

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

JOHN KARCZEWSKI,

Plaintiff-Appellant

v.

K MOTORS, INC., *et al.*,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*  
SUPPORTING APPELLANT AND URGING REVERSAL

---

VANITA GUPTA  
Principal Deputy Assistant  
Attorney General

SHARON M. MCGOWAN  
CHRISTOPHER C. WANG  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 514-9115

---

**TABLE OF CONTENTS**

**PAGE**

INTEREST OF THE UNITED STATES ..... 1

STATEMENT OF THE ISSUE..... 2

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT ..... 5

ARGUMENT

TITLE III OF THE ADA REQUIRES AN AUTOMOBILE DEALERSHIP THAT OFFERS TEST DRIVES TO INSTALL VEHICLE HAND CONTROLS TO ALLOW TEST DRIVES BY INDIVIDUALS WITH DISABILITIES IF INSTALLATION IS READILY ACHIEVABLE..... 7

    A. *Under Title III’s Plain Language, A Test Drive Of A Vehicle Is A “Service[ ],” The Full And Equal Enjoyment Of Which An Automobile Dealership Cannot Deny To Individuals With Disabilities ..... 7*

    B. *Title III’s Regulations Require Automobile Dealerships That Offer Test Drives To Install Vehicle Hand Controls To Allow Test Drives By Individuals With Disabilities If Installation Is Readily Achievable..... 11*

        1. *The Plain Language Of The Most Applicable Regulation, And Other Regulations In The Overall Scheme, Define A Public Accommodation’s Obligation To Remove Tangible Barriers From Existing Facilities To Include Installing Vehicle Hand Controls..... 11*

**TABLE OF CONTENTS (continued):**

**PAGE**

2. *The Department’s Title III Technical Assistance Manual And 1998 Letter Issued By The Civil Rights Division Further Indicate That The Mandate To Install Vehicle Hand Controls Applies To Automobile Dealerships .....14*

3. *The Regulation Excusing Public Accommodations From Altering Their Inventory To Include Accessible Goods For Individuals With Disabilities Is Inapplicable To This Case .....17*

C. *Karczewski Has A Viable Claim That An Automobile Dealership Violates Title III By Refusing To Make A Reasonable Modification To Its Policy Or Practice Of Not Outfitting Vehicles With Hand Controls To Allow Test Drives By Individuals With Disabilities .....20*

CONCLUSION .....22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

| <b>CASES:</b>   | <b>PAGE</b>   |
|---|---------------|
| <i>Alaskan Trojan P’ship v. Gutierrez</i> , 425 F.3d 620 (9th Cir. 2005).....                       | 13            |
| <i>Auer v. Robbins</i> , 519 U.S. 452 (1997).....   | 16            |
| <i>Baughman v. Walt Disney World Co.</i> , 685 F.3d 1131 (9th Cir. 2012) .....                      | 7             |
| <i>Bowers v. National Collegiate Athletic Ass’n</i> ,<br>9 F. Supp. 2d 460 (D.N.J. 1998).....       | 8-9           |
| <i>Celano v. Marriott Int’l, Inc.</i> , No. 05-4004,<br>2008 WL 239306 (N.D. Cal. 2008).....        | 21            |
| <i>Chapman v. Pier 1 Imps. (U.S.) Inc.</i> , 631 F.3d 939 (9th Cir. 2011) .....                     | 7             |
| <i>Daubert v. Sullivan</i> , 905 F.2d 266 (9th Cir. 1990).....                                      | 18-19         |
| <i>Fortyune v. American Multi-Cinema, Inc.</i> ,<br>364 F.3d 1075 (9th Cir. 2004) .....             | 20-21         |
| <i>Holley v. Crank</i> , 400 F.3d 667 (9th Cir. 2005).....  | 22            |
| <i>McGary v. City of Portland</i> , 386 F.3d 1259 (9th Cir. 2004).....                              | 13, 16        |
| <i>Moore v. Dollar Tree Stores Inc.</i> , No. 1:13-cv-1336,<br>2015 WL 65661 (E.D. Cal. 2015) ..... | 8, 11         |
| <i>Rendon v. Valleycrest Prods., Ltd.</i> , 294 F.3d 1279 (11th Cir. 2002).....                     | 8, 10         |
| <br><b>STATUTES:</b>  |               |
| Title III of the Americans with Disabilities Act (ADA),<br>42 U.S.C. 12182 <i>et seq.</i> .....     | 2             |
| 42 U.S.C. 12182.....  | 1, 5          |
| 42 U.S.C. 12182(a) .....  | 7             |
| 42 U.S.C. 12182(b)(2)(A)(ii).....   | 3, 20-22      |
| 42 U.S.C. 12182(b)(2)(A)(iv).....   | <i>passim</i> |

**STATUTES (continued):** **PAGE**

42 U.S.C. 12186(b).....1  
42 U.S.C. 12188(b).....1  
  
42 U.S.C. 12101(b)(1).....7  
42 U.S.C. 12181(7)(E).....7  
42 U.S.C. 12181(9).....5

**REGULATIONS:**

28 C.F.R. 36.104 ..... 5, 9-10  
28 C.F.R. 36.304 ..... 2, 11-12  
28 C.F.R. 36.304(a)..... 11-13  
28 C.F.R. 36.304(b) .....12  
28 C.F.R. 36.304(b)(21).....*passim*  
28 C.F.R. 36.307(a).....*passim*

**RULES:**

Fed. R. App. P. 29(a) .....2  
Fed. R. Civ. P. 12(b)(6).....4

**MISCELLANEOUS:**

Letter from John L. Wodatch, Chief, Disability Rights Section, to  
Trish Farmer, Tennessee Committee for Employment of People  
with Disabilities (Nov. 10, 1998), available at  
[http://www.justice.gov/crt/foia/readingroom/frequent\\_requests/ada\\_coreletter/ltr218.php](http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_coreletter/ltr218.php)..... 16-17  
  
Merriam-Webster’s Collegiate Dictionary (10th ed. 1998).....10

**MISCELLANEOUS (continued):**

**PAGE**

The Americans with Disabilities Act: Title III Technical Assistance  
Manual (1994 Supp.), <http://www.ada.gov/taman3up.html> .....15

The Americans with Disabilities Act: Title III Technical Assistance  
Manual, available at <http://www.ada.gov/taman3.html> ..... 13-14

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

No. 15-55588

JOHN KARCZEWSKI,

Plaintiff-Appellant

v.

K MOTORS, INC., *et al.*,

Defendants-Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

---

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*  
SUPPORTING APPELLANT AND URGING REVERSAL

---

**INTEREST OF THE UNITED STATES**

This case concerns the scope of protection provided by Title III of the ADA, 42 U.S.C. 12182, and federal regulations, which prohibit disability discrimination in places of public accommodation. The Department of Justice is authorized to bring a civil action to enforce Title III, 42 U.S.C. 12188(b), and to promulgate regulations to implement Title III, 42 U.S.C. 12186(b). Accordingly, the United States has a strong interest in how courts interpret this statute and our accompanying regulations. The case likely will turn on the meaning of a

Department regulation implementing Title III's requirement that a public accommodation remove architectural barriers in existing facilities where removal is readily achievable. See 28 C.F.R. 36.304. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

### **STATEMENT OF THE ISSUE**

The United States will address the following issue:

Whether Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12182 *et seq.*, and regulations promulgated pursuant to Title III, require an automobile dealership to install temporary hand controls in a vehicle to allow an individual with a disability to test drive that vehicle if such installation is readily achievable.

### **STATEMENT OF THE CASE**

1. Plaintiff John Karczewski is a California resident who is paralyzed from the waist down and uses a wheelchair for mobility. E.R. 3-4, 11.<sup>1</sup> In September 2014, he visited Toyota of El Cajon (El Cajon Toyota), an automobile dealership owned by defendant K Motors, Inc. (K Motors), to look into purchasing a new van. E.R. 4, 11-13. According to Karczewski, El Cajon Toyota offers potential customers “the opportunity to test drive vehicles that they are considering buying.”

---

<sup>1</sup> This brief uses the abbreviations “E.R. \_\_\_” for the plaintiff’s Excerpts of Record and “R. \_\_\_ at \_\_\_” for the docket number and page number of a district court document that was not included in the Excerpts of Record.



E.R. 13. Karczewski can operate a motor vehicle only if it is equipped with hand controls, which typically involves the installation to a vehicle's steering column of a device with levers that activate rods that reach the foot pedals. Karczewski contends that when he inquired about test driving a vehicle, a sales manager and sales associate told him that El Cajon Toyota will not outfit vehicles with hand controls for individuals with disabilities to test drive. E.R. 4, 13.

In November 2014, Karczewski filed a complaint in the United States District Court for the Southern District of California alleging that El Cajon Toyota's failure to install temporary hand controls in any vehicle for sale to allow an individual with a disability to test drive that vehicle violated Title III of the ADA, as well as the California Unruh Civil Rights Act and the California Disabled Persons Act. E.R. 3-4, 12. The complaint argued that the ADA defines discrimination to include the "failure to make reasonable modifications in policies, practices, or procedures" to accommodate individuals with disabilities, 42 U.S.C. 12182(b)(2)(A)(ii), and the "failure to remove architectural barriers where such removal is readily achievable," 42 U.S.C. 12182(b)(2)(A)(iv). E.R. 15. The complaint further asserted that the relevant ADA regulation establishes that installing vehicle hand controls is among the barrier-removal tasks that may be readily achievable, see 28 C.F.R. 36.304(b)(21). E.R. 16. K Motors moved to

dismiss Karczewski's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. E.R. 4, 9-10.

2. In March 2015, the district court granted K Motors's motion and dismissed the action with prejudice. E.R. 2-8. The court first agreed with K Motors that a vehicle for sale at a car dealership falls outside the scope of 28 C.F.R. 36.304(b)(21). E.R. 5. In the court's view, "[a] vehicle for sale at a car dealership simply does not fall within the ADA's meaning of an 'architectural barrier.'" E.R. 6.

The court further observed that Title III "does not require a place of public accommodation to 'alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.'" E.R. 6 (quoting 28 C.F.R. 36.307(a)). In this regard, the court noted that "[c]ourts have differentiated between access to a good and the good itself." E.R. 6. The court stated that a vehicle for sale at a car dealership is a good that is part of the dealership's inventory, and that "[i]n order to accommodate [Karczewski's] desire to test drive a vehicle in its inventory, the dealership would have to alter the nature of the vehicles that it sells." E.R. 7. Under the plain language of this implementing regulation, the court concluded, a dealership is not required to alter its inventory by adding specific modifications to accommodate individuals with disabilities. E.R. 7. Accordingly, the court held that Karczewski "fail[ed] to state

a plausible claim for discrimination against [K Motors] under Title III of the ADA.” E.R. 7.

Karczewski filed a timely notice of appeal in April 2015. E.R. 1.

### **SUMMARY OF ARGUMENT**

If an automobile dealership offers test drives of vehicles to potential customers, Title III of the ADA requires that the dealership install temporary hand controls in those vehicles to allow use by individuals with disabilities if such installation is readily achievable.<sup>2</sup> Under the plain language of Title III, a test drive of a vehicle is a “service[]” provided by an automobile dealership, the full and equal enjoyment of which the dealership cannot deny to individuals with disabilities. 42 U.S.C. 12182. Title III’s implementing regulations regarding architectural barriers, supported by the Department of Justice’s Title III Technical Assistance Manual interpreting those regulations and a 1998 letter issued by the Department’s Civil Rights Division, confirm this view. The absence of hand controls in a vehicle available for a test drive is a tangible barrier that denies an individual with a disability the opportunity to test drive the vehicle; therefore,

---

<sup>2</sup> Title III and its implementing regulations define “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense,” and list several factors for a court to consider in making this determination. 42 U.S.C. 12181(9); 28 C.F.R. 36.104. The district court did not reach the issue of whether the installation of hand controls was “readily achievable” in this case, and we do not take a position on this issue.

under Title III, the automobile dealership must remedy that denial of access if the installation of temporary hand controls is readily achievable.

In dismissing this case, the district court erroneously relied on 28 C.F.R. 36.307(a), which provides that Title III “does not require a public accommodation to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.” This regulation is inapplicable because Karczewski does not seek to purchase an altered vehicle, but rather requests a service: the ability to test drive a vehicle on terms equal to those of individuals without disabilities. El Cajon Toyota’s rejection of Karczewski’s request to install hand controls would violate Title III’s guarantee of “full and equal enjoyment” of the dealership and its services if installation was readily achievable. Consequently, the district court erred in dismissing Karczewski’s claim for failure to state a claim.

## ARGUMENT

### **TITLE III OF THE ADA REQUIRES AN AUTOMOBILE DEALERSHIP THAT OFFERS TEST DRIVES TO INSTALL VEHICLE HAND CONTROLS TO ALLOW TEST DRIVES BY INDIVIDUALS WITH DISABILITIES IF INSTALLATION IS READILY ACHIEVABLE**

A. *Under Title III's Plain Language, A Test Drive Of A Vehicle Is A "Service[]," The Full And Equal Enjoyment Of Which An Automobile Dealership Cannot Deny To Individuals With Disabilities*

The ADA sets forth a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. 12101(b)(1). To that end, Title III of the ADA prohibits discrimination against any individual on the basis of disability “in the *full and equal enjoyment* of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. 12182(a) (emphasis added). This guarantee of “full and equal enjoyment” requires that individuals with disabilities receive “more than mere access to public facilities” from a place of public accommodation.<sup>3</sup> *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012); see *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 945 (9th Cir. 2011) (noting that the ADA bars not only “obviously exclusionary conduct,” but

---

<sup>3</sup> The statute’s definition of the term “public accommodation” includes a “sales or rental establishment.” 42 U.S.C. 12181(7)(E). An automobile dealership such as El Cajon Toyota is clearly a place of public accommodation.

also “more subtle forms of discrimination \* \* \* that interfere with disabled individuals’ ‘full and equal enjoyment’ of places of public accommodation”). Indeed, the phrase “goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation” carves out a “broad swath” of activities that individuals with disabilities are entitled to enjoy on as full and equal basis as individuals without disabilities. *Bowers v. National Collegiate Athletic Ass’n*, 9 F. Supp. 2d 460, 487 (D.N.J. 1998).

Title III defines discrimination to include, *inter alia*, “fail[ing] to remove architectural barriers \* \* \* in existing facilities \* \* \* where such removal is readily achievable.” 42 U.S.C. 12182(b)(2)(A)(iv). This provision covers “tangible barriers” that would prevent an individual with a disability from “entering [a public] accommodation’s facilities and accessing its goods, services and privileges.” *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002). Read in conjunction with Title III’s prohibition of discrimination, this provision imposes liability not just where the tangible barrier “completely preclude[s] plaintiff from entering or using the facility,” but also where it “interfere[s] with the plaintiff’s full and equal enjoyment of the facility.” *Moore v. Dollar Tree Stores Inc.*, No. 1:13-cv-1336, 2015 WL 65661, at \*4 (E.D. Cal. 2015).

A test drive of a vehicle is a “service[.]” that an automobile dealership typically offers to potential customers, and thus falls within Title III’s prohibition on discrimination against individuals with disabilities. At the very least, a test drive is among the “broad swath” of activities, *Bowers*, 9 F. Supp. 2d at 487, for which individuals with disabilities are entitled to “full and equal enjoyment” under the ADA. An individual such as Karczewski with no feeling in his lower extremities due to paraplegia or another disability cannot use the foot pedals of a standard vehicle available for a test drive at an automobile dealership. The dealership’s failure to temporarily install hand controls in a vehicle that an individual with such a disability wishes to test drive thus prevents that individual from realizing the full and equal enjoyment of a service the dealership offers.

In such circumstances, the absence of vehicle hand controls is an “architectural barrier[.] \* \* \* in [an] exist[ing] facilit[y]” that Title III requires be removed if “such removal is readily achievable.” 42 U.S.C. 12182(b)(2)(A)(iv). The statute does not define the term “existing facility,” but the regulations explain that “[e]xisting facility” means “a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.” 28 C.F.R. 36.104. The regulations further clarify that the term “facility” encompasses more than just bricks-and-mortar structures; rather, it means “all or any portion of buildings, structures, sites, complexes, *equipment*,

