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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Advocates for Individuals with Disabilities
Foundation Inc.,

No. CV-16-02380-PHX-JAT

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Plaintiff,

ORDER

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v.

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Russell Enterprises Inc.,

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Defendant.

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Pending before the Court are: (1) Defendant Russell Enterprises, Inc.’s Motion to Dismiss (Defendant’s “Motion”), (Doc. 5); (2) Plaintiff Advocates for Individuals with Disabilities Foundation, Inc.’s Response to Defendant’s Motion, (Doc. 10); and (3) Defendant’s Reply in Support of its Motion, (Doc. 11). The parties did not request oral argument. The Court now rules on Defendant’s Motion.

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I. BACKGROUND

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Plaintiff is a non-profit charitable foundation which has “past, present[,] and future relationships or associations with individuals with disabilities.” (Doc. 1-1 at ¶¶ 49–51). This case is one of many filed by attorneys Peter Strojnik and Fabian Zazueta that alleges violations of the Americans with Disabilities Act (“ADA”) and similar state statutes.¹

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¹ Since March 2016, 167 of Mr. Strojnik and/or Mr. Zazueta’s cases have been filed in or removed to this Court, either on behalf of Plaintiff or one of its related entities, Advocates for Individuals with Disabilities, LLC or Advocates for American Disabled Individuals, LLC. Defendant claims that “Plaintiff’s counsel has filed over 900 nearly identical lawsuits in Maricopa County Superior Court” on behalf of Plaintiff or Plaintiff’s related entities. (Doc. 5 at 2); *see also* *Advocates for Individuals with Disabilities Found. Inc. v. Golden Rule Props. LLC*, No. CV-16-02413-PHX-GMS, 2016 WL 5939468, at *5

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1 “These cases all appear to assert identical allegations—that the defendant business (the
2 nature of which usually is not identified in the complaint) has violated the ADA by
3 having inadequate signage or parking spaces for disabled persons.” *Advocates for*
4 *Individuals with Disabilities LLC v. WSA Props. LLC*, No. CV-16-02375-PHX-DGC,
5 2016 WL 5436810, at *1 (D. Ariz. Sept. 29, 2016). In this case, Plaintiff alleges that
6 Defendant has failed “to design, construct, and/or own or operate public accommodations
7 that are fully accessible to, and independently usable by, disabled people.”
8 (Doc. 1-1 at ¶ 51). Plaintiff brings its claims against Defendant under the ADA and the
9 ADA’s counterpart under Arizona law, Ariz. Rev. Stat. § 41-1492. (*Id.* at ¶¶ 79–92).

10 After Defendant removed this case to federal court, Defendant filed its Motion,
11 arguing first that the Court lacks subject matter jurisdiction. (Doc. 5 at 3–12). Defendant
12 alternatively argues that the Court should dismiss Plaintiff’s complaint because it fails to
13 state a claim. (*Id.* at 12–13). Plaintiff admits that it lacks Article III standing to sue in
14 federal court but argues that the Court should remand this case to Arizona state court.
15 (Doc. 10 at 1–3). Defendant rejoins that the Court should dismiss this case without
16 remand because any such remand would be futile. (*See* Doc. 11).

17 **II. LEGAL STANDARD**

18 Under Federal Rule of Civil Procedure 12(b)(1), a litigant may seek dismissal of
19 an action for lack of standing because “Article III standing is a species of subject matter
20 jurisdiction.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227
21 (9th Cir. 2011) (citation omitted). To survive a defendant’s motion to dismiss, the
22 plaintiff has the burden of proving jurisdiction. *Tosco v. Cmty. for a Better Env’t*,
23 236 F.3d 495, 499 (9th Cir. 2000).

24 Following removal of an action from state court to federal court, the federal court
25 “shall” remand the case back to state court “[i]f at any time before final judgment it
26 appears that the district court lacks subject matter jurisdiction.”

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 (D. Ariz. Oct. 13, 2016) (“AID and its counsel have filed more than 1,000 lawsuits in the
past year asserting identical state and federal claims in state court.”).

