No. 16-10094-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHEYLLA SILVA, *et al.*,

Plaintiffs-Appellants

v.

BAPTIST HEALTH SOUTH FLORIDA, INC., *et al.*,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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Case No. 16-10094-F

Cheylla Silva, et al., v. *Baptist Health South Florida, Inc., et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, *Amicus Curiae* United States certifies that, in addition to those listed in the certificate filed by appellants in their Brief of Appellants, the following persons may have an interest in the outcome of this case:

1. Chandler, Thomas E., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

2. Flynn, Diana K., United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States;

3. Gupta, Vanita, United States Department of Justice, Civil Rights Division, counsel for *amicus curiae* United States.

s/ Thomas E. Chandler
THOMAS E. CHANDLER
Attorney

Date: June 23, 2016

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INTEREST OF THE UNITED STATES

This appeal concerns the proper interpretation of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, and their implementing regulations, in the context of hospitals' treatment of persons who are deaf. The United States has substantial responsibility for the enforcement of Title III of the ADA (Title III) and Section 504. See 42 U.S.C. 12188; 29 U.S.C. 794a. Also, the Justice Department has authority to issue regulations implementing Title III and

Section 504. See 42 U.S.C. 12186; 29 U.S.C. 794, 794a; 28 C.F.R. Pts. 36 & 41. Accordingly, the United States has an interest in ensuring that these federal statutes and regulations are properly interpreted and applied.

This case also concerns the standing of individuals to bring private actions for injunctive relief under Title III and Section 504. Because private enforcement plays a critical role in ensuring compliance with these statutes, and a private party may seek only injunctive relief under Title III, the United States has an interest in ensuring that the standing of private parties to obtain injunctive relief is not unduly restricted.

STATEMENT OF THE ISSUES

We address the following questions:

1. Whether the district court applied the correct standard in determining whether the hospitals provided plaintiffs with effective communication during their hospital visits.

2. Whether the district court erred in concluding that plaintiffs lacked standing to seek injunctive relief because they did not show that they were sufficiently likely to return to the hospitals.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background – The Provision Of "Auxiliary Aids And Services" To Provide "Effective Communication"

Title III prohibits discrimination based on disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of accommodation." 42 U.S.C. 12182(a). Discrimination includes affording a person with a disability "the opportunity to *participate in* or benefit from a good, service, facility, privilege, advantage, or accommodation that *is not equal* to that afforded to other individuals." 42 U.S.C. 12182(b)(1)(A)(ii) (emphasis added). Discrimination also includes failing to provide an individual with a disability with "auxiliary aids and services" where necessary to ensure that the individual is not excluded, denied services, or otherwise treated differently from other individuals, unless the public accommodation can show that providing such an aid would result in a fundamental alteration or undue burden. 42 U.S.C. 12182(b)(2)(A)(iii). Auxiliary aids and services include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 42 U.S.C. 12103(1).

Title III's implementing regulations include an "[e]ffective communication" provision that requires public accommodations to furnish appropriate auxiliary aids and services "where necessary to ensure effective communication with individuals

with disabilities." 28 C.F.R. 36.303(c). The regulation explains that the type of auxiliary aid or service necessary for effective communication will vary in accordance with the method of communication used by the individual; the "nature, length, and complexity of the communication involved"; and "the context in which the communication is taking place." 28 C.F.R. 36.303(c)(1)(ii). Further, a public accommodation "should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." *Ibid.* The regulation also addresses, in some detail, the requirements for the use of Video Remote Interpreting (VRI)[1] as a means of providing qualified interpreters. See 28 C.F.R. 36.303(f)(1).

Section 504 prohibits recipients of federal funds from discriminating based on disability. 29 U.S.C. 794(a). The Section 504 regulations prohibit a recipient from affording a person with a disability "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," or

[1] VRI is a fee-based service that uses video conferencing technology to access an off-site interpreter to provide real-time sign language interpreting services for conversations between hearing people and people who are deaf or hard of hearing.

providing such person "an aid, benefit, or service that is not as effective as that provided to others." 45 C.F.R. 84.4(b)(1)(ii)-(iii). The Section 504 regulations more specifically prohibit a recipient from providing health services or benefits "in a manner that limits or has the effect of limiting the participation" of a person with a disability. 45 C.F.R. 84.52(a)(4). If a recipient has 15 or more employees, the recipient "shall provide appropriate auxiliary aids to persons with impaired sensory * * * skills, where necessary to afford such persons an equal opportunity to benefit from the service in question." 45 C.F.R. 84.52(d)(1).

Under Title III, a private plaintiff may seek only injunctive relief. 42 U.S.C. 12188(a). Under Section 504, a private plaintiff may also seek compensatory damages, but to recover damages the plaintiff must show that the defendant acted with discriminatory intent, which includes deliberate indifference. See *McCullum* v. *Orlando Reg'l Healthcare, Inc.*, 768 F.3d 1135, 1146-1147 (11th Cir. 2014).

2. The Facts And Procedural History

a. Defendants are two hospitals in Miami, Florida, and their parent organization. Plaintiffs, Cheylla Silva and John Paul Jebian, are deaf and communicate using American Sign Language (ASL). Plaintiffs have been patients at the defendant hospitals on numerous occasions. Defendants have adopted policies for providing sign language interpreters and other auxiliary aids and services for the deaf or hard of hearing, including the use of VRI. Nevertheless, on

numerous occasions, plaintiffs requested, but were denied, an in-person sign language interpreter. Instead, defendants communicated with plaintiffs by exchanging written notes, relying on family members for interpretation, or using VRI, which, according to plaintiffs, often did not function properly.

Plaintiffs filed suit against defendants alleging violations of Title III and Section 504. In the amended complaint, Silva asserted that between 2009 and 2014 she was a patient at one of defendants' hospitals approximately 20 times, and identified 14 specific instances where she alleged the hospitals denied her effective communication. Doc. 12, at 3-7.[2] These hospital visits included treatments for chest and abdominal pain, appendicitis, and pregnancy related matters. She alleged that, on numerous occasions, the hospital denied her request for an in-person interpreter and, instead, used a family member as an interpreter, written notes, or an interpreter not qualified in ASL. Doc. 12, at 3-4. She also asserted that the hospital used VRI, but often the video connection was inadequate to obtain a clear video stream necessary to understand the remote sign language interpreter. Silva alleged that, because of these deficiencies, the hospital conducted tests, performed procedures, and obtained her signature on numerous forms without

[2] Citations to "Doc. __, at __" are to documents on the district court docket sheet and relevant page numbers.

effectively communicating with her as to the nature of her medical condition and the treatment it was providing. Doc. 12, at 3-4.

Jebian alleged that he visited the hospital on numerous occasions as both a patient and as a companion to his father when his father was a patient for heart surgery. Doc. 12, at 8-9.[3] He asserted that, when he was a patient and requested an in-person interpreter, the hospital denied his request. He also asserted that when he sought treatment for chest pain, the hospital offered to use VRI, but the staff did not know how to operate it and relied upon written notes to communicate. Doc. 12, at 9-10.

Plaintiffs alleged that, by not using qualified in-person sign language interpreters, the hospital conducted tests, performed procedures, and obtained signatures on forms without effectively communicating with them as to the nature of the medical services being provided. Doc. 12, at 3, 13. They also alleged that the defendants did not adequately explain the medical risks of procedures, the treatments they were receiving, or follow-up procedures. Further, they alleged that defendants did not give them the opportunity to ask questions and understand what was happening during their hospital visits. Doc. 12, at 13. Plaintiffs alleged that,

[3] Title III's effective communication regulation also requires public accommodations to provide effective communication to companions who are individuals with disabilities. 28 C.F.R. 36.303(c)(1).

because of these deficiencies, they were denied the opportunity to fully participate in their medical treatment to the same extent as provided to others.

To support their claims for injunctive relief, plaintiffs alleged that they will likely return to the hospitals for further treatment. Silva alleged, for example, that because of her medical conditions, which include high blood pressure, it is "certain she will have to return in the near future." Doc. 12, at 7. To support their claims for compensatory damages, plaintiffs alleged that defendants acted with intentional discrimination, including deliberate indifference, in discriminating against them because they are deaf. Doc. 12, at 7, 11.

b. Plaintiffs moved for summary judgment on their claim for injunctive relief. Docs. 61-62.[4] Silva submitted a declaration stating that "[d]ue to many factors, including the location of my doctors, the fact that Defendants have all of my medical records and history, the proximity to my home, and history of prior care/treatment, it is likely I will visit and receive treatment at Defendants' hospitals * * * in the near future." Doc. 61-13, at 4. Silva also noted that she had been a patient at defendant Baptist Hospital "at least twenty-five times" and as recently as March and April 2015 (*i.e.*, after the complaint was filed). Doc. 85, at 3, 9. Further, she stated that her health problems include high blood pressure, anemia,

[4] Plaintiffs requested a trial on their claims for damages. Doc. 62, at 19-20.

gastrointestinal issues, heart issues, and irregular blood pressure. Doc. 78-9, at 4. Jebian also submitted a declaration, similarly stating that he had been a patient at, and visited, defendant Baptist Hospital "on many occasions since 2010" and that he will likely receive treatment at, and visit, the hospital in the near future because of its proximity to his home and his prior care at the facility. Doc. 61-14, at 1-3.

Defendants responded that plaintiffs lack standing to obtain injunctive relief because they failed to show a likelihood of future injury. Doc. 77, at 5-7. They also argued that there is "no evidence that Plaintiffs' care has been negatively impacted by the use of VRI or by not receiving any particular accommodations." Doc. 77, at 14.

Defendants also moved for summary judgment. Defendants asserted that they have policies in place regarding the provision of effective communication for persons who are deaf or hard of hearing, and again emphasized that there is no evidence that plaintiffs' care was adversely affected by the accommodations provided. Doc. 60, at 14-15; see also Doc. 87, at 5-6. Defendants also acknowledged that "[s]ince 2009, Plaintiffs have presented at Defendants' facilities a total of fifty-four times (thirteen for Jebian, and forty-one for Silva)," although "their claims in this lawsuit are limited to twenty visits." Doc. 60, at 5.

3. Decision Below

On October 13, 2015, the district court granted defendants' motion for summary judgment and denied plaintiffs' motion for partial summary judgment. Docs. 133-134.

The court concluded that plaintiffs did not present specific evidence identifying any instances where the medical staff was unable to understand plaintiffs' medical complaint and provide appropriate treatment. Doc. 133, at 29-34. The court stated that "Silva cannot point to any time when Defendants' medical staff was unable to ascertain her chief medical complaint, unable to create a treatment plan, or unable to help Silva understand her instructions under the treatment plan." Doc. 133, at 30. The court also stated that, "[d]espite her generalized assertion that she did not understand the staff, Silva cannot identify what exactly she failed to understand during any of her visits to Defendants' hospitals." Doc. 133, at 29; see also Doc. 133, at 31 ("[B]ecause Silva never specified what information [she] did not understand, no rational jury could find a failure to comply with the ADA" and Section 504.) (citation and internal quotation marks omitted).

The court summarized: "There is no specific fact – or any evidence outside of Plaintiffs' conclusory general testimony – demonstrating that either Plaintiff was misdiagnosed, was given the wrong medical treatment, was impeded in

complying with medical instructions or follow-up care, or was otherwise denied an equal aid, benefit, and service as a result of ineffective communication with Defendants' staff." Doc. 133, at 4. Because the court found that there was insufficient evidence to support the conclusion that defendants denied plaintiffs effective communication, the court did not address whether defendants acted with deliberate indifference. Doc. 133, at 31, 34.

The court also concluded that plaintiffs lacked standing to seek injunctive relief. Doc. 133, at 34-38. The court stated that although plaintiffs "repeatedly state that their preference is to return to Defendants' hospitals, * * * there is no real and immediate threat that either of the Plaintiffs or Jebian's father will be hospitalized again at Defendants' facilities." Doc. 133, at 34. The court also concluded that, even assuming the plaintiffs will return to defendants' hospitals, "there is no reliable evidence indicating that they will experience a denial of benefits or discrimination." Doc. 133, at 36.

On January 7, 2016, plaintiffs filed a timely notice of appeal. Doc. 140.

SUMMARY OF THE ARGUMENT

Title III and Section 504 require the defendant hospitals to ensure "effective communication" with individuals with disabilities, including persons who are deaf or hard of hearing, by providing appropriate auxiliary aids and services. Plaintiffs were treated at defendants' hospitals. Because they are deaf, they requested an in-

person sign language interpreter, one type of auxiliary aid, to facilitate the exchange of information during their visits. For the most part, the defendants refused and used other methods of communication. The district court concluded that plaintiffs were nevertheless afforded effective communication, largely because the plaintiffs did not identify (1) any instances where the means of communication provided resulted in misdiagnosis, incorrect treatment, or adverse medical consequences, and (2) what information they did not understand or failed to receive.

That is not the correct standard for effective communication claims. Title III and Section 504 require that hospitals ensure that a patient can meaningfully understand and participate in the management of her health care throughout the course of intake, diagnosis, and treatment. That requires the equal opportunity to have access to, and exchange, information. Therefore, a satisfactory medical outcome does not preclude an effective communication claim. Further, the court erred in demanding that plaintiffs provide evidence concerning the information they did not hear – a nearly impossible standard to meet.

The district court also applied the requirement of future harm for standing to seek injunctive relief in an overly restrictive manner. Although in some cases this may be a close question, this is not such a case. The evidence reflects that Silva has numerous health issues, has been treated at defendant hospital over two dozen

times, and asserts that she will likely seek treatment there again. Likewise, Jebian frequently visited defendants' hospitals, both as a patient and as a companion to his father. On these facts, the district court's decision that there is insufficient evidence of an actual threat of future harm to confer standing creates an inappropriate and nearly insurmountable barrier to claims for injunctive relief.

ARGUMENT

I

A PATIENT NEED NOT SHOW THAT HER MEDICAL TREATMENT WAS ADVERSELY AFFECTED TO ESTABLISH A CLAIM OF DENIAL OF "EFFECTIVE COMMUNICATION" UNDER TITLE III AND SECTION 504

1. The purpose of the effective communication requirement is to ensure that persons with a disability can communicate with – *i.e.*, receive information from, and convey information to – the public accommodation to the same extent as persons without disabilities. See United States Department of Justice, *ADA Requirements: Effective Communication* (Jan. 2014) (*Effective Communication Technical Assistance*), http://www.ada.gov/effective-comm.pdf; 28 C.F.R. 36.303. This requirement is one of the specific applications of the overarching nondiscrimination mandate of Title III, which prohibits discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a). Title III also prohibits a public accommodation from affording an individual with a

disability the opportunity to "participate in or benefit from" a service "that is not equal to that afforded to other individuals." 42 U.S.C. 12182(b)(1)(A)(ii). Plainly, if a patient cannot effectively communicate with hospital personnel because she is deaf or hard of hearing, it is unlikely she will be able to equally participate in, and benefit from, the exchange of information with the hospital about her medical care.

Whether a health care facility has provided an appropriate auxiliary aid or service to facilitate effective communication with deaf or hard of hearing patients who communicate using ASL is highly fact specific. As the district court noted, health care providers are not always required to provide in-person interpreters, even if requested by the patient. Doc. 133, at 28-29. "The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place." 28 C.F.R. 36.303(c)(1)(ii).

In the health care setting, context is particularly important. Medical care is a process, not a single, discrete encounter. A patient generally arrives at the hospital with a particular ailment or complaint and communicates with intake personnel. The patient then discusses her symptoms, medical condition, medical history, and medications with a doctor or other medical staff. The doctor, in turn, explains and describes the patient's medical condition, tests and treatment options, and related

matters (*e.g.*, informed consent procedures). The doctor and patient may also need to communicate with each other during a medical procedure or surgery. Finally, the doctor and patient must discuss post-treatment activities, instructions for medications, and follow-up treatments.

Under the statutes and regulations, a patient who is deaf or hard of hearing is entitled to participate in this process to the same extent as a patient who is not deaf. See, *e.g.*, 45 C.F.R. 84.52(a)(4) (A health care provider may not "[p]rovide benefits or services in a manner that limits or has the effect of limiting the participation" of a person with a disability.). The relevant question, therefore, is whether the hospital afforded the patient auxiliary aids and services that permitted her to equally participate in, and make choices about, her health care. That inquiry is not limited to whether, in the end, the patient received appropriate treatment or the same treatment she would have received if she were not deaf. Cf. *Feldman* v. *Pro Football, Inc.*, 419 F. App'x 381, 391-392 (4th Cir. 2011) (professional football stadium must provide deaf patrons with auxiliary access to aural information on public address system; the "service[]" defendants provide is more than the football game and includes the "communal entertainment experience" that transpires in the stadium during the game).

In short, Title III and Section 504 do not address the quality of medical care that a person who is deaf or hard of hearing must receive; they address the level of

participation the patient must be afforded throughout the course of her medical care. See 28 C.F.R. 36.303(a); 45 C.F.R. 84.52(a)(4). Given the nature of the provision of health care, the "service" being provided includes the exchange of information at each step of the health care process, as well as the provision of health care itself.

2. The effective communication inquiry, therefore, does not focus on the result of the treatment. In *Proctor* v. *Prince George's Hospital Center*, 32 F. Supp. 2d 820, 827 (D. Md. 1998), which involved a deaf person treated at a hospital after a motorcycle accident, the court rejected the argument that it should look to the course of treatment as a whole, and plaintiff's "after-the fact" understanding, in determining whether plaintiff was denied effective communication. The "real inquiry is whether equal opportunity was provided *during* the course of Plaintiff's treatment," which "involved several distinct procedures for which consent and follow-up were required and a period of physical therapy." *Ibid.* The court emphasized that "[plaintiff] had a right * * * to benefit equally from each of these services and to participate equally at all points in time." *Ibid.*

Similarly, in *Aikins* v. *Saint Helena Hospital*, 843 F. Supp. 1329, 1338 (N.D. Cal. 1994), where a deaf woman alleged she was not afforded effective communication during her husband's hospitalization, the court rejected defendants' argument that they could not have discriminated because the husband received the

same treatment he would have received if his wife were not deaf. Plaintiff's "claims relate to her exclusion from meaningful participation in the decisions affecting her husband's treatment, not to the appropriateness of the treatment itself." *Ibid.*; see also *Martin* v. *Indiana Heart Hosp., LLC*, No. 06-1298, 2007 WL 1498882, at *4 (S.D. Ind. May 21, 2007) (plaintiff's effective communication claim "relates to his exclusion from participation in his medical treatment at various stages of that treatment, not the treatment itself"); *Naiman* v. *New York Univ.*, No. 95-6469, 1997 WL 249970, at *2 (S.D.N.Y. May 13, 1997) (effective communication claim related to plaintiff's "exclusion from participation in his medical treatment," not to whether he received "effective" medical care).

Most recently, in *Sunderland* v. *Bethesda Health, Inc.*, No. 13-80685, 2016 WL 403481, at *10 (S.D. Fla. Feb. 3, 2016), appeal docketed, No. 16-10980 (11th Cir. Mar. 3, 2016), the court rejected the hospital's argument that the court should infer the existence of effective communication from the lack of evidence that any plaintiff was misdiagnosed or given the wrong medication. The court stated that there is no basis for the notion that "ineffective" communication must result in "adverse medical consequence[s]." *Ibid.* Rather, to be "ineffective," it is "sufficient that the patient experiences a real hindrance, because of her disability, which affects her ability to exchange material medical information with her health care providers." *Ibid.* The central question, then, is whether the patient was

"unable to understand what was wrong with them or what was happening to them during their hospital stays, impeding their ability to meaningfully participate in the management of their own health care." *Ibid.* In *Sunderland*, the court concluded that defendant's reliance on VRI as an auxiliary aid "resulted in patient comprehension failures * * * and corresponding impediments to each patient's ability to meaningfully understand and participate in her own course of medical treatment." *Id.* at *11.

Department of Justice regulations, technical assistance guidance, and settlement agreements reflect the fundamental principle that the effective communication requirement applies to the patient's participation in each step of her medical treatment, and cannot be judged by bottom line results. The Title III regulatory guidance, in detailing the circumstances in which a particular auxiliary aid may be appropriate, states that while an exchange of notes may be effective "when blood is drawn for routine lab tests," sign language interpreters may be necessary "to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication." 28 C.F.R. Pt. 36, App. A. The Department of Justice has also explained that in "a doctor's office, an interpreter generally will be needed for taking the medical history of a patient who uses sign language or for discussing a serious diagnosis and its treatment options." *Effective Communication Technical Assistance* 4; see also *ADA Business Brief:*

Communicating with People Who Are Deaf or Hard of Hearing in Hospital Settings (Oct. 2003), available at http://www.ada.gov/hospcombr.htm (listing various situations where an interpreter may be required for effective communication).

Finally, the Department of Justice has entered into settlement agreements with health care providers that list examples of when it may be necessary to provide an interpreter to ensure effective communication, including when discussing a patient's symptoms and medical condition, providing a diagnosis, explaining treatment options, communicating with a patient during treatment, and providing follow-up and discharge instructions. See, *e.g.*, Consent Agreement Between The United States of America and Fairfax Nursing Home Center, Inc. (July 10, 2015), available at http://www.ada.gov/fairfax_nursing_ctr_sa.html. There would be no reason to focus on effective communication – *i.e.*, the meaningful exchange of information – at each of these stages of medical treatment, and to view them as distinct services to which persons with disabilities are entitled to equal participation, if compliance with Title III turned only on whether the patient ultimately received effective medical care.

3. Accordingly, to the extent the district court's decision turned on the conclusion that plaintiffs did not show that the means of communication provided adversely affected their medical care, the court applied an incorrect standard. The

health care provider must provide appropriate auxiliary aids and services to facilitate effective communication throughout the course of intake, diagnosis, and treatment so that the patient can meaningfully understand and participate in the management of her health care. Further, the district court placed undue weight on its conclusion that plaintiffs failed to identify what they did not understand. Doc. 133, at 32-33. If the plaintiffs could not understand what the health care providers were saying to them, it is difficult to see how the plaintiffs could identify the information they missed. Moreover, giving undue emphasis to this factor is at odds with the fundamental principle that effective communication is intended to ensure that the patient can equally participate in, and benefit from, each stage of the health care treatment process through the meaningful exchange of information.

As the district court recognized, this Court has addressed the effective communication regulation in the context of the hospital treatment of deaf patients in several recent cases. See Doc. 133, at 19-23. But these cases do not support an analysis that focuses on outcomes, rather than the equal exchange of information and equal participation. Indeed, in *Liese* v. *Indian River County Hospital District*, 701 F.3d 334 (11th Cir. 2012), this Court concluded that the plaintiff introduced sufficient evidence to show that the auxiliary aids used in connection with her emergency gallbladder surgery were ineffective. The plaintiff had requested an interpreter, but instead the hospital communicated by lipreading, notes, and

pantomiming. The Court stated that in light of the major surgery, "effective communication entails telling the patient more than that the proposed surgery will solve the problem," and that a reasonable jury could conclude that the patient did not receive "an equal opportunity to benefit from medical treatment" despite the successful surgery. *Id.* at 344. In *Martin* v. *Halifax Healthcare Systems, Inc.*, 621 F. App'x 594 (11th Cir. 2015), although this Court affirmed summary judgment for the hospital, concluding that under the circumstances effective communication was provided through auxiliary aids other than in-person interpreters, the Court neither addressed nor suggested that the effectiveness of the communication turned on whether it affected the patients' medical care.[5]

In sum, in determining whether plaintiffs presented sufficient facts to support their claims that the hospitals did not provide effective communication, the court should focus on whether the plaintiffs could meaningfully participate in the management of their health care by exchanging material medical information throughout the treatment process. That determination does not turn on whether the

[5] Two other recent decisions of this Court address effective communication claims by persons who are deaf in the context of medical care, but neither case addresses the merits of the claim. See *McCullum* v. *Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1145 (11th Cir. 2014) (addressing standing and proof of intentional discrimination); *Saltzman* v. *Board of Comm'rs of the N. Broward Hosp. Dist.*, 239 F. App'x 484 (11th Cir. 2007) (addressing proof of intentional discrimination). We address *McCullum* below.

medical treatment was successful or whether plaintiffs can pinpoint what information they did not receive or understand. This standard is consistent with the requirement that hospitals, as public accommodations, must afford persons with disabilities the equal opportunity to *participate in* the services, privileges, and advantages afforded to persons without disabilities.

II

THE DISTRICT COURT'S CONCLUSION THAT PLAINTIFFS LACKED STANDING TO SEEK INJUNCTIVE RELIEF RESTED ON AN OVERLY RESTRICTIVE APPLICATION OF THE REQUIRED SHOWING OF FUTURE HARM

1. To establish Article III standing at the summary judgment stage, a plaintiff must come forward with evidence showing: "(1) an injury in fact that is concrete, particularized, and either actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that a favorable judicial decision will redress the injury." *McCullum* v. *Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1145 (11th Cir. 2014); see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 2136 (1992). A plaintiff who seeks injunctive relief has an additional hurdle under the injury-in-fact prong: she must show "a sufficient likelihood that [s]he will be affected by the allegedly unlawful conduct in the future." *Houston* v. *Marod Supermarkets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013) (citation omitted). "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the

party alleges * * * a real and immediate – as opposed to a merely conjectural or hypothetical – threat of *future* injury." *Wooden* v. *Board of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001); see also *City of L.A.* v. *Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665 (1983). "Allegations of past wrongs alone do not amount to that real and immediate threat of injury necessary to make out a case or controversy," but can be considered "as evidence of an actual threat of repeated injury." *Perez* v. *Doctors Hosp. at Renaissance, Ltd.*, 624 F. App'x 180, 183 (5th Cir. 2015) (citation and internal quotation marks omitted).

In the context of disability discrimination claims, this Court explained that a "plaintiff must prove he is likely to suffer discrimination in the future" because, for example, he "intends to return to a noncompliant establishment." *Gomez* v. *Dade Cnty. Fed. Credit Union*, 610 F. App'x 859, 863 (11th Cir. 2015). The ultimate question, therefore, is whether a plaintiff has introduced sufficient, non-speculative facts to support the conclusion that the plaintiff is likely to suffer future discrimination by the defendant. This inquiry has two parts: Is it sufficiently likely the plaintiff will return to the public accommodation and, if so, is it sufficiently likely that he will again encounter violations of the ADA. *McCullum*, 768 F.3d at 1145-1146.

2. Under these principles, the district court erred in applying the future injury requirement in an overly restrictive fashion. The court's rationale and

conclusion – on the facts here – demand a degree of certainty that cannot be reconciled with the bulk of the cases that have addressed this issue and the particular context of an action under Title III. The court's focus should not be on whether it is certain that plaintiff will return to the public accommodation, but rather whether it is likely that she will return. In *Houston*, for example, this Court held that the plaintiff had standing to challenge architectural barriers at a supermarket she had twice visited where she alleged she would return if the store were accessible. In determining whether plaintiff faced a real and immediate threat of future injury, the Court considered: (1) the proximity of defendant's business to plaintiff's residence; (2) the plaintiff's past patronage of defendant's business; (3) the definiteness of plaintiff's plans to return; and (4) the frequency of the plaintiff's travel near the defendant's business. *Houston*, 733 F.3d at 1337 n.6. The Court concluded that because plaintiff had been to the store in the past, wants to return, and takes frequent trips past the store, it was "likely" she would visit the store again, and therefore the threat of future injury was not merely conjectural or hypothetical. *Id.* at 1337; see also *Seco* v. *NCL (Bahamas), Ltd.*, 588 F. App'x 863, 864-866 (11th Cir. 2014) (allegation that plaintiff has "future cruises planned" on cruise line sufficient to establish likelihood that plaintiff will again be affected by the allegedly unlawful conduct) (citation omitted); *Stevens* v. *Premier Cruises, Inc.*, 215 F.3d 1237, 1239 (11th Cir. 2000) (same); cf. *Access for Am., Inc.* v.

Associated Out-Door Clubs, Inc., 188 F. App'x 818, 819 (11th Cir. 2006) (plaintiff lacked standing to seek injunctive relief against greyhound track where he alleged only an intent to return "someday") (citation omitted); *Hoepfl* v. *Barlow*, 906 F. Supp. 317, 320 (E.D. Va. 1995) (plaintiff moved to a different state, making it highly unlikely she will again be in a position to be discriminated against by defendant).

This Court recently applied these principles in *McCullum*, which, like the instant case, involved a deaf patient seeking the use of an interpreter at a hospital. The plaintiff was twice hospitalized and ultimately had his colon removed. The Court affirmed summary judgment for the hospital on the claim for injunctive relief, holding that plaintiff lacked standing because, in part, given the successful operation, there was insufficient evidence of a "real and immediate threat" that he would be hospitalized again. *McCullum*, 768 F.3d at 1145-1146.

The district court below principally relied upon *McCullum* in concluding that plaintiffs failed to introduce sufficient evidence to establish a likelihood that they would return to the defendant hospitals. Doc. 133, at 35-37. But *McCullum* presented very different facts. Plaintiff's hospitalizations resulted in the removal of his colon, "the organ causing the problem." 768 F.3d at 1146 (alteration omitted). As a result, he could control his symptoms with over-the-counter medication, and he had not been hospitalized over the following four years. *Ibid.*

By contrast, Silva visited the hospital 25 times for recurring health issues that had not all been resolved and anticipated more visits in the future. Therefore, the district court was wrong in asserting that Silva's representations "are similar to those presented in *McCullum*." Doc. 133, at 35.

3. At bottom, the principle is this: it need not be *certain*, but the facts must demonstrate that there is a real, and not conjectural or hypothetical, *likelihood* that the plaintiff will return to the medical facility for treatment. See, *e.g.*, *Constance* v. *State Univ. of N.Y. Health Sci. Ctr.*, 166 F. Supp. 2d 663, 667 (N.D.N.Y. 2001) (emergency room patient treated at hospital only once lacked standing to seek injunctive relief; "[p]laintiffs have at most shown a mere possibility of a return visit to Defendant Hospital, not a 'likelihood'") (citation omitted). Resolution of this issue necessarily turns on evidence of the extent of a plaintiff's past visits to the facility, whether the plaintiff has an established relationship with the facility, the nature of the plaintiff's medical issues and the likelihood that they will require future treatment, the proximity of the facility to the plaintiff's residence, and whether the plaintiff has expressed the intent to return to the facility. See *Houston*, 733 F.3d at 1337 n.6.[6]

[6] Other courts addressing this issue in the health care setting have applied these factors, reaching varying results given the specific facts. But none of these courts sets the bar for standing as high as the district court did in the instant case.

(continued…)

Here, the district court's interpretation and application of the standing principles for injunctive relief in a Title III case involving access to medical care effectively bar private enforcement actions. The court required a degree of certainty of future visits to the hospital that cannot be reconciled with the nature and importance of medical care, and the fact that in this context less frequent visits

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(…continued)
See, *e.g.*, *Benavides* v. *Laredo Med. Ctr.*, No. L-08-105, 2009 WL 1755004 (S.D. Tex. June 18, 2009) (allegations that plaintiff has visited the hospital on several occasions, has medical conditions that make future visits likely, and the hospital is the one closest to his home sufficient to support standing); *Gillespie* v. *Dimensions Health Corp.*, 369 F. Supp. 2d 636 (D. Md. 2005) (allegations that the hospital was in close proximity to plaintiffs' home and plaintiffs received, and were likely to continue to seek, medical treatment there, sufficient to establish standing); *Connors* v. *West Orange Healthcare Dist.*, No. 605CV647ORL31KRS, 2005 WL 1944593 (M.D. Fla. Aug. 15, 2005) (allegations of past visits, the close proximity of the hospital to their home, a chronic medical condition, and a likelihood that they will return to the hospital and again suffer discrimination sufficient to establish standing); cf. *Sunderland*, 2016 WL 403481 (deaf patients treated at hospital lacked standing to seek injunctive relief because there was no evidence that they would return to hospital in near future); *Proctor* v. *Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 830 (D. Md. 1998) (plaintiff treated for motorcycle accident lacked standing to seek injunctive relief where he admitted that it was speculative that he would visit hospital again); *Schroedel* v. *New York Univ. Med. Ctr.*, 885 F. Supp. 594, 599 (S.D.N.Y. 1995) (plaintiff lacked standing where she had been treated at the hospital only once, 12 years before; it was not the nearest hospital to her residence; and she did not allege that she regularly used the hospital for any condition); *Aikins* v. *Saint Helena Hosp.*, 843 F. Supp. 1329, 1333-1334 (N.D. Cal. 1994) (because plaintiff stays at mobile home near the hospital for only several days each year, and has "limited experience" with the hospital, plaintiff has not shown that "she is likely to use the hospital in the near future" and therefore lacks standing).

are likely to be the norm. Medical facilities should not have a free pass because plaintiffs cannot pinpoint their next return. Indeed, although it generally may not be possible for individuals to make precise plans or predictions about *when* they will need future medical care, it is certain that when they again become ill they will need medical services. And where, as here, the facts demonstrate that plaintiffs have repeatedly visited the defendants' health care facilities, they reflect an actual likelihood that plaintiffs will visit the facilities again.

The district court simply dismissed Silva's assertions that she had continuing health issues that might require future visits to the hospital, stating that there was no medical evidence for a diagnosis of a chronic condition. Doc. 133, at 35. But her 25 visits to the hospital, including a visit after the complaint was filed, are more compelling evidence of her likelihood of returning to the hospital. See Doc. 78-9. Therefore, coupled with her resulting familiarity with the hospital (and *vice versa*), the close proximity of the hospital to her home, her recurring health issues, and her expressed desire to return to the same hospital when next required, there is sufficient evidence to support the conclusion that it is likely that she will return to the hospital, and that therefore there is a real threat of future harm that is not merely conjectural or hypothetical. The same holds true for Jebian. See, *e.g.*, Doc. 61-14, at 3 (noting likelihood and reasons he will return to the hospital both as a patient and as a companion to this father). Accordingly, the district court, setting

the bar for standing inappropriately and unnecessarily high, erred in denying plaintiffs' standing for injunctive relief on the basis that the evidence was insufficient to show they will return to the hospital.[7]

[7] As noted above, to establish standing to seek injunctive relief, a plaintiff must also introduce sufficient evidence to show that she will again suffer discrimination when she returns to the public accommodation. The district court concluded that plaintiffs also failed to meet this element of standing. Doc. 133, at 36-37. While this is a relative easy standard to meet in architectural barrier cases (*e.g.*, either the public accommodation has installed a ramp for wheelchair access or it has not), it is a more difficult question in cases, like here, involving effective communication during the provision of services in a discrete series of encounters. For this reason, and because we do not take a position on whether plaintiffs' rights under Title III and Section 504 were violated in this case, we do not address this issue.

CONCLUSION

This Court should reverse and remand the case to the district court for further proceedings.

Respectfully submitted,

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Date: June 23, 2016

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I hereby certify that on June 23, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANTS AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

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