No. 08-993

IN THE
Supreme Court of the United States

BEST WESTERN ENCINA LODGE & SUITES; ENCINA-PEPPER TREE, LTD.; JEANETTE WEBBER; CECILIA E. VILLINES,

Petitioners,

v.

HOLLYN D'LIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff has standing to maintain an Americans with Disabilities Act (ADA) claim against a hotel if the plaintiff demonstrates an intent to return to the area where the hotel is located and a desire to stay at the hotel if it were made accessible.

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioners seek this Court's review of a fact-bound decision that correctly applied well-established Article III standing principles to an Americans with Disabilities Act (ADA) claim for injunctive relief. Petitioners have failed to show any compelling reason to grant the writ. First, petitioners argue that the decision below conflicts with this Court's constitutional standing jurisprudence, but review of the decision shows that the court of appeals faithfully applied the applicable standing principles to the record in this case. Second, petitioners claim that the decision below conflicts with the decisions of other courts, but every case cited by petitioners rests on the same legal standards, and any differences in outcomes are easily explained by differences in the facts of each case. Finally, petitioners employ attention-grabbing catch-phrases such as "judicial hellhole" and "vexatious litigation" in an attempt to suggest that their policy arguments against the ADA's private enforcement scheme inject an important issue of law into this fact-bound case. The petition for a writ of certiorari should be denied.

STATEMENT

On December 13, 2001, Hollynn D'Lil checked into a room at the Best Western Encina Lodge & Suites in Santa Barbara, California (Best Western Encina). D'Lil, who requires a wheelchair for mobility, had been told when she reserved the room that it was fully wheelchair accessible, except for its lack of a roll-in shower. Pet. App. 2a. When she arrived, however, she discovered numerous barriers to accessibility, such as a lack of van-accessible parking spaces near the rooms designated wheelchair accessible; door hardware, heating controls, and lamps that were too high or too far from a clear path for her to use; and a

bathroom that was blocked by furniture and had a toilet that was too low to the ground. *Id.* at 2a-3a. On December 13, 2002, D'Lil filed this suit under Title III of the Americans with Disabilities Act of 1990 (ADA) and California civil rights laws.

The case was settled pursuant to a consent decree that required defendants to construct fully ADA compliant guestrooms and to improve access to other facilities, including the public restrooms, swimming pool, and restaurant. The consent decree reserved the issue of attorney's fees. After D'Lil filed a motion for fees and defendants responded, the district court *sua sponte* ordered the parties to address D'Lil's standing. The parties briefed the issue, and the district court held an evidentiary hearing, after which it decided that D'Lil lacked standing, finding that she had not presented sufficient evidence to show that she intended to return to the Best Western Encina at the time she filed her complaint. *Id.* at 34a-36a.

The court of appeals reversed. The court explained that, to establish standing, a plaintiff must show that she has suffered an actual or imminent injury in fact, *id.* at 7a, and further explained that the "evidence relevant to the standing inquiry consists of 'the facts as they existed at the time the plaintiff filed the complaint.'" *Id.* (citations omitted). Where the place of public accommodation being sued is far from a plaintiff's home, the court went on, the plaintiff can establish an injury sufficient to confer standing by demonstrating an intent to return to the geographic area and a desire to visit the public accommodation if it is made accessible. *Id.* at 9a.

The court found that, on the record in this case, "there can be little doubt" that D'Lil demonstrated that, at the time she filed her complaint, she intended to return to the Santa Barbara area and desired to stay at the Best Western Encina if it were made accessible. *Id.* The court noted that D'Lil regularly visited Santa Barbara before, during, and after her stay at the Best Western Encina. In particular, D'Lil's declaration and testimony at the evidentiary hearing demonstrated that from 1993 to 2000 she visited the area approximately one to three times per year for work, that she took three trips to the area in 2001, that she took four trips to the area between her stay at the Best Western Encina and when she filed her declaration, and that, at the time of the evidentiary hearing, she was planning on taking three additional trips to the area. *Id.* at 9a-10a. The court also found that "D'Lil's desire to stay at the Best Western Encina on future trips to Santa Barbara if it were made accessible" was "well supported by the evidence that she submitted at each successive stage of the litigation," *id.* at 10a, including in her complaint, where she specifically stated that she would like to return to the hotel, and at the evidentiary hearing, where she explained why she would want to stay there if it were fully accessible. *Id.* at 11a.

The court of appeals found "somewhat baffling" the district court's conclusion that D'Lil had not presented evidence of her intent, at the time the complaint was filed, to return to the Best Western Encina. *Id.* at 12a. "That she [intended to return as of December 13, 2002] is the obvious and most reasonable inference to be drawn from her testimony," it explained. *Id.* The court pointed out that D'Lil's testimony established that "she was a frequent

traveler to Santa Barbara during the relevant time period," and that "she had at least one concrete plan to return to the Santa Barbara area at the time she filed suit." *Id.* at 13a. Moreover, the court noted that D'Lil had provided detailed reasons in her testimony for why she would like to stay at the Best Western Encina if it were made accessible, and that because she had not returned to the hotel since she filed suit, her "stated reasons for preferring the Best Western Encina at the evidentiary hearing were necessarily based on impressions of the hotel that were formed, and that she held, at the time that she stayed there and subsequently filed suit." *Id.* at 13a-14a. The court concluded that D'Lil's testimony "plainly evidence[d]" an intent to return to the Best Western Encina at the time she filed her complaint, and, therefore, she had established an actual or imminent injury sufficient to confer standing. *Id.* at 14a.

Finally, the court addressed concerns that the district court had raised about D'Lil's credibility based on her involvement in past ADA litigation and the fact that she had not yet returned to six hotels in Redding that she had previously sued. First, the court noted that although the district court expressed concerns, it had "explicitly declined to decide the credibility issue." *Id.* at 14a. The court pointed out that there was no evidence in the record about whether the six hotels had been made accessible so that D'Lil could return. Moreover, it explained, "whether or not D'Lil visited the hotels in Redding says little about her intent to visit the Best Western Encina, considering that D'Lil identified specific reasons . . . for returning to Santa Barbara," and the district court's "speculation about the plausibility of D'Lil's intent to return to each place of

public accommodation that she sued is further undermined by evidence of D'Lil's extensive and frequent travel throughout the state." *Id.* at 16a. Overall, the court concluded that the district court's statements on credibility did not disturb its "conclusion that D'Lil sufficiently established her standing to sue." *Id.* at 14a.

Judge Rymer dissented in part, disagreeing with the majority over whether the district court's credibility concerns were justified and over whether D'Lil showed "any concrete plan or intent to return to the Best Western Encina as of the time she filed her complaint." *Id.* at 22a. Defendants' petitions for rehearing and rehearing en banc were denied, with no judge requesting a vote on whether to rehear the matter en banc. *Id.* at 47a.

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Consistent with This Court's Standing Jurisprudence.

Petitioners' primary argument for review is that the decision below "conflicts with this Court's constitutional standing jurisprudence." Pet. 13; *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974). But in all three ways in which petitioners claim there is a conflict, the court of appeals expressly followed this Court's precedents.

First, although petitioners contend that the decision below "conflicts with this Court's holding that a plaintiff must establish that standing existed at the time the action was filed," Pet. 15, the court of appeals expressly stated that "[t]he evidence relevant to the standing inquiry

consists of the facts as they existed *at the time the plaintiff filed the complaint*." Pet. App. 7a (citations and internal quotation marks omitted) (emphasis added). And the court specifically held that D'Lil demonstrated her "intent to return *at the time that she filed suit*." *Id.* at 14a (emphasis added). Thus, petitioners' suggestion that the court of appeals held that D'Lil could establish standing even if she had not proven any intent to return to the Best Western Encina at the time she filed her complaint is without merit, and the claimed conflict with this Court's decisions in *Lujan*, *Lyons*, and *O'Shea* is illusory.

Similarly, although petitioners claim that the court of appeals did not adhere "to the requirement that a plaintiff must show a 'real' and 'imminent' threat of injury to have standing," Pet. 17-18 (citing *Lujan*, 504 U.S. at 564; *Lyons*, 461 U.S. at 105, 110), the court of appeals expressly stated that plaintiff needed to show an "actual or imminent" injury, Pet. App. 7a (quoting *Lujan*, 504 U.S. at 560-61), and specifically held that D'Lil had done so. *Id.* at 14a. Petitioners assert that the court erred in discussing D'Lil's prior visits to the Santa Barbara area, arguing that a past injury does not show a present case or controversy. Pet. 17. But the court of appeals did not cite D'Lil's past visits to show that those visits alone established her standing. Rather, the court of appeals noted that "the regularity with which she visited the city before, during, and after her stay at the Best Western Encina," Pet. App. 9a-10a, demonstrated that she was a "frequent traveler to Santa Barbara during the relevant time period." *Id.* at 13a. Petitioners also argue that a statement D'Lil made about her upcoming work in the Santa Barbara area did not establish a real or imminent plan on her part to return.

Pet. 18. But the court of appeals did not rely only on that statement to conclude that D'Lil had a "concrete plan to return to the Santa Barbara area at the time she filed suit[,]" but also on the fact that D'Lil had spent an afternoon looking for an accessible hotel for that trip, and thus "had already begun to plan for [a specific upcoming trip] at the time that the complaint was filed." Pet. App. 13a n.9.

Finally, contrary to petitioners' claim that "the court of appeals ignored this Court's express holding that the plaintiff's burden is to establish each element of standing 'with the manner and degree of evidence required at the successive stages of the litigation[,]'" Pet. 19 (quoting *Lujan*, 504 U.S. at 561), the Ninth Circuit stated explicitly that each of the elements of standing must be supported "with the manner and degree of evidence required at the successive stages of litigation." Pet. App. 7a (quoting *Lujan*, 504 U.S. at 561). Petitioners further assert that the court below erred by relying on the complaint and summary judgment declaration even though the district court had held an evidentiary hearing, but the summary judgment declaration was admitted into evidence at the hearing. Transcript of Evidentiary Hearing Re: Standing at 85-86 & 110 (admitting summary judgment declaration as Exhibit 102). Moreover, the court of appeals concluded that D'Lil's *testimony* evidenced an intent to return to the Best Western Encina sufficient to confer standing. Pet. App. 14a. Thus, there is no conflict between the decision below and this Court's standing jurisprudence.

In the end, petitioners' claim of multiple departures from this Court's precedents is, at most, a simple disagreement with the court of appeal's application of

properly stated rules of law to the facts of this case. Even if the court below had erred in its application of the law to the facts, this case would not be worthy of this Court's review. *See* S.Ct. R. 10. But the court of appeals did not err. Rather, it concluded correctly that D'Lil had standing because her testimony demonstrated her intent, at the time she filed suit, to return to the Santa Barbara area and stay at the Best Western Encina if it were accessible. The petition should be denied.

II. The Decision Below Does Not Conflict with the Decision of Any Other Court.

Petitioners claim that there is a circuit split regarding the degree of rigor with which the courts of appeals apply this Court's standing jurisprudence in cases where plaintiffs seek injunctive relief under the ADA. Pet. 21. But an examination of the cases petitioners cite reveals no such conflict.

Petitioners rely primarily on *Shotz v. Cates*, 256 F.3d 1077, 1082 (11th Cir. 2001), in which the Eleventh Circuit affirmed the dismissal of an ADA complaint for lack of standing to seek injunctive relief because the plaintiffs had not even alleged any intent to return to the building at issue. *Shotz* is easily distinguished from this case because the court below determined that D'Lil's testimony established her intent to return to the Best Western Encina at the time that she filed suit. Pet. App. 14a. Petitioners also rely on the Eleventh Circuit's unpublished decision in *Access for America, Inc. v. Associated Out-Door Clubs, Inc.*, 188 F. App'x 818 (11th Cir. 2006) (per curiam), but under Eleventh Circuit Rule 36-2, an unpublished decision of that court is not binding circuit

precedent. Thus, *Access for America* cannot establish a circuit split because no court is bound to follow the decision. In any event, *Access for America* does not conflict with the decision below because it affirmed in cursory fashion a dismissal for lack of standing to seek injunctive relief where the plaintiff "could not demonstrate that there was any reasonable chance of his revisiting" the facility at issue. *Id.* at 818. Again, in this case, the court of appeals concluded that D'Lil had made such a demonstration. Pet. App. 14a.

Petitioners also assert that the decision below conflicts with the D.C. Circuit's decision in *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496 (D.C. Cir. 1994), but that case did not involve the ADA or an analysis of a plaintiff's intent to return to a place where she had been subjected to unlawful conditions. Rather, *Animal Legal Defense Fund* was an Administrative Procedure Act (APA) challenge to an agency regulation. The court found that one plaintiff lacked standing to seek injunctive relief because she had not shown an injury presently suffered or imminently threatened where she "merely state[d] that at some undefined future time" she might again engage in activities that she had not pursued during the previous six years, *id.* at 500, and that the other plaintiff's claim "amount[ed] to nothing more than an attempt to compel executive enforcement of the law, detached from any factual claim of injury," *id.* at 501. In contrast, the court below concluded that D'Lil had demonstrated a specific intent to return to the Best Western Encina at the time she filed suit and, therefore, had "suffered an 'actual or imminent' injury sufficient to confer standing." Pet. App. 14a. Because the plaintiffs in *Animal Legal Defense Fund* were not

similarly situated to the plaintiff in this case, the decisions do not conflict.

Having cited only three appellate cases that they claim conflict with the decision below—none of which presents an actual conflict—petitioners attempt to bolster their claim of a circuit split by citing two cases that they assert are consistent with the Ninth Circuit's decision here. Pet. 23 (citing *Camarillo v. Carrols Corp.*, 518 F.3d 153, 158 (2d Cir. 2008) (per curiam); *Steger v. Franco, Inc.*, 228 F.3d 889, 891-92 (8th Cir. 2000)). Because the petitioners have failed to identify any appellate decisions that conflict with the decision below, their citation of non-conflicting decisions by other courts provides no basis to grant review. Rather, that the Second Circuit in *Camarillo* and the Eighth Circuit in *Steger*, like the court below, have found that plaintiffs have standing to pursue ADA claims where they intend to return to the offending establishments shows that there is no compelling reason for this Court to address the question presented here.

Unable to show any conflict at the appellate level, petitioners cite a handful of district court decisions that they claim "are in tension with or flatly contradict the outcome reached by the decision below." Pet. 24. But the cases petitioners cite apply the same law as the court below—the outcomes differ only because of differences in the facts. For example, petitioners cite *Blake v. Southcoast Health System, Inc.*, 145 F. Supp. 2d 126 (D. Mass. 2001). But the court in *Blake*, noting that "every court to have considered the standing requirements under Title III of the ADA has held that in order for a private litigant to prove standing, she must show a risk of future harm[,]" *id.* at 132-33, held that a decedent's estate lacks

standing to seek injunctive relief under the ADA because the decedent cannot further be harmed by the discrimination, *id.* at 137. *Blake* does not conflict with the decision here because D'Lil's testimony demonstrated that she was at risk of future harm because she intended to return to Santa Barbara and desired to stay at the Best Western Encina if it were accessible. Pet. App. 14a.

Petitioners also cite *Rosenkrantz v. Markopoulos*, 254 F. Supp. 2d 1250, 1253 (M.D. Fla. 2003), in which the district court dismissed the plaintiff's ADA complaint against a motel for lack of standing because the plaintiff failed to demonstrate "anything but a speculative or conjectural future injury." The plaintiff in *Rosenkrantz* traveled only twice a year and on a route that "comes nowhere near" the defendant motel, had been to the area of the motel only once, and had no specific plans to ever return. *Id.* The decision in *Rosenkrantz* does not conflict with the decision below because both decisions applied this Court's decision in *Lujan*. The results differed only because of factual differences between the two cases. As opposed to the plaintiff in *Rosenkrantz*, D'Lil was a frequent traveler to the area of the defendant hotel and had specific plans for future trips to the area at the time she filed her suit. Pet. App. 9a-14a. Similarly, in *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368 (M.D. Fla. 2004), the district court applied the same standing jurisprudence as the court below but found that the plaintiff lacked standing based on facts different from those presented by D'Lil. The plaintiff in *Brother* discovered the defendant hotel by chance while driving an indirect route to his destination, did not stay at the hotel, does not ordinarily travel to the area where the hotel is

located, professed only a general intent to return to the area, and gave inconsistent testimony about his frequency of travel. *Id.* at 1371.

Finally, petitioners assert that the decision below conflicts with three district court decisions that considered a plaintiff's history of ADA litigation in assessing the credibility of a plaintiff's professed intent to return to a particular facility. Pet. 25-26 (citing *Brother*, 331 F. Supp. 2d at 1374-75; *Molski v. Mandarin Touch Rest.*, 385 F. Supp. 2d 1042, 1046 (C.D. Cal. 2005); *Rodriguez v. Investco, LLC*, 305 F. Supp. 2d 1278, 1279, 1284-85 (M.D. Fla. 2004)). The cases cited by petitioners do not demonstrate a conflict with this case for three reasons. First, the court below did not hold that litigation history may never be considered in assessing the credibility of a professed intent to return, but instead noted that "[t]he attempted use of past litigation to prevent a litigant from pursuing a valid claim in federal court warrants [the court's] most careful scrutiny." Pet. App. 15a (citing *Outley v. City of New York*, 837 F.2d 587, 592 (2d Cir. 1988)). Second, in this case, "the district court explicitly declined to decide the credibility issue[.]"[1] Pet. App. 14a. Third, to the extent the district court focused on D'Lil's history of ADA litigation as a basis for questioning the sincerity of her intent to return to the Best Western

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[1]Even if the question presented included whether litigation history is relevant to determine the credibility of a plaintiff's intent to return, this case would be a poor vehicle to address the issue because the district court did not decide it. Further, the court of appeals found it unnecessary to reach significant due process issues raised by D'Lil regarding the scope of the evidentiary hearing with regard to prior litigation. Pet. App. 4a n.4.

Encina, the court of appeals rejected any "purported adverse credibility determination" under the facts of this case because "D'Lil identified specific reasons" for returning to Santa Barbara and for wanting to stay at the Best Western Encina if it were made accessible. *Id.* at 16a. In contrast, in the cases cited by petitioners, the plaintiffs offered only generalized statements of an intent to return.

In sum, petitioners have not identified any decisions that conflict with the decision below on an issue of law. At most, petitioners have identified cases where courts reached different results because of different facts. There is no reason to believe that the outcome of this case would have been any different had it been litigated in another forum, and there is no reason for this Court to review the decision below.

III. Petitioners' Policy Disagreement with the ADA's Private Enforcement Mechanism Does Not Provide a Basis to Grant the Petition.

The final section of the petition criticizes Congress's decision to rely on a private right of action as a means of promoting the ADA's goal of equal access for people with disabilities. *See* Pet. 27-31. Petitioners argue that serial litigation aimed at ensuring compliance with the law has imposed burdens on businesses and the judicial system, even as petitioners acknowledge that "[t]he value of this serial litigation in vindicating the purposes of the ADA is a subject of legitimate debate." *Id.* at 29; *see* Cari Becker, *Private Enforcement Of The Americans With Disabilities Act Via Serial Litigation: Abusive Or Commendable?*, 17 Hastings Women's L.J. 93 (2006). Whatever the merits of petitioners' criticism of the statutory scheme, such

criticism does not provide a basis for this Court to grant review. The court below faithfully applied the applicable standing principles to the record in this case and concluded that D'Lil had "demonstrate[d] 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." Pet. App. 9a. If petitioners believe that the ADA is in need of reform they should seek a legislative solution because "[o]nly Congress can respond to vexatious litigation tactics that otherwise comply with its statutory frameworks." *Brother*, 331 F. Supp. 2d at 1375.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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