No. 17-2678

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHRISTOPHER MIELO and SARAH HEINZL,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

STEAK 'N SHAKE OPERATIONS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Pennsylvania

Brief of *Amici Curiae* Katherine Corbett, Julie Farrar-Kuhn, Carrie Ann Lucas, Julie Reiskin, and the Civil Rights Education and Enforcement Center in support of Plaintiffs-Appellees

Amy Farr Robertson
Colorado Bar No. 25890
Civil Rights Education and Enforcement Center
104 Broadway, Suite 400
Denver, CO 80203
303.757.7901

Counsel of Record for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Other Authorities

Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus* the Civil Rights Education and Enforcement Center states that it is a private 501(c)(3) non-profit organization, that it is not publicly held corporation or other publicly held entity, and that it has no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

Statements of Interest of *Amici Curiae*

Katherine Corbett (who writes under the name Corbett O'Toole) has been a national leader on disability rights for over 40 years, created the first national project on women and disability, organized the Disabled Women's Symposium in Beijing, China in 1995, has published two books as well as numerous articles in both peer-reviewed and popular publications, and is the founder of Reclamation Press which publishes Wisdom from Disability Communities. She has post-polio syndrome and uses a power wheelchair for mobility.

Julie Farrar-Kuhn is a healthcare policy analyst with a degree in Human Services Public Administration. She is the Education and Outreach Coordinator for the Open Doors Project, helping New Yorkers with disabilities in skilled nursing facilities transition successfully back into their communities. She has been

a disability rights activist since the age of 16, fighting for the passage of the Americans with Disabilities Act ("ADA") and the protection and preservation of Medicaid and other critical supports for the disability community. Ms. Farrar-Kuhn has sacral agenesis and uses a power wheelchair for mobility.

Carrie Ann Lucas is an attorney and is the Case Strategy Director for the Office of Respondent Parents' Counsel, an independent agency within the Colorado Judicial Branch. She is also the founder and Executive Director of Disabled Parent Rights, a nonprofit dedicated to combating discrimination that impacts parenting for parents with disabilities. She is currently a candidate for the Town Board of Windsor, Colorado. She has a form of muscular dystrophy and uses a power wheelchair for mobility.

Julie Reiskin, LCSW, is the Executive Director of the Colorado Cross-Disability Coalition, a member of the Board of Directors of the Legal Services Corporation, and an adjunct faculty member at the University of Denver Graduate School of Social Work. Ms. Reiskin provides consulting with organizations seeking to improve, expand, or enhance their ability to effectively practice real and meaningful client/constituent engagement. She also helps organizations develop disability cultural competence. She has multiple sclerosis and uses a power wheelchair for mobility.

Ms. Corbett, Ms. Farrar-Kuhn, Ms. Lucas, and Ms. Reiskin -- the "Individual *Amicae*" -- are all busy professional women who use wheelchairs. All relate, in emails to and conversations with the undersigned, recent and repeated encounters with architectural barriers throughout their daily lives at businesses constructed before and after the effective date of the ADA including: stores and restaurants with a single step at the entrance; new restaurants with inaccessible tables; businesses with inaccessible restrooms; inaccessible hotel transportation; inaccessible theaters; inaccessible medical equipment; and inaccessible parking lots. While these barriers present significant difficulties for their professional and personal lives, they cannot possibly take time to challenge every barrier they encounter each day. Each one has, however, stepped up and served as a class representative in ADA class actions challenging patterns of barriers at related facilities, litigation that has led to significant improvements in access.[1]

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization whose mission is to defend human and

[1] *Reiskin v. Regional Transp. Dist.*, No. 14-cv-03111-CMA-KLM, 2017 WL 5990103 (D. Colo. July 11, 2017) (Reiskin); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014) (Farrar-Kuhn); *Moeller v. Taco Bell Corp.*, No. C 02-5849-PJH-NC, 2012 WL 3070863 (N.D. Cal. July 26, 2012 (Corbett); *Farrar-Kuhn v. Conoco, Inc.*, No. 99-cv-02086-MSK-PAC (D. Colo.) (Farrar-Kuhn; Lucas); *Lucas v. Kmart Corp.*, No. 99-cv-1923-JLK, 2005 WL 1648182 (D. Colo. July 13, 2005) (Lucas; Reiskin); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (Reiskin).

civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to places of public accommodation and that Title III of the ADA, 42 U.S.C. § 12181 *et seq*. ("Title III") can be effectively enforced to ensure equal access and independence.

All parties have consented to the filing of this *amicus* brief.

Statement Pursuant to Fed. R. App. P. 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person -- other than the *amici curiae*, their members, or their counsel -- contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Cases that challenge accessibility barriers at a chain of commonly-owned or -operated facilities are ideal for class treatment. The experience of disabled class members encountering these barriers is very similar and liability is often simply and objectively established -- for example, with a tape measure or level -- thus presenting common legal and factual questions. Finally, a single injunction can remedy these systemic violations, addressing headquarters-level policies and procedures without requiring individual location-by-location lawsuits.

People with disabilities who bring cases challenging these barriers under Title III of the Americans with Disabilities Act are playing an important role -- a role intended by Congress and recognized by the Supreme Court -- in the enforcement of this landmark civil rights law. Bringing such a case as a class action does this in an efficient and court-supervised fashion, and advances the time when the built environment will provide "full and equal enjoyment of the goods, services, facilities, privileges, advantages, [and] accommodations" of places of public accommodation, 42 U.S.C. § 12182(a).

ARGUMENT

I. Title III of the Americans with Disabilities Act

The ADA was passed by a bi-partisan majority and signed into law by President George H.W. Bush in 1990. Title III of the ADA prohibits disability

discrimination by places of public accommodation, including restaurants such as Defendant's Steak 'N Shakes. 42 U.S.C. §§ 12181(7)(B); 12182(b). Prohibited discrimination includes not only intentional exclusion but also construction of, and failure to remove, architectural barriers. *Id.* §§ 12182(b)(2)(A)(iv); 12183(a). As President Bush stated, in signing the ADA, "[t]ogether, we must remove the physical barriers we have created and the social barriers that we have accepted." President George H.W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990, (July 26, 1990).[2]

Crucially -- for purposes of the issue before this Court -- Congress did not leave the question of what constitutes an architectural barrier to individual interpretation, but instructed the Department of Justice ("DOJ") to issue implementing regulations and standards. 42 U.S.C. §§ 12186(b), (c); 12204. Accordingly, the DOJ issued detailed, quantitative design standards, first in 1991 (the "1991 Standards"), 28 C.F.R. pt. 36, app D, and again in 2010 (the "2010 Standards"), 28 C.F.R. pt. 36, subpt. D and 36 C.F.R. pt. 1191.[3]

In addition, as explained in greater detail in Section III(A) below, by incorporating the remedial provision of Title II of the Civil Rights Act of 1964

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[2] Available at https://www.eeoc.gov/eeoc/history/35th/videos/ada_signing_text.html (last visited Jan. 18, 2018).

[3] The 1991 Standards and the 2010 Standards will be collectively referred to as the "Standards."

("CRA") into Title III's remedial provision, 42 U.S.C. § 12188(a), and providing for attorneys' fees for prevailing plaintiffs, *id.* § 12205, Congress intended that Title III would be enforced -- and full participation of people with disabilities achieved -- through litigation brought by private individuals. *See, e.g.*, *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 457 (4th Cir. 2017) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401 (1968)).

II. Claims Challenging Architectural Barriers under Title III of the ADA are Ideally Suited for Class Treatment.

A. Violations of the Standards Present Questions Common to a Class of Individuals with Disabilities.

Violations of Title III's architectural Standards present a straightforward case for class certification -- especially where, as here, a class of individuals with common disabilities challenges a single feature governed by a single standard at a chain of commonly-owned or -operated facilities. Unlike employment and other discrimination cases, a court does not need statistical evidence to stand in for motive; instead, a tape measure, door pressure gauge, or -- here -- a level can provide objective, quantitative evidence that a barrier exists. While this does not end the liability case, these barriers affect the class in the same way and the ensuing legal questions are common to the class. And, unlike the many non-Title

III cases cited by Defendant and its supporting *amici*,[4] Title III does not have a damages remedy, *see* 42 U.S.C. § 12188(a), so class-wide relief never requires an individualized analysis of each class member's injuries or damages.

The latter point is crucial, because for all the talk of "death knells,"[5] the relief available in a Title III class action is simply an order requiring the defendant to do what it has been required to do since 1993: bring its facilities into compliance with the Standards and ensure they stay that way. In the present case this means ensuring that the parking lots Defendant controls or operates comply with slope requirements first published in 1991.

Because the question whether discrimination has occurred is largely quantitative and common to the class, and because there are no individual damages, many multi-facility ADA cases have been certified as class actions.[6]

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[4] *See* Brief of *Amici Curiae* National Association of Convenience Stores, *et al.*, ("NASC *Amici*" or "NASC Br."); Brief of National Retail Federation, *et al.*, ("NRF *Amici*" or "NRF Br.").

[5] Appellant Steak 'N Shake Operations, Inc.'s Opening Brief ("SnS Br.") at 19; NRF Br. at 25.

[6] *See, e.g.*, *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) (affirming certification of class of wheelchair-users challenging architectural feature at over 200 stores nationwide under Title III); *Armstrong v. Davis*, 275 F.3d 849, 868-69 (9th Cir. 2001) (affirming certification of class of individuals with varying disabilities challenging barriers and policies at prison facilities in California); *Lightbourn v. Cty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of a class of blind and mobility-impaired individuals challenging accessibility of polling places); *Moeller v. Taco Bell Corp.*, No. C 02-5849-PJH-NC, 2012 WL 3070863, at *1 (N.D. Cal. July 26, 2012) Continued.

B. The Class as Certified Shares Common Legal And Factual Questions at the Covered Restaurants.

Rule 23(a)(2) of the Federal Rules of Civil Procedure requires, for class certification, that there be "questions of law or fact common to the class." This requirement is satisfied here by the slope measurements at each parking lot, and the legal questions they raise concerning compliance with Title III. Defendant and the NRF *Amici* make a common mistake in asserting that class certification is

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(certifying class of persons with mobility disabilities challenging violations of architectural accessibility requirements at a fast food chain), *reaffirming Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 613-14 (N.D. Cal. 2004); *Kirola v. City and Cty of San Francisco*, No. 4:07-CV-03685 SBA (EMC), 2010 WL 11488931, at *4 (N.D. Cal. June 7, 2010) (certifying class of people with mobility impairments challenging policies and lack of program access due to sidewalk barriers throughout San Francisco); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120-23 (C.D. Cal. 2008) (certifying class of persons with mobility disabilities challenging alleged violations of architectural accessibility requirements at a grocery store chain); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 344-49 (N.D. Cal. 2008) (certifying class of persons with mobility and/or vision disabilities challenging barriers along outdoor designated pedestrian walkways throughout the state of California); *Lucas v. Kmart Corp*., No. 99-cv-01923-JLK, 2005 WL 1648182, at *3 (D. Colo. July 13, 2005) (certifying nationwide class of people who use wheelchairs challenging architectural barriers at chain of 1,500 retail stores); *Nat'l Org. on Disability v. Tartaglione*, No. CIV A 01-1923, 2001 WL 1258089, at *5 (E.D.Pa. Oct. 22, 2001) (certifying class of blind and mobility-impaired individuals challenging accessibility of voting machines and polling places); *Access Now, Inc. v. Ambulatory Surgery Ctr. Grp., Ltd.*, 197 F.R.D. 522, 530 (S.D. Fla. 2000) (certifying a class of individuals with all disabilities challenging barriers at a chain of health care facilities); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 363 (D. Colo. 1999) (certifying class of people who use wheelchairs challenging barriers at approximately 42 restaurants); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 458 (N.D. Cal. 1994) (certifying statewide class of people who use wheelchairs challenging barriers at a chain of movie theaters).

precluded by differences among the *facilities* at issue. In a single-element case such as this one -- Plaintiffs challenge only parking slope -- any such differences are minimal and, in any event, irrelevant to the class certification decision.

Because the barriers and experiences are so similar across the class certified by the District Court, Defendant attempts to manufacture complexity where it does not exist. For example, Defendant's statement that this case, if certified, would require "evaluation of the thousands of features at each of Steak 'N Shake's more than 400 owned restaurants," SnS Br. at 44, is inaccurate by a factor of 1,000. