

The **National Disability Rights Network** ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories, and there is a P&A and CAP affiliated with the Native American Consortium. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The **National Federation of the Blind** ("NFB") is the largest and most influential organization of blind and low-vision people in the United States. Founded in 1940, the NFB has grown to over fifty thousand members. The organization consists of affiliates in every state, the District of Columbia, and Puerto Rico, and over seven hundred local chapters in most major cities. The NFB devotes significant resources toward advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence, and to remove barriers and change social attitudes, stereotypes,

and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB actively engages in litigation and advocacy to protect the civil rights of the blind under our nation's laws.

The Arc of the United States ("The Arc") is the nation's largest organization of and for people with intellectual and developmental disabilities ("I/DD"). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with I/DD receive the protections and supports to which they are entitled by law.

SUMMARY OF THE ARGUMENT

The Army's childcare program discriminates against children who need insulin treatment for diabetes. By refusing to administer insulin in the past and now by forcing children who require insulin to go through a long and uncertain application process, the Army continues to deter and effectively exclude these children from participating in Army childcare in a manner equal to children who do not have diabetes. This is precisely the type of discrimination that persons with disabilities face on a regular basis and in response to which Congress has enacted broad statutory schemes to provide protection.

The district court, however, precluded the American Diabetes Association (or "the Association") from even attempting to challenge this discriminatory policy

by ruling that it lacks standing to bring this lawsuit. The court, first, discounted the injuries the Association and its constituents suffered under the Army's policy without even considering whether the "new" policy fully addresses the exclusion and harm they suffered under its "old" policy. *See* Excerpts of Record ("ER") 10–14. Ignoring these unremedied injuries, the court also held that the Association lacked direct standing because, although "[n]either side disputes" that both the "old" and "new" policy "frustrate the Association's organizational mission," the Association had not yet expended sufficient resources to fight the "new" policy in order to establish its standing. *Id.* at 18–20.

The court finally concluded that the Association lacked representational standing on behalf of its constituents. Ninth Circuit precedent clearly establishes that deterrence to participation is an injury sufficient to confer standing. The district court nevertheless ruled that the deterrence suffered by the Association's constituents is somehow not an injury, and thus not actionable. According to the district court, the Association's members lacked the purported "prerequisite" of "an unsuccessful attempt to use the New Policy," even though this Court's cases make quite clear that an "unsuccessful attempt" is not necessary in this civil rights context. *Id.* at 21–23.

But the Association has also alleged cognizable injuries, directly and to its constituents, starting before and continuing after the Army changed its policy. The

new policy does not remedy the injuries caused by the old policy. Both versions of the Army's policy discriminate against children with diabetes by imposing barriers to their participation in the Army's childcare program—which harms constituents who would benefit from this program and directly harms the Association by forcing it to expend resources to serve its mission of improving the lives of people affected by diabetes. In this case, however, not only did the district court mistakenly disregard the older injuries, deeming them "moot," but it also erroneously discounted the barriers to seeking accommodation under the "new" policy by imposing additional requirements for standing that have no basis in Article III of the Constitution or this Court's case law.

The district court, in short, took too narrow of a view of the Article III case-or-controversy and injury-in-fact requirements, contrary to jurisprudence in the Supreme Court and Ninth Circuit. Congress has enacted broad statutes to protect the rights of individuals with disabilities. This statutory scheme relies heavily on rigorous private enforcement, and both the Supreme Court and this Court have emphasized that district courts must, consistent with Article III, take a broad view of standing in civil rights cases. The district court failed to properly apply this teaching, and its order should be reversed.

