

1 LOHIER, *Circuit Judge*, concurring in the judgment:

2 In the instant appeals, plaintiffs-appellants Marcos Calcano, Yovanny
3 Dominguez, Braulio Thorne, and James Murphy—legally blind individuals who
4 require aids such as Braille to read written materials—claim that they have been
5 denied meaningful use of the gift cards sold by defendants-appellees Swarovski
6 North America Limited (“Swarovski”), Banana Republic, LLC (“Banana
7 Republic”), Jersey Mike’s Franchise Systems, Inc. (“Jersey Mike’s”), The Art of
8 Shaving–FL, LLC (“Art of Shaving”), and Kohl’s, Inc. (“Kohl’s”), because these
9 gift cards are not embossed with Braille. The District Court dismissed all five
10 actions for lack of standing and, alternatively, for failure to state a claim under
11 Title III of the Americans with Disabilities Act (ADA). My colleagues in the
12 majority affirm on the ground that the plaintiffs lack standing. I disagree. If
13 Title III of the ADA is to mean anything at all, then the disabled plaintiffs in
14 these actions (except the plaintiff in Kohl’s) surely have standing to sue. Because
15 I agree with the District Court’s alternative ruling that the complaints fail to state
16 a cause of action under the ADA, however, I concur in the judgment.

17 Let me first address standing, followed by the merits of the ADA claims as
18 alleged in the plaintiffs’ complaints.

1 **A. Standing**

2 In Camarillo v. Carrols Corp., 518 F.3d 153 (2d Cir. 2008), and Kreisler v.
3 Second Avenue Diner Corp., 731 F.3d 184 (2d Cir. 2013), we held that a plaintiff
4 has adequately alleged standing “[i]n the ADA context . . . where (1) the plaintiff
5 alleged past injury under the ADA; (2) it was reasonable to infer that the
6 discriminatory treatment would continue; and (3) it was reasonable to infer,
7 based on the past frequency of plaintiff’s visits and the proximity of defendants’
8 [establishment] to plaintiff’s home, that plaintiff intended to return to the subject
9 location.” Kreisler, 731 F.3d at 187–88. Until today, we have never suggested
10 that these three prongs are necessary for Article III standing in the ADA context.
11 Instead, we have held that satisfying these prongs had been sufficient in the past.
12 In other words, they serve as a helpful guide in determining whether the
13 plaintiffs have standing in this case, not as elements for standing in ADA cases.

14 In my view, contrary to the majority’s, a plaintiff in an ADA case is
15 ultimately required to satisfy only the three well-established requirements for
16 Article III standing: (1) an injury in fact that is concrete and particularized and
17 actual or imminent, not conjectural or hypothetical; (2) the injury is fairly
18 traceable to the challenged action of the defendant; and (3) it is likely that the

1 injury will be redressed by a favorable decision. See Lujan v. Defenders of
2 Wildlife, 504 U.S. 555, 560–61 (1992). At most, the factors we identified in
3 Kreisler and Camarillo shed light on whether a plaintiff seeking injunctive relief
4 has shown “a likelihood that he will be injured in the future.” Shain v. Ellison,
5 356 F.3d 211, 215 (2d Cir. 2004) (quotation marks and alteration omitted); see City
6 of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). They do not impose any
7 additional standing requirements in ADA cases.¹

8 Unfortunately, the majority opinion has ignored this. Interpreting the
9 intent-to-return prong as a necessary element of standing, it holds that the
10 plaintiffs in this case lack standing to pursue their ADA claims. At a practical
11 level, doing so creates more (needless) problems than it solves in the ADA
12 context. But setting aside the practical implications of the majority’s holding, I
13 write separately to emphasize that there is no basis to erect any additional
14 requirement that disabled individuals must meet to have standing to sue under
15 Title III of the ADA. Let me explain why.

¹ Importantly, both Kreisler and Camarillo involved claims under Title III of the ADA, which prevents a private individual from recovering monetary damages. 42 U.S.C. § 12188(a)(1). Neither decision sheds light on the requirements for Article III standing in cases where a plaintiff seeks monetary damages under Title II of the ADA, which prohibits discrimination by a public entity against a qualified individual with a disability in the benefits or activities of the public entity.

1 First, a bit of history. We borrowed the “intent-to-return” analysis from
2 the Ninth Circuit’s decision in Pickern v. Holiday Quality Foods, Inc., 293 F.3d
3 1133 (9th Cir. 2002). See Camarillo, 518 F.3d at 158 (citing Pickern). Unlike my
4 colleagues in the majority, however, the Ninth Circuit explicitly declined to
5 apply that analysis strictly and dispositively to conclude that a disabled
6 individual has no standing to even claim a violation of the ADA. The Ninth
7 Circuit instead concluded that “a disabled individual who is currently deterred
8 from patronizing a public accommodation due to a defendant’s failure to comply
9 with the ADA has suffered ‘actual injury.’ Similarly, a plaintiff who is
10 threatened with harm in the future because of existing or imminently threatened
11 non-compliance with the ADA suffers ‘imminent injury.’” Pickern, 293 F.3d at
12 1138.

13 Second, as Pickern points out, a disabled individual has standing if they
14 are deterred from returning to a noncompliant facility, without reference to the
15 plaintiff’s intent to return. Since Pickern, the Ninth Circuit has reaffirmed this
16 view in Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939 (9th Cir. 2011),
17 holding that “an ADA plaintiff can establish standing to sue for injunctive relief .
18 .. by demonstrating deterrence.” Id. at 944; see also id. at 950 (discussing

1 Pickern and noting that “we have Article III jurisdiction to entertain requests for
2 injunctive relief both to halt the deterrent effect of a noncompliant
3 accommodation and to prevent imminent ‘discrimination,’ as defined by the
4 ADA, against a disabled individual who plans to visit a noncompliant
5 accommodation in the future.”). The practical reality is that in too many cases
6 individuals with disabilities realize that they cannot return to an inaccessible
7 facility (a store, a restaurant, etc.). There is no need for a disabled person who
8 has previously attempted to access such a facility to show an intent to return if
9 doing so would be futile or even to show that she intended do so if she were able
10 to access it. In no other area of civil rights law do we impose a similar
11 requirement to establish standing. Congress recognized as much when, for
12 example, it refused to require people with disabilities to engage in “futile
13 gesture[s]” in its remedy provision. 42 U.S.C. § 12188(a)(1). The majority seems
14 to agree with this in theory, Majority Op. at 11 n.4, although its reasoning today
15 suggests otherwise.

16 With that context in place, I submit that all of the plaintiffs except the
17 plaintiff in Kohl’s² established that they have standing. As we said in Kreisler,

² The plaintiff in Kohl’s alleges that he “resides on W. 23rd Street, New York, NY, on the same street and less than a block from Defendant’s retail store at 271 W. 23rd St, New

1 one way a plaintiff can establish standing is by alleging facts that lead to a
2 reasonable inference that “plaintiff intended to return to the subject location.”
3 Kreisler, 731 F.3d at 188. In assessing a plausible intent to return in the ADA
4 context, we have considered factors such as, for example, the frequency of a
5 plaintiff’s visits to a defendant’s store, the proximity of a plaintiff’s residence or
6 work to the store in question, and a plaintiff’s demonstrated travel habits. See
7 id.; see also Bernstein v. City of New York, 621 F. App’x 56, 58–59 (2d Cir. 2015).