1 28 U.S.C. § 1447(c) (2012). Although § 1447(c) uses the word “shall,” the Ninth Circuit
2 Court of Appeals has allowed dismissal, rather than remand, if a state court would
3 inevitably dismiss the case as well, rendering a remand futile. *See, e.g., Deutsch v. Turner*
4 *Corp.*, 324 F.3d 692, 718–19 & n.22 (9th Cir. 2003) (declining to remand case involving
5 uncertain federal jurisdiction because a state court would inevitably dismiss on statute of
6 limitations grounds); *Bell v. City of Kellogg*, 922 F.2d 1418, 1424–25 (9th Cir. 1991)
7 (“Where the remand to state court would be futile, however, the desire to have state
8 courts resolve state law issues is lacking. We do not believe Congress intended to ignore
9 the interest of efficient use of judicial resources.”). However, a court should only apply
10 the futility doctrine “where there is ‘absolute certainty that remand would prove futile.’”
11 *Bell*, 922 F.2d at 1425 (quoting *M.A.I.N. v. Comm’r, Me. Dep’t of Human Servs.*,
12 876 F.2d 1051, 1054 (1st Cir. 1989)).

13 **III. ANALYSIS**

14 Plaintiff argues “there is [a] strong likelihood that Plaintiff’s claims will survive
15 any challenge based on subject matter jurisdiction when heard by Arizona state courts.”
16 (Doc. 10 at 3). Defendant responds that, although Arizona courts apply a different legal
17 standard for standing than federal courts, Plaintiff still cannot prove standing under the
18 Arizona standard. (Doc. 11 at 3).

19 Unlike the United States Constitution, the Arizona Constitution does not require a
20 party to assert an actual “case or controversy” in order to establish standing. *Karbal v.*
21 *Ariz. Dep’t of Revenue*, 158 P.3d 243, 245 (Ariz. Ct. App. 2007). However, as a matter of
22 “sound judicial policy,” the Arizona Supreme Court requires plaintiffs seeking redress in
23 Arizona to demonstrate their standing to sue. *Bennett v. Napolitano*, 81 P.3d 311, 316
24 (Ariz. 2003). Standing in Arizona generally requires “an injury in fact, economic or
25 otherwise, caused by the complained-of conduct, and resulting in a distinct and palpable
26 injury giving the plaintiff a personal stake in the controversy’s outcome.” *Strawberry*
27 *Water Co. v. Paulsen*, 207 P.3d 654, 659 (Ariz. Ct. App. 2008). Specifically, the injury
28 must be “particularized” to the plaintiff itself. *Bennett v. Brownlow*, 119 P.3d 460, 463

1 (Ariz. 2005) (“To establish standing, we require that [the plaintiffs] show a particularized
2 injury to themselves.”).

3 However, because standing raises only prudential—not constitutional—concerns,
4 Arizona courts have waived the standing requirement “on rare occasions.” *Brownlow*,
5 119 P.3d at 462–63 (citing *Rios v. Symington*, 833 P.2d 20, 22 n.2 (Ariz. 1992)). The
6 Arizona Supreme Court has elaborated that “as a matter of discretion, we can waive the
7 requirement of standing . . . only in exceptional circumstances, generally in cases
8 involving issues of great public importance that are likely to recur.” *Sears v. Hull*,
9 961 P.2d 1013, 1019 (Ariz. 1998); *see, e.g., Rios*, 833 P.2d at 22 (accepting jurisdiction
10 notwithstanding “potential standing issues” in an action brought by the state senate
11 president against the governor); *Goodyear Farms v. City of Avondale*,
12 714 P.2d 386, 387 n.1 (Ariz. 1986) (waiving standing requirement because the case
13 involved a claim that the state statute governing procedures for municipal annexation
14 violated the equal protection clauses of the federal and state constitutions); *State v. B Bar*
15 *Enters.*, 649 P.2d 978, 980 n.2 (Ariz. 1982) (reaching the merits of a claim despite
16 appellants’ lack of standing because the claim required the court to determine the
17 constitutionality of a statute that had not yet been interpreted); *Montgomery v. Mathis*,
18 290 P.3d 1226, 1234 n.7 (Ariz. Ct. App. 2012) (waiving the standing requirement in a
19 case regarding whether the Arizona Independent Redistricting Commission was required
20 to follow Arizona’s Open Meeting Law). Besides limiting use of the waiver to “issues
21 of great public importance,” the Arizona Supreme Court has not provided objective
22 guidance as to whether a case presents one of the “rare occasions” for a court to waive
23 the standing requirement. *Sears*, 961 P.2d at 1019.

24 Here, Plaintiff does not affirmatively argue that it has standing under Arizona law.
25 Rather, Plaintiff argues that the Court cannot determine with “absolute certainty” that a
26 state court would dismiss this case because Plaintiff lacks standing under Arizona law.
27 (Doc. 10 at 3). The Court agrees. Although Defendant has demonstrated that Plaintiff
28 cannot meet the particularized injury requirement under Article III, (*see* Doc. 11 at 3),

1 and Arizona courts have applied Article III case law to determine whether a plaintiff
2 alleged a particularized injury, *see, e.g., McComb v. Super. Ct.*, 943 P.2d 878, 882–83
3 (Ariz. Ct. App. 1997), the Court cannot state with “absolute certainty” that a state court
4 would not waive the standing requirement in this case. Further, Defendant does not
5 present any argument convincing the Court that a state court would *not* waive Arizona’s
6 standing requirement in this case. *See Conrad Assocs. v. Hartford Accident & Indem.*
7 *Co.*, 994 F. Supp. 1196, 1198 (N.D. Cal. 1998) (“In a motion to remand to state court, the
8 party asserting federal jurisdiction has the burden of proof.”). Therefore, remand of
9 Plaintiff’s state claims to the Arizona state court is the appropriate action in this case.

10 However, in remanding this case, the Court will dismiss Plaintiff’s federal claims
11 without prejudice. Plaintiff argues that the Court should remand both the state and federal
12 claims because “[s]tate [c]ourts have concurrent jurisdiction to hear the claims.” (Doc. 10
13 at 3). While the Court does not dispute the state court’s concurrent jurisdiction, Plaintiff
14 is actually arguing that a state’s more-lenient standing requirements can divest a federal
15 court of its 28 U.S.C. § 1331 federal question jurisdiction, which Defendant invoked by
16 removing this case to federal court. Plaintiff does not address, and the Court finds no
17 authority, that such divestment is possible. *See, e.g., DaimlerChrysler Corp. v. Cuno*,
18 547 U.S. 332, 339, 354 (2006) (ordering the district court to dismiss—not remand to state
19 court—an action originally filed in state court because the plaintiffs lacked Article III
20 standing and despite plaintiffs filing motions to remand the case to state court); *Lone Star*
21 *Coll. Sys. v. Immigration Reform Coal. of Tex.*, 418 S.W.3d 263, 280 (Tex. App. 2013)
22 (Christopher, J., concurring) (“[I]f [the plaintiff] had sued [the defendant] in federal court
23 for violating federal law, it would have had no Article III standing—whether based on
24 state or municipal taxpayer status—to do so. Why then should [the plaintiff] have
25 standing to bring the same claim in state court?”); Paul J. Katz, *Standing in Good Stead:*
26 *State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 Nw. U. L.
27 Rev. 1315, 1352 (2005) (“Federal courts have constitutional jurisdiction of cases ‘arising
28 under’ the laws of the United States. Article III jurisdiction is only a ceiling for federal

1 subject matter jurisdiction, but Congress in 1866 copied this ‘arising under’ language in
2 28 U.S.C. § 1331 to grant federal courts general subject matter jurisdiction [I]t
3 seems unreasonable that the Constitution would allow Congress to use state courts to
4 enforce statutory directives where federal courts cannot.”); *see also generally* William A.
5 Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of*
6 *Federal Questions*, 78 Calif. L. Rev. 263 (1990).

7 **IV. CONCLUSION**

8 For the foregoing reasons,

9 **IT IS ORDERED** the Court **GRANTS** Defendant’s Motion to Dismiss for lack of
10 subject matter jurisdiction as to Plaintiff’s federal claim (Count I of Plaintiff’s Complaint,
11 Doc. 1-1 at ¶¶ 79–85) without prejudice, (Part of Doc. 5); there being no just reason for
12 delay, the Clerk of the Court shall enter judgment of dismissal without prejudice on
13 Count I.

14 **IT IS FURTHER ORDERED** the Clerk of the Court shall remand Plaintiff’s
15 state claim (Count II of Plaintiff’s Complaint, Doc. 1-1 at ¶¶ 86–92) to the Maricopa
16 County Superior Court.

17 **IT IS FURTHER ORDERED** the Court **DENIES** Defendant’s Motion to
18 Dismiss for failure to state a claim as moot. (Part of Doc. 5).

19 Dated this 9th day of December 2016.

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23 James A. Teilborg
24 Senior United States District Judge
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