ARGUMENT

I. CONGRESS PROTECTS DISABILITY RIGHTS BROADLY TO ENSURE EQUAL ACCESS FOR INDIVIDUALS WITH DISABILITIES.

The Rehabilitation Act states Congress's intent to protect disability rights broadly.[2] Congress expressly recognized that "disability is a natural part of the human experience and in no way diminishes the right of individuals to," among other things, "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." 29 U.S.C. § 701(a)(3). As Congress recognized in enacting the Rehabilitation Act, our society has improperly discriminated against individuals with disabilities by creating barriers to their full participation "in such critical areas as employment, housing, public

[2] Enacted in 1973, the modern Rehabilitation Act replaced the prior Vocational Rehabilitation Act, including several significant sections implementing congressional intent to address disability discrimination. *See* Pub. L. No. 93-112, 87 Stat. 355 (1973). As originally enacted—explicitly modeled on Title VI of the Civil Rights Act and Title IX of the Education Amendments Act—Section 504 mandated nondiscrimination for entities receiving federal financial assistance. Section 504 was amended in 1978 also to prohibit discrimination by federal executive agencies and the U.S. Postal Service. *See* Pub. L. 95-602, § 119, 92 Stat. 2955, 2982. The overall history of the Rehabilitation Act helps confirm the congressional commitment to ongoing, robust enforcement of these key civil rights. This is further emphasized by the subsequent expanding amendments to the Rehabilitation Act since 1978, including the 1998 addition of Section 508 (mandating access to electronic and information technology), and the 2008 clarifying and conforming amendments to the definition of "disability." *See* Workforce Investment Act of 1998, Pub. L. 105-220, sec. 408, § 508, 112 Stat. 936, 1203–06 (codified at 29 U.S.C. § 794d); ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *infra* note 3.

accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." *Id.* § 701(a)(5).

Congress passed the Rehabilitation Act to protect individuals with disabilities against such barriers and other discrimination by the federal government. The statute serves "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities." *Id.* § 701(b)(3). To take a leading role, Congress made its purpose clear: "[T]he goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to . . . achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals." *Id.* § 701(a)(6).

In service of these goals, Congress enacted Section 504 to prohibit "any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency" from "exclud[ing] from the participation . . . , den[ying] the benefits [to], or . . . subject[ing] to discrimination" any "otherwise qualified" person on the basis of disability. *Id.* § 794. Section 504 thus expresses Congress's broad intent not just to prohibit federal discrimination, but also to ensure that the government's resources will not support discrimination.

The legislative history to the Act also underscores Congress's commitment to broadly protect the rights of individuals with disabilities. The Senate Committee

Report, for example, stated that the Rehabilitation Act arose from the Committee's "belie[f] that it was necessary to emphasize that the final goal of all rehabilitation services was to improve in every possible respect the lives as well as livelihood of individuals served." S. Rep. No. 93-318 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2076, 2078–79. To achieve this goal, "the Committee placed particular emphasis on developing a method of providing services which would be responsive to individual needs and would ensure that no individual would be excluded from the program merely because his handicap[3] appeared to be too severe." *Id.* at 2079.

The Supreme Court has also examined the Rehabilitation Act's legislative history in applying and interpreting the Act. As the Court has recognized, Congress meant Section 504 to target not just discrimination based on "invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985). "Senator Humphrey, who introduced a companion measure [to Section 504's predecessor] in the Senate, asserted that 'we can no longer tolerate the invisibility of the handicapped in America.'" *Id.* at 296 (quoting 118 Cong. Rec. 525–26 (1972)). Representative

[3] The term "handicap" has been replaced in legislation with the now-preferred term "disability," along with explicit congressional recognition that no change in definition was intended in adopting the new term. *See, e.g.*, 42 U.S.C. § 12101 (Americans with Disabilities Act of 1990); S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50–51 (1990).

Vanik, when introducing the predecessor to Section 504, called the treatment of individuals with disabilities "one of the country's 'shameful oversights,' which caused [individuals with disabilities] to live among society 'shunted aside, hidden, and ignored.'" *Id.* at 295–96 (quoting 117 Cong. Rec. 45974 (1971)). Amici devote themselves to ensuring that individuals with disabilities are not "shunted aside, hidden, and ignored," and they recognize that discrimination and thoughtlessness can lead down this path.

Case law from the Supreme Court and this Court also recognizes Congress's intent to protect disability rights broadly with the Rehabilitation Act. The Supreme Court has noted that "Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance." *Id.* at 304. This Court, too, has been a leading voice in repeatedly emphasizing the breadth of the Rehabilitation Act: "Section 504 contains a broadly-worded prohibition on discrimination against, exclusion of and denial of benefits for disabled individuals." *Mark H. v. Lemahieu*, 513 F.3d 922, 930 (9th Cir. 2008). As the Court has noted, Congress has revisited the Act to reiterate its broad remedial purpose: "To the extent that there was any ambiguity about the breadth of [the] wording . . . , Congress amended § 504 in 1988 to make its breadth clear. That amendment defined the term 'program or activity' to include 'all of the operations' of the entity."

Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1181 (9th Cir. 1999); *see also Fleming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 943 (9th Cir. 2009) (recognizing "Congress's broad definition of 'program[s] and activit[ies]'").

In sum, the statutory text, legislative history, and case law applying the Rehabilitation Act leave no question: Congress intended the Act to be a broad remedial statute, providing equal access for individuals with disabilities and removing federal discrimination and barriers.

II. CONGRESS INTENDED THAT THE ACT WOULD BE ENFORCED WITH VIGOROUS PRIVATE ENFORCEMENT.

Congress relies on a vigorous system of private enforcement to protect the civil rights of individuals with disabilities. As this Court, sitting en banc, has recognized in the closely related context of the Americans with Disabilities Act, "private enforcement suits 'are the primary method of obtaining compliance with'" these civil rights statutes.[4] *Chapman v. Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (en banc) (quoting *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039 (9th Cir. 2008)). To serve Congress's broad, remedial purpose in the Rehabilitation Act, private individuals and organizations must have access to

[4] It is appropriate to "examine cases construing claims under the ADA, as well as section 504 of the Rehabilitation Act, because there is no significant difference in the analysis of rights and obligations created by the two Acts." *Vinson v. Thomas*, 288 F.3d. 1145, 1152 n.7 (9th Cir. 2002).

federal courts to enforce the civil rights of individuals with disabilities without having to overcome artificial barriers to their standing.

Organizational lawsuits are an especially important tool to enforce the rights that Congress protected in the Rehabilitation Act. As a practical matter, a single individual with a disability will most often lack the experience, expertise, and resources to litigate his or her civil rights claims. Organizations such as Amici fill that gap. And, indeed, people frequently join such organizations primarily "to create an effective vehicle for vindicating interests that they share with others." *UAW v. Brock*, 477 U.S. 274, 290 (1986). An organization that has the resources and wherewithal to commence and prosecute a lawsuit to vindicate its members' interests "can draw upon a pre-existing reservoir of expertise and capital" and add "specialized expertise and research." *Id.* at 289 (citation omitted). Organizations' litigation resources "can assist both courts and plaintiffs." *Id.* Indeed, as this Court has recognized, if not for organizational lawsuits, the public interest "frequently would not be represented." *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991).

For these and other reasons, as this Court has noted, the "Supreme Court has instructed [courts] to take a broad view of constitutional standing in civil rights cases, especially where, as under the ADA [and also the Rehabilitation Act], private enforcement suits 'are the primary method of obtaining compliance with

the Act.'" *Chapman*, 631 F.3d at 946 (quoting *Doran*, 524 F.3d at 1039). This "broad view" is especially important when, as in this context, the statutory scheme relies on private suits for enforcement. *Id.* To be sure, a Section 504 plaintiff must establish the Article III standing requirements of an actual or imminent injury, causation, and redressability. *Id.*; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). But "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is . . . instructive and important." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). Especially in the "somewhat murky area" of intangible injuries, "Congress's judgment as to what amounts to a real, concrete injury is instructive." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

In the Rehabilitation Act, Congress addressed federal discrimination against and exclusion of individuals with disabilities as serious injuries to such individuals and the country at large. Congress's use of "such broad language" in the Rehabilitation Act shows that it intended "to define standing to bring a private action under 504 . . . as broadly as is permitted by Article III of the Constitution." *Barker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 826 (9th Cir. 2009) (citation omitted). To construe standing for a Section 504 claim as broadly as Article III allows therefore "is consistent with Congress's statutory goal to protect the rights of the disabled." *Id.*

III. POLICIES THAT DETER ACCESS TO ACCOMMODATIONS INFLICT AN ARTICLE III INJURY.

The district court here, however, applied standing principles in an artificially *narrow* manner that conflicts with this Court's precedents and congressional intent. As this Court has repeatedly held, in the related context of the ADA, a condition that deters an individual from accessing a public accommodation suffices to give rise to standing; there is no requirement that he or she try to overcome that barrier as a formal prerequisite to commencing a lawsuit. *See Doran*, 524 F.3d at 1040; *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136–37 (9th Cir. 2002). Here, the Army's policy deterred members of the American Diabetes Association—in particular, Ms. Brantly and Ms. Bendlin—from seeking an accommodation for diabetes care in a manner that should have readily sufficed to satisfy the injury in fact necessary for Article III standing. And yet, the district court erroneously ruled that this Court's precedents required these members to make "an unsuccessful attempt to use the New Policy." ER 23. That is simply not the law in this Circuit, as Plaintiff has argued in its brief. Amici address this point separately to underscore for the Court how policies that deter individuals with disabilities from seeking accommodations inflict real injury on them and the organizations that have as their mission protecting their civil rights.

Being excluded from public programs deprives people with disabilities of direct benefits. Exclusion from childcare, at issue in this case, is a serious example

of such an injury. "[H]igh quality, intensive early childhood education programs," at least for children who come from low-income backgrounds, are tied to "lasting positive effects such as greater school success, higher graduation rates, lower juvenile crime, decreased need for special education services later, and lower adolescent pregnancy rates." Am. Acad. of Pediatrics, Comm. on Early Childhood, Adoption & Dependent Care, *Policy Statement: Quality Early Education and Child Care from Birth to Kindergarten*, 115 Pediatrics 187, 187 (2005). "Children who attend high-quality early childhood programs demonstrate better math and language skills, better cognition and social skills, better interpersonal relationships, and better behavioral self-regulation than do children in lower-quality care" inside or outside the home. *Id.* These positive and negative effects "are magnified for children from disadvantaged situations or with special needs, and yet these children are least likely to have access to quality early education and child care." *Id.*

The Army generally provides for childcare. But the Army's policy with respect to administering insulin impairs access to that program by families with children that have diabetes, thus disadvantaging these children and hurting their long-term outcomes. Beyond causing them to lose the direct benefits of programs such as childcare, such discriminatory policies injure children with diabetes by stigmatizing them. These policies send a message to children with diabetes and to

others that individuals with disabilities cannot participate fully in programs accessible to others and cannot contribute to communities such as the Army in the same manner as others. *See* UNICEF, *Children and Young People with Disabilities Fact Sheet* 4 (2013), https://www.unicef.org/disabilities/files/Factsheet _A5__Web_NEW.pdf. Discriminatory policies inherently communicate that individuals subjected to them are a burden, not worth the cost or trouble of an accommodation. In short, deterrence hurts.

Discrimination and stigmatization are generally harmful to individuals with disabilities. But their consequences can be even more severe for children. A child's participation in socializing activities such as childcare builds practical and social skills that help develop a child's self-confidence and self-regard. *See, e.g.*, U.S. Dep't of Health & Human Servs. & U.S. Dep't of Educ., *Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs* 2–4 (2015), https://ed.gov/policy/speced/guid/earlylearning/joint-statement-full-text.pdf ("Meaningful inclusion can support children with disabilities in reaching their full potential resulting in broad societal benefits, including higher productivity in adulthood and fewer resources spent on interventions and public assistance later in life."). Inclusion has been linked to a higher probability of employment, higher earnings, fewer school absences, higher reading and math test scores, larger friend networks, and stronger social skills. *See id.* at 4.

Equal participation in programs such as childcare is also important in teaching other children from a young age that individuals with disabilities are valuable members of the community—not people to be feared, pitied, or ridiculed. For example, research shows that young children who interact with their peers with disabilities form more positive attitudes about people with disabilities. *See id.*; *see also* Paddy C. Favazza & Samuel L. Odom, *Promoting Positive Attitudes of Kindergarten-Age Children Toward People with Disabilities*, 63 Exceptional Children 405, 406, 413 (1997). In contrast, "children who have less exposure to people with disabilities are less accepting than are those who have more exposure." Favazza & Odom, *supra*, at 414.

Exclusion from Army childcare also hurts the Association's constituents who are family members of children with diabetes. Families without access to childcare must urgently find another way to provide care, imposing costs of time, money, or both. Lack of childcare can require family members to reduce or cease employment.

In short, as Amici know all too well from pursuing their respective missions on behalf of individuals with disabilities, programs, people, or structures that deter individuals with disabilities from equal access inflict short- and long- term harm on not only such individuals but the larger community as a whole. These are exactly the sort of injuries that Congress aimed to remedy with the ADA and the

Rehabilitation Act, with its recognition that "individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. § 701(a)(5). Indeed, as noted, Congress passed Section 504 as a broad remedial measure to prohibit the federal government from contributing to this harm. *See id.* § 794. This "[c]ongressional judgment leaves little doubt that" Section 504 "is a substantive provision that protects concrete interests." *Cf. Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983 (9th Cir. 2017).

IV. ARTICLE III DOES NOT REQUIRE A FUTILE EFFORT TO ACCESS PUBLIC ACCOMMODATIONS.

The district court ruled that "an unsuccessful attempt to use the New Policy" was a "prerequisite necessary . . . to claim standing based on deterrence." ER 23. That holding is directly contrary to this Court's case law. "[W]hen a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the 'futile gesture' of attempting to gain access in order to show actual injury." *Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1098 (9th Cir. 2017) [hereinafter *CREEC*] (quoting *Pickern*, 293 F.3d at 1135).

In *CREEC*, individuals who rely on wheelchairs for mobility sued a hotel group that provided free local shuttle service that was not accessible to them. *See*

id. at 1097. The plaintiffs did not allege that they had actually attempted to stay at the hotel or enter one of the shuttles. *See id.* Instead, they had only called the hotels to ask about the shuttles' accessibility and learned from those calls that they could not use the shuttles. *See id.* Each plaintiff alleged that she would have stayed at the hotel if equivalent shuttle service had been available, and that she intended to stay at the hotel in the future. *See id.*

The hotel group argued that the plaintiffs had not suffered Article III injuries because they had not "had at least one 'personal encounter' with the alleged barrier." *Id.* at 1099. The group claimed that Article III requires such a "personal encounter" and that the plaintiffs failed to meet this requirement because they had merely called to ask about the shuttles, not actually tried to board them. *Id.*

This Court disagreed, concluding on the basis of its own precedents and Supreme Court case law that "the purported requirement . . . of a 'personal encounter' with an access barrier lacks foundation in Article III." *Id.* What matters is whether the plaintiff *actually knows* about the barrier, not "the source of that knowledge." *Id.* "Actually visiting a hotel, as opposed to phoning, does not make a plaintiff's injury any more concrete: she is deterred from using the accommodation in either event." *Id.* (citing *Lujan*, 504 U.S. at 560). The Court therefore rejected the hotel group's "invitation to create a bright-line predicate of a

'personal encounter' with a barrier to access as a requirement for standing." *Id.* at 1100.

This Court's rule should have sufficed to confer standing on the American Diabetes Association constituents in this lawsuit, in particular Ms. Brantly and Ms. Bendlin. These Association members submitted detailed, sworn testimony that, due to the lengthy delays for review to accommodate their children who have diabetes and require insulin injections, it is pointless for them to apply for an accommodation for insulin administration. Ms. Bendlin's uncontradicted testimony states the problem in clear, direct terms: childcare is an "urgent need, and my family cannot wait several months to learn whether J.B. is even accepted to a program with basic accommodations." ER 47. Insulin administration, too, is an "immediate need for children with type 1 diabetes"; these children simply cannot be in a childcare program "for months without providing insulin administration." *Id.* Ms. Bendlin and Ms. Brantly have therefore been deterred from applying for an accommodation under the Army's new policy by the lengthy delays and other discriminatory aspects of the policy.

There should be no serious question that, under this Court's precedents, such deterrence suffices to confer standing on an individual seeking to enforce his or her civil rights under the Rehabilitation Act and the ADA. *See Chapman*, 631 F.3d at 950 ("[W]e have Article III jurisdiction to entertain requests for injunctive relief

both to halt the deterrent effect of a noncompliant accommodation and to prevent imminent discrimination. . . .") (internal quotation marks omitted). Article III does not require these children to apply for accommodations and to wait, without childcare, for a decision on whether those accommodations will be provided during the lengthy review process. And Article III certainly does not require the children to have attended a childcare program that will not provide accommodations necessary for their physical health. For the Association to have standing under this Court's precedents, it is required to show only that the Army's policy deterred its constituents from seeking accommodations for diabetes treatment based on their awareness of that policy.