*rolling stock or other conveyances*, roads, walks, passageways, parking lots, or other real or *personal property*, including the site where the building, property, structure, or equipment is located.” 28 C.F.R. 36.104 (emphasis added). Because a vehicle qualifies as equipment, rolling stock or other conveyances, or other personal property, it fits within this broad definition of “facility.” See Merriam-Webster’s Collegiate Dictionary 392 (10th ed. 1998) (defining “equipment” as “all the fixed assets other than land and buildings of a business enterprise”); *id.* at 1015 (defining “rolling stock” as “the wheeled vehicles owned and used by a railroad or motor carrier”); *id.* at 254 (defining “conveyance” as “a means of transport: vehicle”); *id.* at 867 (defining “personal property” as “property other than real property consisting of things temporary or movable: chattels”). Consequently, as pertains to this case, an automobile dealership is a place of public accommodation, and a vehicle that the dealership makes available for a test drive is one of the dealership’s facilities. As a result, the dealership has a duty to remove architectural barriers in its vehicles if removal is readily achievable.

Neither the statute nor the regulations define the term “architectural barriers,” but in the context of removing such a barrier from equipment, rolling stock or other conveyances, or “other \* \* \* personal property,” 28 C.F.R. 36.104, this term connotes a tangible barrier preventing an individual with a disability from using the facility. See *Rendon*, 294 F.3d at 1283. Because the



absence of hand controls is a tangible barrier that “interfere[s] with” an individual’s “full and equal enjoyment” of a facility at the dealership, *Moore*, 2015 WL 65661, at \*4, the protections of Title III are triggered. See 42 U.S.C. 12182(b)(2)(A)(iv). While a question remains whether installation of hand controls is readily achievable, the district court erred in concluding that these allegations failed to state a claim.

*B. Title III’s Regulations Require Automobile Dealerships That Offer Test Drives To Install Vehicle Hand Controls To Allow Test Drives By Individuals With Disabilities If Installation Is Readily Achievable*

*1. The Plain Language Of The Most Applicable Regulation, And Other Regulations In The Overall Scheme, Define A Public Accommodation’s Obligation To Remove Tangible Barriers From Existing Facilities To Include Installing Vehicle Hand Controls*

Title III’s implementing regulations reinforce the statute’s mandate of non-discrimination on this issue. The most applicable regulation – the one regarding architectural barriers – expressly defines a public accommodation’s obligation to remove tangible barriers from existing facilities to include installing vehicle hand controls. This regulation first reiterates that “[a] public accommodation shall remove architectural barriers in existing facilities \* \* \* where such removal is readily achievable,” and defines “readily achievable” as “easily accomplishable and able to be carried out without much difficulty or expense.” 28 C.F.R. 36.304(a). The regulation then provides a non-exhaustive list of 21 examples of “steps to remove barriers,” such as installing ramps, rearranging display racks,

vending machines and other furniture, widening doors, repositioning telephones, and removing high pile carpeting. 28 C.F.R. 36.304(b). One of the examples listed is “installing vehicle hand controls.” 28 C.F.R. 36.304(b)(21). The plain language of this regulation thus makes explicit what can be inferred from the statutory language, as previously explained: the absence of vehicle hand controls qualifies as an “architectural barrier[] \* \* \* in [an] existing facilit[y]” that must be removed if “such removal is readily achievable.” 42 U.S.C. 12182(b)(2)(A)(iv).

K Motors and the district court both took the position, based on the phrase “architectural barriers,” that 28 C.F.R. 36.304 does not require an automobile dealership to install hand controls in a vehicle made available for a test drive at the request of an individual with a disability. K Motors asserted that “[t]he barriers contemplated by the plain language of subsection (a) relate only to architectural barriers or communication barriers that are structural in nature” and “[t]he vehicles for sale at [El Cajon] Toyota’s place of business are simply not within the realm contemplated by Section 36.304(a) or (b).” R. 7-1 at 5. Along similar lines, the district court concluded that “[a] vehicle for sale at a car dealership simply does not fall within the ADA’s meaning of an ‘architectural barrier.’” E.R. 6.

Despite their claimed appeal to the regulation’s plain language, neither K Motors nor the district court took into account the regulation’s definition of

“existing facilities” in Section 36.304(a), much less attempted to reconcile their position with Section 36.304(b)(21)’s clear statement that “installing vehicle hand controls” is an example of a “step[] to remove barriers.” As noted above, a careful reading of the regulatory language in its entirety indicates that a vehicle available for a test drive at an automobile dealership is an *existing facility* under 28 C.F.R. 36.304(a). See *Alaskan Trojan P’ship v. Gutierrez*, 425 F.3d 620, 628 (9th Cir. 2005) (“[T]his court must look at the regulations as a whole in determining the plain meaning of a term.”). Because there is no evidence that these regulations “are arbitrary, capricious, or manifestly contrary to the statute,” the Department’s definition of the term “facility” should be given “controlling weight.” *McGary v. City of Portland*, 386 F.3d 1259, 1269 n.6 (9th Cir. 2004) (citation omitted).

The district court recognized that architectural barriers are “physical elements of a facility that impede access by people with disabilities (E.R. 6 (quoting The Americans with Disabilities Act: Title III Technical Assistance Manual § III-4.4100, available at <http://www.ada.gov/taman3.html>)), but then disregarded the definition of the term “facility” set forth in the regulation. This critical misstep by the court led it to conclude – in error – that the absence of vehicle hand controls could not be an “architectural barrier.” Because a vehicle made available by an automobile dealership for a test drive is a “facility” for

purposes of the regulations, the absence of hand controls in that vehicle indeed constitutes an “architectural barrier” for purposes of Title III.

2. *The Department’s Title III Technical Assistance Manual And 1998 Letter Issued By The Civil Rights Division Further Indicate That The Mandate To Install Vehicle Hand Controls Applies To Automobile Dealerships*

The Department’s Title III Technical Assistance Manual (TA Manual), which interprets the Department’s ADA regulations, further supports the position that the ADA may require an automobile dealership to install hand controls in vehicles available for test drives to allow individuals with disabilities to operate them. In its discussion of removal of barriers in general, the TA Manual reiterates the implementing regulations’ requirement that “[p]ublic accommodations \* \* \* remove architectural barriers \* \* \* that are structural in nature in existing facilities when it is readily achievable to do so.” TA Manual § III-4.4100. The TA Manual defines “architectural barrier” as “physical elements of a facility that impede access by people with disabilities” and defines “facility” as “all or any part of a building, structure, equipment, *vehicle*, site (including roads, walks, passageways, and parking lots), or other real or personal property.” *Ibid.* (emphasis added). As previously noted, a vehicle’s lack of hand controls is a physical element that impedes access by an individual with a disability. The TA Manual leaves no doubt that the implementing regulations mean what they say:

the absence of hand controls in a vehicle is a physical barrier that a public accommodation must remedy under Title III where it is readily achievable to do so.

The 1994 supplement to the TA Manual's discussion further validates this position. In the section on readily achievable barrier removal, the supplement specifically discusses the vehicle hand controls provision:

ILLUSTRATION 3: A small car rental office for a national chain is located in a rural community. *Title III requires the company to install vehicle hand controls if it is readily achievable to do so.* However, this procedure may not be readily achievable in a rural, isolated area, unless the company is provided adequate notice by the customer. What constitutes adequate notice will vary depending on factors such as the remoteness of the location, the availability of trained mechanics, the availability of hand controls, and the size of the fleet. For example, notice of an hour or less may be adequate at a large city site where it is readily achievable to stock hand controls and to have a mechanic always available who is trained to install them properly. On the other hand, notice of two days may be necessary for a small, rural site where it is not readily achievable to keep hand controls in stock and where there is only a part-time mechanic who has been trained in the proper installation of controls.

TA Manual § III-4.4200 (1994 Supp.), available at

<http://www.ada.gov/taman3up.html> (emphasis added). For purposes of requiring the installation of vehicle hand controls where readily achievable, there is no reason to distinguish an automobile dealership that provides the service of test drives from an automobile rental company that provides the service of temporary use. Because nothing in Title III's implementing regulations suggests that the TA Manual is inconsistent with the regulations – indeed, as noted above, the plain

language of the regulations indicates that an automobile dealership must install hand controls in a vehicle available for a test drive for use by individuals with disabilities where the dealership offers test drives to potential customers, and installation is readily achievable – this interpretation is entitled to substantial deference. See *McGary*, 386 F.3d at 1269 n.8. As the Supreme Court has made clear, where an agency’s interpretation of its own regulations is neither “plainly erroneous” nor “inconsistent with the regulation[s],” the agency’s interpretation is controlling. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Such is the case here.

A 1998 letter issued by the Department of Justice’s Civil Rights Division verifies that there is no distinction between automobile dealerships and automobile rental companies for purposes of applying the vehicle hand controls requirement. In response to an inquiry about the obligation of automobile dealerships to have hand controls on site to allow individuals with disabilities to test drive cars, the letter states, in relevant part, that “[i]nSTALLATION of vehicle hand controls is specifically listed in the title III regulation as an example of a step toward barrier removal. Therefore, the failure to provide hand controls is considered a barrier to access that must be removed if providing hand controls is readily achievable.” Letter from John L. Wodatch, Chief, Disability Rights Section, Civil Rights Division, Department of Justice, to Trish Farmer, Tennessee Committee for Employment of People with Disabilities (Nov. 10, 1998), available at

[http://www.justice.gov/crt/foia/readingroom/frequent\\_requests/ada\\_coreletter/ltr218.php](http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_coreletter/ltr218.php). Although the letter specifically notes that it “does not constitute a legal opinion, and \* \* \* is not binding on the Department of Justice,” *ibid.*, it provides further support for the position that Title III and its implementing regulations require El Cajon Toyota to install hand controls in a vehicle Karczewski wishes to test drive if the installation is “readily achievable.”

3. *The Regulation Excusing Public Accommodations From Altering Their Inventory To Include Accessible Goods For Individuals With Disabilities Is Inapplicable To This Case*

In support of its holding that Title III does not obligate El Cajon Toyota to install temporary hand controls in vehicles made available for test drives (even if doing so is readily achievable), the district court relied on 28 C.F.R. 36.307(a), which provides that Title III “does not require a place of public accommodation to ‘alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities.’” E.R. 6 (quoting 28 C.F.R. 36.307(a)). In this regard, the court noted the distinction other courts have drawn between “access to a good,” which Title III requires, and “the good itself.” E.R. 6. The court stated that a vehicle for sale at a car dealership is a good that is part of the dealership’s inventory, and concluded that “[i]n order to accommodate [Karczewski’s] desire to test drive a vehicle in its inventory, the dealership would have to alter the nature of the vehicles that it sells.” E.R. 7.

The district court, however, misapprehended the nature of Karczewski's claim, which led the court to the wrong conclusion. The court is correct that El Cajon Toyota is not required to stock vehicles outfitted with permanent hand controls. That does not mean, however, that Karczewski's request that the dealership install temporary hand controls in a vehicle he wants to test drive is an impermissible demand that the dealer sell him (or even stock) an altered vehicle. It is undisputed that Karczewski does not wish to purchase an altered vehicle, and that any temporary hand controls that are installed would be removed from the vehicle at the test drive's conclusion. Karczewski's request is for *equal access to a service* rather than a *good*: the ability to test drive a vehicle on terms equal to those of individuals without disabilities. By rejecting Karczewski's request, El Cajon Toyota prevented him from realizing the "full and equal enjoyment" of the dealership and its services, and thus violated Title III if installation of hand controls was readily achievable. See pp. 7-11, *supra*.

Further compounding its error, the district court incorrectly refused to apply 28 C.F.R. 36.304(b)(21), which *specifically* enumerates "installing vehicle hand controls" as a "step[] to remove barriers," based on its view that the regulation conflicted with 28 C.F.R. 36.307(a), a regulation pertaining to inventory. But it is well-settled that courts must interpret regulations in harmony to give each of them meaning where possible. See *Daubert v. Sullivan*, 905 F.2d 266, 270 (9th Cir.



1990) (rejecting plaintiff's interpretation of regulation that rendered another regulatory provision superfluous in favor of Secretary's interpretation that did not). In this case, the district court concluded that "[i]n order to accommodate [Karczewski's] desire to test drive a vehicle in its inventory, the dealership would have to alter the nature of the vehicles that it sells" (E.R. 7), without even attempting to reconcile this conclusion with Section 36.304(b)(21). A reasonable alternative interpretation exists, however, that gives meaning to both Sections 36.307(a) and 36.304(b)(21). In accordance with the former, an automobile dealership is not required to stock vehicles equipped with permanent hand controls. Nor is the dealership obligated to install hand controls in a vehicle at the request of an individual with a disability if it does not offer test drives to potential customers. Only where the dealership offers test drives is the latter regulation triggered, requiring the dealer to install temporary hand controls in vehicles on request – if installation is readily achievable – to allow individuals with disabilities equal access to the service (*i.e.*, test drives) that the dealer offers to the public. As the inventory regulation does not apply to the situation presented in this case, it cannot justify the district court's dismissal of the complaint.

C. *Karczewski Has A Viable Claim That An Automobile Dealership Violates Title III By Refusing To Make A Reasonable Modification To Its Policy Or Practice Of Not Outfitting Vehicles With Hand Controls To Allow Test Drives By Individuals With Disabilities*

Karczewski also has a viable claim that El Cajon Toyota violated Title III by refusing to modify its policy or practice of not outfitting vehicles with hand controls to accommodate his request for a test drive. In addition to the provision discussed *supra* regarding the removal of architectural barriers, Title III includes within the meaning of “discrimination” the “failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless \* \* \* such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. 12182(b)(2)(A)(ii). An individual with a disability alleging a violation of this provision must show that the defendant public accommodation (1) “employed a discriminatory policy or practice,” and (2) “discriminated against the plaintiff based upon the plaintiff’s disability by (a) failing to make a requested reasonable modification that was (b) necessary to accommodate the plaintiff’s disability.” *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004).

On its face, Karczewski’s complaint satisfies two of the three elements necessary to establish discrimination in violation of this provision of Title III. E.R.

11-13. El Cajon Toyota's stated policy or practice of not outfitting vehicles with hand controls for individuals with disabilities to test drive "has a discriminatory effect in practice" by preventing such individuals from realizing the full and equal enjoyment of the test-drive service the dealership offers to potential customers. See *Fortyune*, 364 F.3d at 1082. And Karczewski's request for such hand controls is necessary to accommodate his paralysis. See *ibid.*; *Celano v. Marriott Int'l, Inc.*, No. 05-4004, 2008 WL 239306, at \*1, \*14 (N.D. Cal. 2008) (concluding that the defendant's failure to provide "single-rider" golf carts to allow individuals with disabilities to play golf at the defendant's golf courses deprived such individuals of "an experience that is functionally equivalent to that of" individuals without disabilities, and thus constituted discrimination under Title III's reasonable-accommodations provision).

The only remaining element – that this request is reasonable – requires a fact-intensive analysis. See *Fortyune*, 364 F.3d at 1083.<sup>4</sup> In light of this Court's

---

<sup>4</sup> Although Karczewski cited Section 12182(b)(2)(A)(ii) in his complaint (E.R. 15), he did not elaborate on how El Cajon Toyota's actions violated this provision, including whether his request for hand controls was reasonable. Nevertheless, even if this Court believes that Karczewski insufficiently pled a claim based on Section 12182(b)(2)(A)(ii), reversal of the district court's order on this ground is still warranted because the court erred in concluding (E.R. 7-8) that amendment of Karczewski's complaint would be futile and consequently dismissing the action with prejudice. In light of the facts already in the record, Karczewski could easily cure any deficiency in his complaint with respect to a Section 12182(b)(2)(A)(ii) claim.

liberal construing of civil rights complaints, see, *e.g.*, *Holley v. Crank*, 400 F.3d 667, 674 (9th Cir. 2005), Karczewski is entitled to the opportunity to prove that his request for hand controls was reasonable. Accordingly, Karczewski also stated a viable claim that an automobile dealership is required under Title III to modify its policy or practice of not installing hand controls in a vehicle that an individual with a disability wishes to test drive if the request for hand controls is reasonable and will not fundamentally alter the nature of the goods or services provided by the dealership. See 42 U.S.C. 12182(b)(2)(A)(ii).

### CONCLUSION

This Court should reverse the district court's dismissal of Karczewski's complaint with prejudice, and remand the case for further proceedings.

Respectfully submitted,

VANITA GUPTA  
Principal Deputy Assistant  
Attorney General

s/ Christopher C. Wang  
SHARON M. MCGOWAN  
CHRISTOPHER C. WANG  
Attorneys  
Department of Justice  
Civil Rights Division  
Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, DC 20044-4403  
(202) 514-9115

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d), because it contains 4,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney

Date: September 4, 2015

## CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I electronically filed the foregoing Brief for the United States as *Amicus Curiae* Supporting Appellant and Urging Reversal with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney