No. 15-55704

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT SCHUTZA,

Plaintiff-Appellant

v.

FRN OF SAN DIEGO, LLC, *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

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

RULES:

MISCELLANEOUS:

MISCELLANEOUS (continued): **PAGE**

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INTEREST OF THE UNITED STATES

This case concerns the scope of protection provided by Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181 *et seq.*, 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. This 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 ADA, 42 U.S.C. 12181 *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 Scott Schutza is a California resident who is paralyzed from the waist down and uses a wheelchair for mobility. E.R. 3-4, 13.[1] In June 2014, he visited Witt Lincoln (Witt), an automobile dealership owned by defendant FRN of San Diego, LLC (FRN), to look into purchasing a used car. E.R. 4, 14-15. According to Schutza, Witt offers potential customers "the opportunity to test drive vehicles that they are considering buying." E.R. 15. Schutza can operate a motor vehicle only if it is equipped with hand controls, which typically involves the

[1] 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.

installation to a vehicle's steering column of a device with levers that activate rods that reach the foot pedals. Schutza contends that when he inquired about test driving a vehicle, he was informed that Witt will not outfit any of its vehicles with hand controls for individuals with disabilities to test drive. E.R. 4, 15. Schutza was told that Witt instead would help him find a rental car that could have vehicle hand controls installed if any were available. E.R. 4, 15.

In November 2014, Schutza filed a complaint in the United States District Court for the Southern District of California. E.R. 3. He filed an amended complaint in February 2015 alleging that Witt'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, 13-14, 24. The amended 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. 17. The amended 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. 18. FRN moved to dismiss Schutza's amended complaint

under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. E.R. 4, 11-12.

2. In May 2015, the district court granted FRN's motion and dismissed the action with prejudice. E.R. 2-10. The court first observed that Section 36.304(b)(21)'s enumeration of "installing vehicle hand controls" is an "outlier" on the list of examples of steps to remove barriers that "does not appear to readily relate to the facility's architectural barriers." E.R. 6. The court then noted that "[a]t a minimum, * * * 'installing vehicle hand controls' must relate to the scope of the regulation" – *i.e.*, "the removal of architectural barriers in existing facilities, and not the regulation of vehicles sold at the facility." E.R. 6. Because Schutza's claims "do not arise out of or relate to architectural barriers existing at the facility" but rather "relate[] to the vehicle inventory sold by Witt," the court concluded that his amended complaint failed to state a claim. E.R. 6-7.

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. 7 (quoting 28 C.F.R. 36.307(a)). Accordingly, the court concluded, "[t]he vehicles sold by Witt, as opposed to the physical facilities of the dealership, need not comply with 42 U.S.C. § 12182(b)[(2)](A)(iv)." E.R. 7. The court rejected Schutza's argument that the opportunity to test drive a vehicle before purchasing it is a privilege or

advantage offered to potential customers as "untethered to relevant ADA statutes and regulations." E.R. 7-8. The court also rebuffed Schutza's contention that installation and de-installation of hand controls was not a modification of a finished good because "the installation, however temporary, of vehicle hand controls is, in fact, a modification to the vehicle, even if the vehicle hand controls are subsequently removed." E.R. 8.

Finally, the court declined Schutza's reliance on The Americans with Disabilities Act: Title III Technical Assistance Manual (TA Manual). To support his argument, Schutza cited two illustrations from the 1994 Supplement: (1) a car rental office that must install hand controls in its vehicles if readily achievable; and (2) laundromats and guest resort laundry rooms that "must do what is readily achievable to remove barriers to the use of existing [washing] machines." E.R. 8-9 (quoting TA Manual § III-4.4200 (1994 Supp.), available at http://www.ada.gov/taman3up.html). The court rejected the applicability of these examples because "the businesses identified * * * provide services to the general public, and do not involve the sale of goods." E.R. 9. The court further observed that "the Manual is advisory, not obligatory," and cited a Supreme Court case for the proposition that "courts need not follow the [TA] Manual if 'plainly erroneous or inconsistent with the regulation.'" E.R. 9 (citation omitted). Because Section 36.307(a) "do[es] not require Witt to alter its inventory to include accessible or

special goods that are designed for, or facilitate use by, individuals with disabilities," the court concluded that "the illustrations, as misconstrued by [Schutza], cannot require Witt to modify its vehicles and install temporary vehicle hand controls." E.R. 9-10.

Schutza filed a timely notice of appeal in May 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.[2] 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 TA 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

[2] 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.

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, 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 Schutza 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. Witt's rejection of Schutza'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 Schutza's complaint 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.[3] *Baughman* v. *Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (citation omitted); see *Chapman* v. *Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 945 (9th Cir. 2011) (noting that the ADA bars not only "obviously

[3] 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 Witt is clearly a place of public accommodation.

exclusionary conduct," but also "more subtle forms of discrimination * * * that interfere with disabled individuals' 'full and equal enjoyment' of places of public accommodation" (citation omitted)). 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) (citation omitted).

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. Jan. 5, 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. *Id.* at 488 (citation omitted). An individual such as Schutza 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] existing 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 "[f]acility" 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 "[f]acility." 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 "[i]nstalling 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).

FRN 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 for sale at the request of an individual with a disability. FRN 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 "the vehicles for sale at Witt's place of business are not within the universe of barriers contemplated by Section 36.304(a) or (b)." R. 16-1 at 5-6. Along similar lines, the district court concluded that Schutza's claims "do not arise out of or relate to architectural barriers existing at the facility," but rather "relate[] to the vehicle inventory sold by Witt." E.R. 6-7.

Despite their claimed appeal to the regulation's plain language, neither FRN 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 "[i]nstalling 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).

2. The Department's Title III TA 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 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." The Americans with Disabilities Act: Title III TA Manual § III-4.4100, available at http://www.ada.gov/taman3.html. 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) (citation omitted). Such is the case here.

None of the district court's justifications to disregard this illustration possesses any merit. First, the court contended that this example does not apply because the car rental office "provide[s] services to the general public, and do[es] not involve the sale of goods." E.R. 9. The court failed to explain how this distinction makes a difference given that a test drive is a service that an automobile dealership offers to potential customers that is ancillary to its sale of vehicles.[4] Second, the district court asserted that the TA Manual is "advisory, not obligatory," and cited a Supreme Court case for the proposition that "courts need not follow the [TA] Manual if 'plainly erroneous or inconsistent with the regulation.'" E.R. 9 (citation omitted). As noted above, the TA Manual is consistent with the plain language of the Title III implementing regulations, and thus entitled to substantial deference. Contrary to the view of the court (E.R. 9-10), the regulation that forbids requiring a public accommodation to alter its inventory to include accessible goods for individuals with disabilities has no applicability to this case. See pp. 19-21, *infra*.

[4] For this reason, the 1994 Supplement's illustration of laundromats and guest resort laundry rooms that "must do what is readily achievable to remove barriers to the use of existing [washing] machines" (E.R. 9 (quoting TA Manual § III-4.4200 (1994 Supp.))) also supports our argument. This example reiterates that a place of public accommodation must remove architectural barriers in equipment, where readily achievable, to ensure that individuals with disabilities have full and equal enjoyment of a service that the business offers. We do not address this example in detail because the car-rental example is more directly on point with the issue this appeal presents.

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. 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 Witt to install hand controls in a vehicle Schutza 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 Witt 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 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. 7 (quoting 28 C.F.R. 36.307(a)). Applying this regulation, the court concluded that "[t]he vehicles sold by Witt, as opposed to the physical facilities of the dealership, need not comply with 42 U.S.C. § 12182(b)[(2)](A)(iv)." E.R. 7. The court further concluded that "the installation, however temporary, of vehicle hand controls is, in fact, a modification to the vehicle, even if the vehicle hand controls are subsequently removed." E.R. 8.

The district court, however, misapprehended the nature of Schutza's claim, which led the court to the wrong conclusion. The court is correct that Witt is not required to stock vehicles outfitted with permanent hand controls. That does not mean, however, that Schutza'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 Schutza 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. Schutza'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 Schutza's request, Witt 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. 8-12, *supra*.

Further compounding its error, the district court incorrectly refused to apply 28 C.F.R. 36.304(b)(21), which *specifically* enumerates "[i]nstalling 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 rejected Schutza's claim based on its conclusions that Witt was not obligated to remove architectural barriers from its vehicles, as opposed to its physical facilities (E.R. 7), and that a temporary installation of hand controls is a modification of a vehicle that the dealership is not required to make (E.R. 8), without even attempting to reconcile these conclusions 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. Schutza 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

Schutza also has a viable claim that Witt 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, Schutza's complaint satisfies two of the three elements necessary to establish discrimination in violation of this provision of Title III. E.R. 13-15. Witt'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 Schutza'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. Jan. 28, 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.[5] In light of this Court's liberal construing of civil rights complaints, see, *e.g.*, *Holley* v. *Crank*, 400 F.3d 667, 674 (9th Cir. 2005), Schutza is entitled to the opportunity to prove that his request for hand controls was reasonable. FRN's argument (R. 16-1 at 7-8) that it is not required to make a reasonable modification to its policy or practice of not outfitting vehicles with hand controls because it is not required under Title III's regulations to alter its inventory to provide goods accessible to individuals with disabilities is without merit. As noted above, Schutza'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. See p. 20, *supra*. Accordingly, Schutza 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

[5] Although Schutza cited Section 12182(b)(2)(A)(ii) in his complaint (E.R. 17), he did not elaborate on how Witt's actions violated this provision, including whether his request for hand controls was reasonable. Nevertheless, even if this Court believes that Schutza 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 dismissing (E.R. 10) Schutza's complaint with prejudice without leave to amend. In light of the facts already in the record, Schutza could easily cure any deficiency in his complaint with respect to a Section 12182(b)(2)(A)(ii) claim.

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 Schutza's complaint with prejudice, and remand the case for further proceedings.

Respectfully submitted,

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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 5,506 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.

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Date: September 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 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.

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