Case No. 21-55926

UNITED STATES COURT OF APPEALS

for the

NINTH CIRCUIT

ORLANDO GARCIA
Plaintiff-Appellant,
vs.

GATEWAY HOTEL L.P., A CALIFORNIA LIMITED PARTNERSHIP
Defendant-Appellee.

Appeal from the United States District Court,
Central District of California
Case No. 2:20-CV-10752-PA-GJS
Honorable Percy Anderson

BRIEF OF DISABILITY RIGHTS EDUCATION AND DEFENSE FUND AND SIX OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

Michelle Uzeta
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Email: muzeta@dredf.org
Tel: 510-644-2555

Counsel for Amici Curiae

FULL LIST OF *AMICI CURIAE*

1. Disability Rights Education and Defense Fund
2. American Civil Liberties Union
3. American Civil Liberties Union of Northern California
4. American Civil Liberties Union of Southern California
5. Civil Rights Education and Enforcement Center
6. Disability Rights Advocates
7. Impact Fund

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

<u>Statutes</u>

<u>Congressional Materials</u>

<u>Rules</u>

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* certifies that no *Amici* has a parent corporation and that no publicly held corporation owns 10 percent or more of any *Amici's* respective stock.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

The undersigned certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or any other person other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici Disability Rights Education and Defense Fund, American Civil Liberties Union, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, Civil Rights Education and Enforcement Center, Disability Rights Advocates, and Impact Fund are non-profit organizations that represent and advocate for the rights of people with disabilities. *Amici* have extensive policy and litigation experience and are recognized for their expertise in the interpretation of civil rights laws affecting individuals with disabilities including the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 and the Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3619. Collectively and individually, *Amici* have a strong interest in ensuring that these civil rights statutes are properly interpreted and enforced, consistent with Congress's remedial intent to eliminate discrimination and address segregation and exclusion.

Given these strong interests, the September 15, 2023, Opinion of the Panel upholding the award of costs to Defendant-Appellee Gateway Hotel L.P. ("Opinion") is of significant concern to *Amici*. The Opinion ignores well-established Circuit precedent holding that a three-judge panel is bound by the opinion of a prior panel absent a conflicting "subsequent" or "intervening" Supreme Court decision and, by expanding the circumstances under which a prevailing defendant is entitled to an award of costs, runs afoul of the remedial goals of the ADA by undermining the private enforcement scheme upon which the Act so heavily relies.

The experience, expertise, and unique perspective of *Amici* make then particularly well suited to assist this Court in understanding and resolving the important legal issues presented in this case.

The individual *Amici*, and their specific interests, are described in detail in the concurrently filed motion for leave to file the present Brief of *Amicus Curiae* in Support of Plaintiff-Appellant's Petition for Rehearing *En Banc*.

SUMMARY OF ARGUMENT

Unlike the Fair Debt Collection Practices Act at issue in *Marx v. General Revenue Corp*., 568 U.S. 371 (2013), the Americans with Disabilities Act (ADA) is a civil rights statute that must be constructed liberally to effectuate its remedial purpose. Expanding the circumstances under which prevailing defendants are entitled to costs in ADA cases without regard to this requirement will chill the private enforcement upon which the ADA heavily relies, frustrating its goals and compromising its promise of equality and inclusion.

The discretion provided under Federal Rule of Civil Procedure 54(d)(1) is inadequate to meet the remedial goals of the ADA. Despite the balanced requirements of the ADA, and the critical role of private enforcement, unfairly negative and inflammatory portrayals of ADA plaintiffs proliferate. In this context, the presumption established by Rule 54(d)(1) will be difficult for ADA plaintiffs to overcome in many cases. Moreover, people with disabilities disproportionally live in poverty and already experience barriers to legal representation and the justice system. If Rule 54(d)(1) is the standard for costs to prevailing defendants in ADA cases moving forward, these barriers to justice will only be exacerbated.

For these reasons, and because the Panel failed to follow the three-judge panel rule articulated in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (*en banc*), Plaintiff-Appellant's petition for rehearing *en banc* should be granted.

ARGUMENT

I. The ADA is a Remedial Statute that Must be Liberally Construed

Congress passed the ADA in 1990, and ushered in a new era of civil rights, by acknowledging and seeking to end the discrimination encountered by individuals with disabilities. "In studying the need for such legislation, Congress found that 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.'" *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 674–75 (2001) (quoting 42 U.S.C. § 12101(a)(2)). Congress also found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services" and that the various forms of discrimination encountered include "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(3) and (5). This discrimination was found to have placed individuals with disabilities at a severe disadvantage and inferior status in society. *Id.* § 12101(a)(6).

The ADA was enacted because "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4). Thus, the far-reaching purpose of the ADA was pronounced boldly and unequivocally by Congress: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* § 12101(b)(1)-(2). *See also, PGA Tour, Inc. v. Martin*, 532 U.S. at 674 ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals."). Congress' intent was not only to codify the rights of people with disabilities, but also to promote inclusion and end discrimination as a result of strong enforcement of the statute. H.R. REP. No. 101-485, 40, 1990 U.S.C.C.A.N. 303, 322 ("the rights guaranteed by the ADA are meaningless without effective enforcement provisions.")

Because it is a "remedial statute, designed to eliminate discrimination against the disabled in all facets of society," the ADA "must be broadly construed to effectuate its purposes." *Kinney v. Yerusalim,* 812 F. Supp. 547, 551 (E.D. Pa. 1993). *See also, Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014) (Courts "construe the language of the ADA broadly to advance its remedial purpose."). This obligation applies to all the ADA's provisions, including its remedies. The Panel's failure to construe the ADA's cost-shifting provision liberally, and consistent with its fee-shifting provision and goals as a civil rights statute, frustrates and undermines its remedial purposes.

II. Expanding the Circumstances Under Which Prevailing Defendants are Entitled to Costs will Chill the Private Enforcement Upon Which the ADA Heavily Relies

Congress chose to make private enforcement "the primary method of obtaining compliance with the [ADA]." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039-40 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)); *see also,* 42 U.S.C. § 12133 (providing a private right of action for injunctive relief and compensatory damages against public entities that violate

Title II of the ADA). Understandably so, as "the ADA regulates more than 600,000 businesses, 5 million places of public accommodation, and 80,000 units of state and local government."[1] The pace of government litigation cannot keep up with this broad reach.[2] Public enforcement of the ADA suffers from factors including a lack of staff,[3] lack of resources,[4] and the fact that the political environment at any one time often dictates the amount of effort the Department of Justice ("DOJ") invests in civil rights enforcement.[5] These factors have had a negative impact on the DOJ's ability to enforce federal disability rights laws. At best, the DOJ's enforcement efforts have been "inconsistent," and can "result in a relapse of gains achieved or a failure to appropriately react to emerging issues."[6]

---

[1] Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 Law & Soc'y Rev. 493, 499-500 (2006).
[2] *See* Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. Rev. 1, 9-10 (2006) (noting that government enforcement resources are limited, and the DOJ disability rights enforcement unit is understaffed).
[3] *See Id*. at 10.
[4] *See Id.* at 9-10; Michael Waterstone, *A New Vision of Public Enforcement,* 92 Minn. L. Rev. 434, 436, 450-451 (2007). *See also National Disability Policy: A Progress Report, Has the Promise Been Kept? Federal Enforcement of Disability Rights Laws (Part 2)* ("Progress Report"), Nat'l Council on Disability, at 89 tbl. A, 90 tbl. B (Oct. 31, 2019), https://ncd.gov/sites/default/files/NCD_Progress%20Report_508.pdf (reporting consistently declining budget levels and a 24% drop in staffing for the DOJ's Civil Rights Division between 2010 and 2018).
[5] Progress Report at 436.
[6] *Id.* at 42.

Reliance on private enforcement to enforce civil rights laws has its roots in Title II of the Civil Rights Act of 1964 ("CRA"), 42 U.S.C. § 2000a *et seq*. – prohibiting race discrimination in public accommodations – and has been explicitly endorsed by the Supreme Court. In *Newman v. Piggie Park Enterprises, Inc.*, the Court held that when a private plaintiff sues to enforce Title II of the CRA, he "does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." 390 U.S. 400, 402 (1968). Indeed, it held, private litigation was essential to "securing broad compliance with the law." *Id.* at 401.

Private suits to enforce the ADA likewise "vindicate[e] a policy that Congress considered of the highest priority." *Newman*, 390 U.S. at 402; *see, e.g., Dudley v. Hannaford Bros. Co*., 333 F.3d 299, 307 (1st Cir. 2003) ("It is fair to assume that Congress had the same understanding [as expressed in *Newman*] when it enacted Title III of the ADA." As confirmed by the United States in a recent an amicus brief to the Supreme Court, "private suits ... are an essential complement to the federal government's enforcement of [the ADA] and other antidiscrimination laws" by supplementing "the federal government's limited enforcement resources." *ACHESON HOTELS, LLC, petitioner, v. Deborah LAUFER*., 2023 WL 4028533 (U.S.), 1. Even when unsuccessful, this Court has recognized that ADA enforcement actions have public benefit. *Kohler v. Bed Bath & Beyond of*

California, LLC, 780 F.3d 1260, 1267 (9th Cir. 2015) ("The law grows with clarity for benefit of the public through such actions even if they are not successful.").

Despite Congressional intent to facilitate private enforcement and create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1)-(2), government's characterization of private suits as "essential" to enforcement, and this Court's acknowledgment of the public value of even unsuccessful private actions, ADA cases are inherently risky and difficult for the private bar to bring. Litigating an ADA case – especially against the not-uncommon headwind of defense motions practice – often takes many years and extensive resources.[7] The fact that Title III of the ADA provides only injunctive relief "removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit . . .." *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (internal citations omitted). "[A] defendant's voluntary removal of alleged barriers prior to trial can have the effect of mooting a plaintiff's ADA claim." *Oliver v. Ralphs Grocery Co*., 654 F.3d 903, 905 (9th Cir. 2011). If the defendant in an ADA case removes the alleged barriers and demonstrates that the alleged barriers could not reasonably be expected to arise again, the ADA

---

[7] *See, e.g.,* Amy F. Robertson, *ADA Defense Abuse: A Case Study*, CREECblog (Feb 27, 2018), https://creeclaw.org/2018/02/27/ada-defense-abuse-a-case-study/ (case study presenting typical example of ADA defense lawyer delays and abuses).

claim may be dismissed. *See id.; see also Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010). Generally, if an ADA claim is mooted and dismissed, the plaintiff is not entitled to attorney's fees.[8] *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598 (2001) (affirming denial of attorney's fees where ADA claim rendered moot prior to trial); *see also Molski v. Foster Freeze Paso Robles*, 267 Fed.Appx. 631, 632 (9th Cir. 2008) (citing *Buckhannon*, 532 U.S. at 605) (affirming district court's order dismissing ADA claims as moot, dismissing supplemental state claims, and denying attorney's fees).

As a result of these risks and hurdles, many individuals with disabilities are unwilling or unable to assume the burdens of the litigation process, and the ADA remains a chronically *under-enforced* statute.[9] Few disabled people are willing to endure the rigors of ADA litigation with the mere hope for a favorable ruling and a chance to be made whole. National Council on Disability, *Implementation of the*

---

[8] In some cases, a preliminary injunction is sufficient to make a plaintiff a prevailing party even if the case becomes moot before final judgment on the merits. *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013) (listing cases).

[9] *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act,* 58 Vand. L. Rev. 1807, 1854 (2005) (arguing that "[c]ombined with survey data and other social science research showing that people with disabilities are still at the margins of society in areas covered by Titles II and III, these low numbers demonstrate under-enforcement of these Titles ... [and] demonstrated noncompliance."); Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act,* 188 (2005).

ADA: Challenges, Best Practices and New Opportunities for Success 169 (2007) ("Few civil rights plaintiffs, no matter how self-motivated and justified by circumstances, have sufficient resources of time, money, and specialized training to successfully bring and maintain a federal lawsuit by themselves.")

Therein lies the concern regarding the Panel's Opinion. It creates yet another strong disincentive for disabled people to pursue ADA cases, particularly cases that seek to expand or clarify rights and responsibilities under the Act. If individuals with the fortitude to take on the burden of such cases risk liability for costs moving forward, regardless of their good intentions and the non-frivolous nature of their claims, the result will inevitably be less private enforcement of the ADA, frustration of statutory goals, and the continued exclusion of people with disabilities from community life.

III. Rule 54(d)(1) Creates a Presumption in Favor of Awarding Costs that is Difficult to Overcome, Requiring Reasons that are "Sufficiently Persuasive"

Federal Rule of Civil Procedure 54(d)(1) establishes that costs are to be awarded as a matter of course in the ordinary case. *Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 593 (9th Cir. 2000). By its terms, the rule creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court discretion to refuse to award costs. *Id.* at 591. "The burden is on the losing party to demonstrate why the costs should not be awarded." *In re Ricoh Co., Ltd. Pat. Litig.*, 661 F.3d 1361, 1364 (Fed. Cir. 2011) (citing *Stanley v. Univ. of S. California*, 178 F.3d 1069, 1079 (9th Cir. 1999)). The objecting party's reasons must be "sufficiently persuasive to overcome the presumption in favor of an award," *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914, 932 (9th Cir. 2015) (internal quotations omitted) (quoting *Save Our Valley v. Sound Transit*, 335 F.3d 932, 945 (9th Cir. 2003)), and may include: (1) the substantial public importance of the case, (2) the closeness and difficulty of the issues in the case, (3) the chilling effect on future similar actions, (4) the plaintiff's limited financial resources, and (5) the economic disparity between the parties. *Draper v. Rosario*, 836 F.3d 1072, 1087 (9th Cir. 2016) (citation omitted).

Challenging the presumption requires litigants to engage in post-judgment motion practice and/or the filing of objections. There is no guarantee that even with favorable facts, the district court will deny or reduced a defendant's costs. For example, the District Court for the Eastern District of California recently denied, in part, a motion to reduce prevailing defendant fees to a County filed by an unhoused plaintiff with no regular income in a non-frivolous civil rights case. *JOHN DAVID PETERSON, an individual, Plaintiff, v. NEVADA COUNTY, CALIFORNIA, a county government & operator of the NEVADA COUNTY SHERIFF'S DEPARTMENT; et al., Defendants. Additional Party Names: Keith Royal*, No.

219CV00949JAMJDP, 2023 WL 7167779, at *3 (E.D. Cal. Oct. 31, 2023). Although the case raised important civil rights claims about the medical care to be provided to pretrial detainees, the district court determined that the plaintiff did not "support his argument with legal authority demonstrating that [his] case [wa]s so extraordinary that a reduction in costs [wa]s warranted" or meet his burden of showing that the case carried the "weight of one with <u>substantial</u> public importance." *Id.* (emphasis in original). In another case, the District Court for the District of Arizona overruled a plaintiff's objections to an award of costs to agents of the Department of Child Services in a case brought under 42 U.S.C. § 1983, reasoning that the importance of the case was "primarily to the plaintiffs," so "did not concern a matter of substantial public importance"; that the issues were "close and difficult but not unusually so"; and that although "the economic disparity between the parties [wa]s substantial [it did] not on its own overcome the presumption in favor of awarding costs." *Stein v. Depke*, No. CV-20-00102-TUC-JCH, 2023 WL 6038407, at *2 (D. Ariz. Sept. 15, 2023).

Given the district courts' generally unfavorable view of ADA cases,[10] and the fact that the majority of ADA cases are brought by individual plaintiffs seeking the relatively routine relief of compliance with technical accessibility standards and/or the modification of discriminatory policies to ensure their own access and

---

[10] *See* Section IV, *infra.*

for their own benefit, it is probable that in the run of ADA cases, district courts will rarely find basis for the Rule 54(d)(1) presumption to be overcome.

IV. Plaintiffs in ADA Cases are Targeted by Egregious and Inflammatory Narratives, and will be Unfairly Harmed by a Discretionary Rule

The Ninth Circuit has repeatedly acknowledged that "[f]or the ADA to yield its promise of equal access for the disabled" ADA enforcement actions are both "necessary and desirable." *Molski v. Evergreen Dynasty Corp*., 500 F.3d. 1047, 1062 (9th Cir. 2007); *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d at 1040. Nonetheless, many district court judges have been influenced by the constant barrage of false narratives around ADA enforcement[11] and have themselves described ADA litigation in unfair and highly inflammatory terms – <u>even in cases where alleged ADA violations were/are legitimately at issue (i.e., meritorious claims) and/or the disabled plaintiff had prevailed</u>. *See, e.g.*, *White v. Sutherland*, No. CIV S-03-2080 CMK, 2005 WL 1366487, at *2 (E.D. Cal. May 6, 2005) (district court unnecessarily references the "issue of whether the ADA has spawned

[11] *See, e.g.,* Michelle Uzeta, *Acheson v. Laufer: Debunking Common ADA Enforcement Myths*, DREDF, The Blog (July 28, 2023), https://dredf.org/web-log/2023/07/28/acheson-v-laufer-debunking-common-ada-enforcement-myths/ (exposing as false, the narratives that ADA cases are clogging the courts, lack merit, are unfair and abusive, are easy to bring, and are about money rather than compliance).

a cottage industry of 'shake-down' lawsuits out of all proportion to the initial aims of the ADA" in an order granting fees to a *prevailing* disabled plaintiff whose case resulted in a restaurant remediating its facilities to comply with the ADA, benefitting the disability community); *Wilson v. Wal-Mart Stores, Inc.*, No. 05CV1216 BEN (BLM), 2005 WL 3477827, at *3 (S.D. Cal. Oct. 12, 2005) (citing *White v. Sutherland*, in the context of a motion to strike on which the disabled ADA plaintiff *prevailed*); *Doran v. Del Taco, Inc.*, 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005), vacated and remanded, 237 F. App'x 148 (9th Cir. 2007) (describing ADA litigation as a "cottage industry" in order denying attorney' fees *to a successful ADA plaintiff* in lawsuit brought to remedy architectural barriers in a restaurant confirmed to have violated the ADA); and *Langer v. Kiser*, 495 F. Supp. 3d 904, 910 (S.D. Cal. 2020) (in the context of a motion in limine, describing the ADA as producing "extortion suits" and referencing "vexatious litigants' perversion of the ADA").

Given the ongoing narratives surrounding ADA actions as a category, a rule that creates a presumption in favor of awarding costs to a prevailing ADA defendant will invite arbitrariness in the awarding of costs. This, in turn, will result in an inconsistency and disuniformity that is squarely at odds with the interests of justice, and will undermine Congress' intent that private enforcement be the primary tool to eliminate disability discrimination and address the segregation and exclusion that continues to persist in our communities.

V. Equitable Considerations Warrant the Use of Different Standards for the Awarding of Costs in ADA Cases

There are strong equitable reasons for cost awards to a prevailing ADA plaintiff that are wholly absent in the case of an ADA defendant, justifying the use of different standards.

First, as discussed in Section II, disabled plaintiffs are Congress' chosen instrument to enforce the ADA. *Doran v. 7-Eleven, Inc.*, at 1039-40. When a district court awards costs to a prevailing plaintiff, it is awarding them against a violator of federal law and promoting Congress' goal of attracting plaintiffs and lawyers to bring civil rights enforcement cases. Second, people with disabilities experience poverty at more than double the rate of nondisabled people. In 2022, 24 percent of disabled people were living below the poverty level compared with 9.5 percent for those without disabilities.[12] This high rate of poverty makes people with disabilities less likely to be able to afford legal assistance and impacts their experiences and outcomes in the legal system. According to the 2021 Justice Gap

[12] Emily A. Shrider and John Creamer, U.S. Census Bureau, Current Population Reports, P60-280, *Poverty in the United States: 2022*, U.S. Government Publishing Office, Washington, DC, September 2023.

Measurement Survey, 82% of low-income households with disabilities experienced at least one civil legal problem in the past year, and 48 percent experienced at least five.[13] The survey also revealed that 91 percent of individuals in low-income households with disabilities did not receive any or enough legal help for their civil legal problems.[14]

Allowing a prevailing defendant to collect costs against a disabled plaintiff in an ADA case absent a showing that the case was frivolous, unreasonable, or lacking in foundation is inherently inequitable. The risk of incurring costs in ADA litigation will chill enforcement actions by people with disabilities, deter civil rights attorneys – many of whom hail from non-profits or small firms – from representing them, and make such cases less attractive to the private bar. This is not what Congress intended when it enacted the ADA.

VI. The Panel's Decision Runs Afoul of the *En Banc* holding in *Miller v. Gammie*

Amici agree with Petitioner-Appellant that a rehearing *en banc* should be granted because of the Panel's failure to follow the rule articulated in *Miller v.*

---

[13] Legal Services Corporation. 2022. *The Justice Gap: Disability.* https://justicegap.lsc.gov/resource/disability/#:~:text=The%202022%20Justice%20Gap%20Measurement,health%20care%2C%20and%20income%20maintenance (summarizing data from the 2021 Justice Gap Measurement Survey conducted by National Opinion Research Center at the University of Chicago).

[14] *Id.*

Gammie. In *Miller*, this Court held that a three-judge panel is bound by the opinion of a prior panel absent a conflicting "subsequent" or "intervening" Supreme Court decision. 335 F.3d 889, 899–900 (9th Cir. 2003) (*en banc*). Because the opinion in *Green v. Mercy Housing, Inc.*, 991 F.3d 1056, 1057–58 (9th Cir. 2021) was published after *Marx v. General Revenue Corp*., and directly addressed the issue of prevailing defendant's entitlement to costs under the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq*. – a civil rights statute that, similar to the ADA, treats costs as parallel to attorney's fees[15] – is directly relevant precedent that should have been followed. If the three-judge panel in this case is not required to follow Circuit precedent based on a perceived conflict with a Supreme Court decision handed down *before* that precedent, future three-judge panels will be emboldened to abrogate Circuit precedent wherever it conflicts with a non-intervening Supreme Court ruling. This, in turn, violates a long-standing and central principle of law: courts are supposed to adhere to precedent to resolve current disputes. It promotes uniformity and consistency in the law.

[15] Because of the similarities between the FHAA and ADA, the Court "interpret[s] them in tandem." *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1157 (9th Cir. 2013) (quoting *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 n.4 (2d Cir. 2003)).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that Plaintiff-Appellant's petition for rehearing *en banc* be granted.

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

November 9, 2023

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE RULE 32(g)(1)

I certify that the foregoing brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6). The brief contains 4039 words, excluding the items exempted by Fed. R. App. P. 32(f), as counted using Microsoft Word for Mac, Version 16.78.3, and uses a proportionally spaced typeface and 14-point font. This brief is accompanied by Form 8, in compliance with Circuit Rule 32-1(e).

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: November 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2023, I electronically filed the foregoing AMICUS CURIAE BRIEF OF THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND AND SIX OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all the participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: November 9, 2023