Amici and their constituents know firsthand that deterrence and exclusion erect barriers to participating fully in society, thus limiting future opportunities and outcomes. *See supra* Section III. Congress recognized the same in the Rehabilitation Act, and this Court has agreed. Article III does not require a futile attempt to access an accommodation before a plaintiff seeking to challenge it can have standing to bring a lawsuit.

The district court, however, reasoned that the acknowledged barriers to children with diabetes seeking an accommodation under the Army's new policy do not establish a cognizable injury because the Association's members did not "[seek] an accommodation under the New Policy." ER 23. That is not the law in

this Circuit. In making this ruling the district court essentially held that the deterrent-effect doctrine applies for architectural barriers but not for other impediments to an accommodation for an individual with a disability. ER 22. This Court has not, and should not, so hold, and the text of Section 504 and case law provide no basis for such a murky distinction. Nor does the Article III injury-in-fact analysis, which does not depend on the cause of action. *See Kirola v. City of San Francisco*, 860 F.3d 1164, 1174–75 & n.3 (9th Cir. 2017) (applying the standing analysis from an ADA Title III case to a Title II case and noting that "despite the titles' different application and different standards for relief on the merits, the answer to the *constitutional* question of what amounts to injury under Article III is the same.").

This Court's case law does not distinguish between architectural barriers and programmatic barriers. As noted, in *CREEC*, this Court found an injury based on the hotel group's failure to provide the service of transportation accessible to people with disabilities. 867 F.3d at 1099. And, in *Kirola*, the Court found Article III injuries based on physical barriers that impeded access to a library's programs and services. *See* 860 F.3d at 1175. In articulating the deterrent-effect doctrine, this Court also relied on a case that arose from a store's refusal to sell alcohol to a man whose disability made him appear intoxicated. *See Dudley v. Hannaford Bros. Co.*, 146 F. Supp. 2d 82, 86–87 (D. Me. 2001) (cited with approval in

Pickern, 293 F.3d at 1138), *aff'd*, 333 F.3d 299 (1st Cir. 2003). Further still, a district court in this Circuit has similarly found an injury in fact based on Uber's rejection of service animals, *i.e.*, a policy that deterred individuals with disabilities from using Uber's service. *See Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc.*, 103 F. Supp. 3d 1073, 1081 (N.D. Cal. 2015).

Each of these barriers inflicts an injury by excluding people with disabilities from gaining the benefit of a program or service. If there were, for standing purposes, a material distinction between architectural and non-architectural barriers, these cases would fall on the non-architectural side of the line. But, critically, there is no such distinction. The Constitution requires an injury, not a particular type of barrier. Exclusion is just as harmful regardless of whether the barrier is architectural. Courts therefore have not found it necessary to try to distinguish between the types of barriers individuals with disabilities encounter. Rather, they have concluded that barriers that deter individuals from access give rise to an Article III injury, period. A burdensome review process for seeking an accommodation for a child with diabetes excludes and discriminates against that child just as much as the lack of a ramp would exclude and discriminate against a child who uses a wheelchair for mobility.

Association members Ms. Brantly and Ms. Brendlin have plainly established cognizable injuries for which they may seek redress in federal court, under this

Court's well-established framework for evaluating standing in ADA and Rehabilitation Act cases. The district court's decision in this case imposes an improper overlay on the Article III standing analysis that is in contravention of this Court's precedents and the broad, remedial scope of the Rehabilitation Act.

V. A DEFENDANT CANNOT MOOT A CHALLENGE BY SUPERFICIALLY REVISING A POLICY BUT LEAVING THE UNLAWFUL PRACTICES IN PLACE.

Finally, Amici wish to briefly address the district court's treatment of the mootness issue in this case. The Army's "new" policy fails to moot the Association's challenge because it continues to discriminate against and exclude children with disabilities.

The Army's old childcare policy effectively excluded children with diabetes by prohibiting personnel "from providing a range of essential diabetes accommodations . . . including counting carbohydrates, administering insulin, and administering glucagon injections." ER 3. After Plaintiffs filed their initial complaint, the Army issued a new policy that no longer prohibits these accommodations in a blanket fashion, but instead imposes a complicated application and review process that can take up to four months. *See id.* at 4. For families that need childcare, this "new" policy still effectively excludes children with diabetes. A four-month waiting period—with no certainty of being able to gain childcare services in the end—requires families to find alternative options,

and may force a family member to quit or reduce employment to care for children. The Army's new policy therefore still hurts children with diabetes and their families.

In any event, the Army has also not shown that its new policy is "entrenched" or "permanent." *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015). "[W]hile a statutory change is usually enough to render a case moot, an executive action that is not governed by any clear or codified procedures cannot moot a claim." *Id.* (citation and internal quotation marks omitted). Amici and their constituents rely on legal challenges to protect the right to participation that Congress codified in the Rehabilitation Act. If offenders can evade legal challenges by simply changing their policies to make it appear as though they are offering accommodations, without actually eliminating the barriers to participation, they can continue discriminating against individuals with disabilities with impunity. Allowing this manipulation of jurisdiction would create a blueprint for how to avoid scrutiny by federal courts under the Rehabilitation Act. *See Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes,* 30 F.3d 1203, 1206 (9th Cir. 1994) ("To decline jurisdiction merely because the precise manner in which the Tribes are allegedly violating the [law] has changed would permit the Tribes to avoid appellate review of their actions altogether, by periodically changing the nature of their continued [violations]. . . . We should not leave the Tribes with such a

powerful incentive to change their regulations in order to avoid review."). Such a revision to the mootness doctrine—not rooted in Article III or case law—would undercut individuals with disabilities who seek to protect their federal rights and disrupt the statutory scheme Congress created.

Moreover, the district court's mistaken reasoning would also, if endorsed by this Court, extend beyond the Rehabilitation Act to all civil rights claims. The rule the district court announced tells offenders that they may keep discriminating, as long as they change their policies to offer a purported accommodation accompanied by a lengthy and burdensome process for seeking it. This rule would take the teeth out of private enforcement of civil rights. This is precisely the kind of manufactured barrier to standing that the Supreme Court has instructed courts not to impose in civil rights cases.

These practical considerations make it no surprise that this Court, and the Supreme Court, have reiterated the same rule. "Where the threatened harm still exists, or the changes in the law do not resolve the conflict, the case remains alive and suitable for judicial determination." *Pub. Serv. Colo.*, 30 F.3d at 1205. This principle applies with particular force to direct challenges by organizations such as Amici that counsel and fight discrimination against their constituents. The American Diabetes Association, for example, exists "to prevent and cure diabetes and to improve the lives of all people affected by diabetes." American Diabetes

Association, http://www.diabetes.org (last visited June 22, 2018); *see also* ER 29. Pursuing this longstanding mission, the organization advocates "for laws, regulations, and policies that keep children with diabetes safe at school" and provides "legal information and assistance to individuals and families experiencing diabetes-related discrimination," among other activities. ER 29.

Before the Army articulated its "new" policy, the Army's effective exclusion of children who use insulin conflicted with the Association's mission and therefore required the Association to expend resources on advocacy and counseling. After the policy change, the Army's effective exclusion of children who use insulin still conflicts with the Association's ongoing mission and therefore still requires the Association to expend resources on advocacy and counseling. The discrimination persists. So does the American Diabetes Association's commitment to fighting discrimination and improving its constituents' lives. In other words, the controversy continues and has not been rendered moot by the Army's new policy.

CONCLUSION

Amici therefore urge the Court to reverse and rule that the American Diabetes Association has standing to mount its challenges to the Army's policies with respect to providing care to children with diabetes in the Army's childcare program.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a) because this brief contains **6,995** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft® Word 2016 MSO, Version 16, Times New Roman 14-point font.

Dated: July 2, 2018

s/ Todd R. Geremia
Todd R. Geremia

CERTIFICATE OF SERVICE

I certify that on July 2, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: July 2, 2018

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