8 Keeping these factors in mind, and even assuming that plaintiffs must
9 allege an intent to return, the complaints in Swarovski, Banana Republic, Jersey
10 Mike’s, and Art of Shaving have adequately alleged such an intent. They allege
11 that (1) each plaintiff “has been a customer at [his respective defendant’s store or
12 restaurant] on prior occasions,” (2) each plaintiff “resides within close proximity
13 to at least one of [his respective defendant’s] physical locations,” and (3) each
14 plaintiff “intends to immediately purchase at least one store gift card from [his
15 respective defendant] as soon as [that defendant] sells store gift cards that are

York, NY.” Joint App’x 417. At oral argument, however, counsel conceded that this allegation was mistaken, and that no Kohl’s store exists at that address or anywhere in Manhattan. I therefore agree with the majority that the plaintiff in Kohl’s relies on an inaccuracy about his proximity to Kohl’s that negates injury-in-fact, and I therefore also agree with the majority that we should affirm the dismissal of Kohl’s for lack of standing.

1 accessible to the blind and utilize it at [that defendant's business]." Joint App'x
2 102-03, 167-68, 287, 351, 417. Because the defendants have advanced a facial
3 challenge to the plaintiffs' standing, we accept as true all material facts alleged in
4 the complaints and draw all reasonable inferences in the plaintiffs' favor. See
5 Cortlandt St. Recovery Corp. v. Hellas Telecomm., S.à.r.l., 790 F.3d 411, 417 (2d
6 Cir. 2015). Accordingly, unless factually contradicted (as in Kohl's, as discussed),
7 we accept as true the plaintiffs' allegations that they live near at least one of the
8 defendants' businesses.

9 To start, all the plaintiffs allege that they have previously visited the store
10 or restaurant at issue and that it was inaccessible. Such an allegation makes it
11 plausible to infer that they intend to visit again. The plaintiffs also allege that
12 they live sufficiently close to the facilities they claim violated their rights under
13 the ADA that it is plausible they would visit again. Calcano and Dominguez, for
14 example, allege that they live in the Bronx, which, in my view, is close enough to
15 establish their proximity to various Swarovski and Banana Republic stores
16 located in the Bronx and Manhattan. See Camarillo, 518 F.3d at 155, 158 (noting
17 that plaintiff's residence in Catskill, New York is proximate to defendants'
18 restaurants in Catskill, Hudson, Cairo, and Kingston, New York). Likewise,

1 Calcano's home in the Bronx and Thorne's in "New York, NY"³ are all located in
2 the same metropolitan area and are thus close enough to the Art of Shaving store
3 in Manhattan and to Jersey Mike's restaurant in the Bronx, respectively, to make
4 it plausible that they will shop there again.

5 Taken together, these allegations "tend to show" in each case that, but for
6 the defendants' misconduct, "the plaintiff will likely frequent the area where the
7 public accommodation is located and is interested in what it has to offer."

8 Hirsch v. Campaniello Soho, Inc., No. 14-cv-5097, 2015 WL 678662, at *3
9 (S.D.N.Y. Feb. 17, 2015); see Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528
10 U.S. 167, 184 (2000).

11 Consider Thorne's assertion that he would return to Jersey Mike's in the
12 Bronx. The majority contends it is "impossible" to assess Thorne's proximity to
13 the restaurant because he "doesn't even allege where he lives." Majority Op. at
14 18. To the contrary, Thorne specifically alleges that he lives in New York, New
15 York (Manhattan), which, as every New Yorker knows, borders the Bronx. Joint

³ Although Thorne does not specify where in "New York, NY" he lives, Joint App'x 223, in a separate ADA action he alleged that he lived less than a block from a Boston Market restaurant at 271 West 23rd St., New York, NY, see Thorne v. Boston Mkt. Corp., 469 F. Supp. 3d 130, 133 (S.D.N.Y. 2020). I would take judicial notice of this uncontested factual allegation. See Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).

1 App'x 223. To the extent that the majority demands a more specific address, to
2 show how close he lives to Jersey Mike's, it confuses Rule 12(b)(6)'s plausibility
3 standard for a "probability requirement." Ashcroft v. Iqbal, 556 U.S. 662, 678
4 (2009) (noting that "[t]he plausibility standard is not akin to a 'probability
5 requirement[.]'"). Neither our Court nor the Supreme Court has "require[d] the
6 pleading of specific evidence or extra facts beyond what is needed to make [a]
7 claim plausible." Arista Records, LLC v. Doe 3, 604 F.3d 110, 120–21 (2d Cir.
8 2010).

9 The majority's error continues in Art of Shaving, where it finds it
10 implausible that Calcano might travel "up to an hour" to purchase shaving
11 supplies. Majority Op. at 16. But if Calcano sought products sold only in that
12 store, it is hardly implausible that he might again travel to attend his store of
13 choice. See Camarillo, 518 F.3d at 155, 158. And the majority cannot reconcile its
14 observation that such a trip would be implausible with Camarillo, where we
15 found it altogether plausible that the plaintiff would travel approximately 28
16 miles (from Catskill to Kingston, New York) to patronize a fast-food restaurant.
17 See id.

18 The majority's approach to the core allegations in these cases is improper.

1 Article III contains none of the requirements that the majority imposes in this
2 case. In defense of its approach, the majority resorts to “judicial experience and
3 common sense.” Majority Op. at 13 (quoting Iqbal, 556 U.S. at 679). I agree that
4 “judicial experience and common sense” can help us assess the plausibility of
5 factual allegations, including allegations relevant to standing. But there is no
6 basis to doubt the sincerity of plaintiffs’ assertions, other than by reference to
7 one’s own subjective tastes or preferences. In second-guessing the plaintiffs’
8 preferences, my colleagues go too far. Describing with evident distaste the
9 plaintiffs’ history of litigation and status as repeat filers of ADA suits, they rely
10 not so much on experience or common sense as suspicion about the plaintiffs’
11 motives for suing. The majority believes that the plaintiffs’ litigation history or
12 motive for bringing these lawsuits weakens their claims of future injury, strips
13 them of their standing to sue, or otherwise bears on whether their claims meet
14 the requirements of Article III standing.⁴ What the majority derides as “burying
15 our heads in the sand,” Majority Op. at 18, is in fact an exercise in judicial

⁴ The majority’s reference to the “cumulative implausibility” of the plaintiffs’ allegations is especially curious. Majority Op. at 18. These are different plaintiffs who filed different complaints against different defendants. That we heard these appeals in tandem does not mean that we can now evaluate the plausibility of the plaintiffs’ complaints at the group level rather than individually.

1 restraint.

2 More broadly, the majority’s reasoning has nothing to do with Article III,
3 and its view runs headlong into the text, history, and purpose of the ADA.
4 “In enacting the ADA, Congress recognized that we live in a ‘society [that] has
5 tended to isolate and segregate individuals with disabilities.’” Nanni v.
6 Aberdeen Marketplace, Inc., 878 F.3d 447, 453 (4th Cir. 2017) (quoting 42 U.S.C.
7 § 12101). “Such individuals ‘continually encounter various forms of
8 discrimination, including outright intentional exclusion’ as a result of various
9 barriers to access.” Id. (quoting 42 U.S.C. § 12101). It is against this backdrop of
10 discrimination and ostracism that “Congress concluded that there was a
11 compelling need for a clear and comprehensive national mandate to eliminate”
12 all kinds of discrimination against disabled individuals, including “outright
13 intentional exclusion” and “failure to make modifications to existing facilities
14 and practices.” PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001) (quotation
15 marks omitted). Private litigation is one linchpin in achieving broad compliance
16 with the ADA. For this reason, among others, Title III of the ADA does not limit
17 claims to “bona fide” customers⁵ (although it is worth recalling that each of the

⁵ The majority deems the plaintiffs’ allegations of future injury “implausible” largely because so many nearly identical cases have been filed in district courts in our Circuit.

1 plaintiffs here is indisputably blind), and the statute instead guarantees the right
2 to be “free from disability discrimination” regardless of “[the plaintiff’s] motive.”
3 Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1332–34 (11th Cir. 2013).

4 Applying the correct approach—and assuming again for the sake of
5 argument that Kreisler requires that an ADA plaintiff plausibly allege a past
6 injury at a particular location, coupled with an intent to return to that location, in
7 order to demonstrate a likelihood of future injury as a basis for equitable relief—
8 the complaints here plausibly allege both the plaintiffs’ past injuries at particular
9 noncompliant facilities and their intent to return to those facilities. The plaintiffs
10 have accordingly established their standing to sue for equitable relief.

11 Whether the complaints state a claim under Title III or instead expose the
12 plaintiffs’ cases as less than meritorious is what I turn to next.

13 **B. Failure to State a Claim Under the ADA**

14 “To state a claim under Title III, [a plaintiff] must allege (1) that she is
15 disabled within the meaning of the ADA; (2) that defendants own, lease, or
16 operate a place of public accommodation; and (3) that defendants discriminated

Majority Op. at 19. Not even the defendants advanced this as their central position. Nor am I aware of any prior example where this Court has rejected otherwise well-pleaded allegations at the motion to dismiss stage because they parrot allegations in unrelated cases.

1 against her by denying her a full and equal opportunity to enjoy the services
2 defendants provide.” Camarillo, 518 F.3d at 156. Only the last element is in
3 dispute. As to that element, Title III provides that “[n]o individual shall be
4 discriminated against on the basis of disability in the full and equal enjoyment of
5 the goods, services, facilities, privileges, advantages, or accommodations of any
6 place of public accommodation.” 42 U.S.C. § 12182(a). The statute further
7 defines discrimination to include, among other things:

8 a failure to take such steps as may be necessary to ensure that no
9 individual with a disability is excluded, denied services,
10 segregated or otherwise treated differently than other individuals
11 because of the absence of auxiliary aids and services, unless the
12 entity can demonstrate that taking such steps would
13 fundamentally alter the nature of the good, service, facility,
14 privilege, advantage, or accommodation being offered or would
15 result in an undue burden[.]

16 Id. § 12182(b)(2)(A)(iii). Regulations promulgated under these provisions by the
17 United States Department of Justice (“DOJ”) provide that “[a] public
18 accommodation shall furnish appropriate auxiliary aids and services where
19 necessary to ensure effective communication with individuals with disabilities.”
20 28 C.F.R. § 36.303(c)(1).

21 To discern whether these provisions require the defendants to provide gift
22 cards with Braille, we must first determine how to conceptualize gift cards. As

1 relevant here, there are three possible options that are not mutually exclusive.
2 First, gift cards may be deemed “goods” that are sold in places of public
3 accommodation. As explained in more detail below, the ADA does not regulate
4 what types of good and services should be made available, just as a bookstore
5 need not sell Brailled versions of every book it sells. Accordingly, under this
6 view of gift cards, the defendants need not provide Brailled gift cards. Second,
7 gift cards may be considered a means by which customers may access other
8 goods and services sold by the defendants, in which case the ADA—which
9 prohibits a place of public accommodation from discriminating on the basis of
10 disability when providing access to its goods and services—would extend to gift
11 cards. Third, gift cards themselves may qualify as “place[s] of public
12 accommodation,” in which case they must be accessible to blind individuals
13 under 42 U.S.C. § 12812(a).

14 The District Court adopted the first view, while rejecting the second and
15 third views. The District Court properly determined that gift cards are goods in
16 themselves and that they are not places of public accommodation. In my view,
17 however, the District Court erred when it opted not to consider gift cards as a
18 means by which to access goods and services, from which it concluded that they

1 are exempt from the ADA's accessibility requirement. Nevertheless, I would
2 affirm the District Court's dismissal of the complaints because the plaintiffs do
3 not plausibly and adequately allege that the defendants denied them adequate
4 auxiliary aids and services by failing to provide Brailled gift cards.

5 **1. Gift Cards as Means of Access to Goods or Services**

6
7 The plaintiffs argue that, even if gift cards themselves were not places of
8 public accommodation, they would still fall within the ambit of Title III because
9 they are means by which the plaintiffs would access or acquire the defendants'
10 other goods and services. I agree.

11 To begin with, Title III of the ADA prohibits a place of public
12 accommodation from discriminating on the basis of disability when providing
13 access to its goods and services, but not to regulate what types of goods and
14 services should be made available. See Weyer v. Twentieth Century Fox Film
15 Corp., 198 F.3d 1104, 1115 (9th Cir. 2000) (noting that the ADA "does not require
16 provision of different goods or services, just nondiscriminatory enjoyment of
17 those that are provided"); McNeil v. Time Ins. Co., 205 F.3d 179, 188 (5th Cir.
18 2000). And the DOJ's implementing regulations likewise state that the ADA
19 "does not require a public accommodation to alter its inventory to include

1 accessible or special goods that are designed for, or facilitate use by, individuals
2 with disabilities.” 28 C.F.R. § 36.307(a); *id.* pt. 36, app. C (“The purpose of the
3 ADA’s public accommodations requirements is to ensure accessibility to the
4 goods offered by a public accommodation, not to alter the nature or mix of goods
5 that the public accommodation has typically provided.”).

6 The district court applied the above logic to hold that, because gift cards
7 are goods in themselves, the ADA does not require the defendants to modify and
8 provide gift cards in accessible forms to blind individuals, just as a bookstore
9 need not ensure that the books it sells are available in both Braille and standard
10 print. See id. § 36.307(c) (singling out “Brailled versions of books” as a specific
11 example of accessible or special goods that public accommodations need not
12 ordinarily make available). Indeed, while the ADA itself does not define
13 “goods,” gift cards—items in the defendants’ inventory to be sold—clearly
14 comport with an ordinary and common meaning of that term. See Goods,
15 Oxford English Dictionary (3d ed. 2014) (defining “goods” as “things that are
16 produced for sale; commodities and manufactured items to be bought and sold;
17 merchandise, wares” and “economic assets which have a tangible, physical
18 form”).

1 While I may agree that gift cards are types of goods, that does not mean
2 that gift cards may not also be a means by which customers access other goods
3 and services within the meaning of Title III. Gift cards, types of prepaid debit
4 cards, are a purchase mechanism that the defendants provide for the
5 convenience of customers so that they can purchase other goods and services
6 offered by the defendants. Although gift cards may not be generally accepted as
7 a “universal medium” of exchange, Am. Council of the Blind v. Paulson, 525 F.3d
8 1256, 1268 (D.C. Cir. 2008) (quotation marks omitted), they need not be as
9 fungible as cash, debit cards, or other money instruments to qualify as means of
10 access to the defendants’ goods and services. Moreover, it is irrelevant that the
11 plaintiffs have other means of accessing the defendant’s goods and services, such
12 as cash or credit cards, because there may be privacy, security, or budgetary
13 reasons for using gift cards rather than those other payment methods. In
14 arriving at this conclusion, I am guided by the principle that, “[a]s a remedial
15 statute, the ADA must be broadly construed to effectuate its purpose of
16 providing a clear and comprehensive national mandate for the elimination of
17 discrimination against individuals with disabilities.” Noel v. N.Y.C. Taxi and
18 Limousine Comm’n, 687 F.3d 63, 68 (2d Cir. 2012) (quotation marks omitted).

1 Because gift cards qualify as means of access to goods and services offered
2 by the defendants and therefore fall within the ambit of Title III, public
3 accommodations must ensure that, with respect to the use of gift cards to access
4 other goods and services, no blind individual is “excluded, denied services,
5 segregated or otherwise treated differently than other individuals because of the
6 absence of auxiliary aids and services, unless the entity can demonstrate that
7 taking such steps would fundamentally alter the nature of the good, service,
8 facility, privilege, advantage, or accommodation being offered or would result in
9 an undue burden.” 42 U.S.C. § 12182(b)(2)(A)(iii).

10 **2. Failure To Provide Auxiliary Aids and Services**
11

12 Because the ADA allows for the defendants to provide auxiliary aids and
13 services of their choice, the plaintiffs must adequately allege that Braille is the
14 only type of ADA-compliant auxiliary aid or service in this context or that the
15 defendants do not offer any auxiliary aid or service, including Braille. And
16 because the plaintiffs did neither, the dismissal of their complaints was proper.
17 Thus, although I believe that all but one of the plaintiffs have standing and that

1 gift cards fall within the ambit of the ADA, I would affirm the dismissal of the
2 complaints.

3 First, that gift cards qualify as means of access to goods and services does
4 not mean that the lack of Braille on gift cards necessarily constitutes an ADA
5 violation, since there may be other auxiliary aids and services available to assist
6 blind individuals with using gift cards. Indeed, the statutory definition of
7 auxiliary aids and services includes “qualified readers, taped texts, or other
8 effective methods of making visually delivered materials available to individuals
9 with visual impairments” and “other similar services and actions.” Id. §
10 12103(1); see also 28 C.F.R. § 36.303(b)(2) (listing the same, plus “audio
11 recordings,” “Brailled materials and displays,” “accessible electronic and
12 information technology,” and more). Braille is thus just one among many types
13 of auxiliary aids and services.

14 The ADA leaves it up to merchants to decide what particular auxiliary aids
15 and services they would offer to disabled individuals, given the context-
16 dependent nature of what constitutes effective communication. See id. §
17 36.303(c)(1)(ii) (“A public accommodation should consult with individuals with
18 disabilities whenever possible to determine what type of auxiliary aid is needed

1 to ensure effective communication, but the ultimate decision as to what measures
2 to take rests with the public accommodation, provided that the method chosen
3 results in effective communication.”). For example, “a clothing boutique would
4 not be required to have Brailled price tags if sales personnel provide price
5 information orally upon request.” 28 C.F.R. pt. 36, app. C; see also Camarillo,
6 518 F.3d at 157 (explaining that restaurants are not required to provide large
7 print menus so long as they ensure the menu is effectively communicated).
8 Accordingly, “[n]othing in the ADA itself or its implementing regulations
9 dictates that a disabled individual must be provided with the type of auxiliary
10 aid or service he requests.” Burkhart v. Washington Metro. Area Transit Auth.,
11 112 F.3d 1207, 1213 (D.C. Cir. 1997) (emphasis in original).

12 Based on the above, the District Court held that alleging the absence of
13 Braille on gift cards is not tantamount to alleging that the defendants failed to
14 provide any auxiliary aids and services. In asking this Court to reverse that
15 holding, the plaintiffs argue that (1) Braille is the only type of ADA-compliant
16 auxiliary aid or service in a gift card context, and (2) even if that were not the
17 case, the defendants did not offer any other auxiliary aids and services. I am not
18 persuaded by these arguments, as they are neither adequately nor plausibly

1 pleaded.

2 With respect to the first argument, the complaints are devoid of any
3 plausible allegation as to why other types of auxiliary aids and services—such as
4 store clerks’ assistance—would not permit the plaintiffs to enjoy the benefits of
5 gift cards. The plaintiffs respond that only Braille, among all potential auxiliary
6 aids and services in this context, would satisfy federal and state laws mandating
7 that gift cards contain written disclosures such as: an expiration date;
8 information regarding a dormancy, inactivity, or service fee; a toll-free number
9 and a website to obtain information about the card; whether the card is subject to
10 a replacement fee; and other terms and conditions. See, e.g., 15 U.S.C. § 1693l-
11 1(b)(3), (c)(2)(B); 12 C.F.R. § 205.20(c)(4), (d)(2), (e)(3); N.Y. Gen. Bus. Law § 396-
12 i(3). These consumer protection laws do not interact with the ADA in such a way
13 that the required disclosures must necessarily be made in Braille, in addition to
14 regular print. Rather, these laws collectively appear to require that the
15 defendants effectively communicate the information required to be disclosed via
16 an adequate auxiliary aid or service of their choice. Here, the plaintiffs do not
17 allege that other auxiliary aids and services, such as employee assistance, are
18 ineffective means of communicating the required information to blind

1 individuals. The plaintiffs have failed to make the necessary allegations here.

2 Alternatively, the plaintiffs argue that, even if Braille were not the only
3 type of ADA-compliant auxiliary aid or service, the defendants do not offer other
4 aids or services that might enable blind customers to use gift cards. Although, in
5 my view, such an allegation might have saved the complaints, the plaintiffs do
6 not adequately allege this anywhere, and we cannot plausibly infer from the
7 allegations that they do make that the plaintiffs were denied other types of
8 auxiliary aids or services. See, e.g., Joint App'x 416 (alleging that defendant's
9 employee "did not offer any alternative auxiliary aids or services" on the phone
10 when informing the plaintiff that Braille gift cards were unavailable (emphasis
11 added)). For instance, the complaints could have alleged that the plaintiffs asked
12 the defendants' employees about the availability of other auxiliary aids or
13 services, or that the plaintiffs took other steps to find out what other auxiliary
14 aids or services might have been available. But none of these are alleged.⁶

15 As a fallback, plaintiffs allege that, "[u]pon information and belief, [the
16 defendants] do[] not offer auxiliary aids with respect to the gift cards." Joint

⁶ For substantially the same reason, I would reject the plaintiffs' assertion that they were denied full enjoyment of the gift cards from their homes because of the lack of Braille. The plaintiffs do not allege that they asked the defendants what kinds of auxiliary aids or services would be available for their desired use online or over the phone.

1 App'x 102, 167, 286, 350, 417. This conclusory allegation is not sufficient to
2 overcome the shortcoming just identified. "A litigant cannot merely plop 'upon
3 information and belief' in front of a conclusory allegation and thereby render it
4 non-conclusory. Those magic words will only make otherwise unsupported
5 claims plausible when the facts are peculiarly within the possession and control
6 of the defendant or where the belief is based on factual information that makes
7 the inference of culpability plausible." Citizens United v. Schneiderman, 882
8 F.3d 374, 384–85 (2d Cir. 2018) (quotation marks omitted); see also Amidax
9 Trading Grp. v. S.W.I.F.T. SCRL, 671 F.3d 140, 146 (2d Cir. 2011) ("It is well
10 established that we need not credit a complaint's conclusory statements without
11 reference to its factual context." (quotation marks omitted)). Here, the plaintiffs
12 could have simply inquired a bit further to discern the availability of other
13 auxiliary aids and services, the fact of which is not peculiarly within the
14 possession and control of the defendants.⁷

15

⁷ Because, in my view, the plaintiffs' federal law claims were properly dismissed, I do not fault the District Court for refusing to exercise supplemental jurisdiction over the plaintiffs' state and local law claims without prejudice to refile in state court. See 28 U.S.C. § 1367(c)(3); Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305 (2d Cir. 2003).

1 **CONCLUSION**

2 To summarize, I would conclude that, contrary to the majority's holding,
3 all plaintiffs other than the Kohl's plaintiff have established standing; that gift
4 cards are not only goods but also means of access to goods and services under
5 Title III of the ADA, such that places of public accommodation must provide
6 adequate auxiliary aids and services to ensure that blind customers can make
7 meaningful use of gift cards, unless doing so would fundamentally alter the
8 nature of goods and services provided or would result in an undue burden; and
9 the plaintiffs have not adequately alleged that the defendants failed to provide
10 them with ADA-compliant auxiliary aids and services in connection with their
11 desired use of gift cards.

12 For these reasons I respectfully concur in the judgment.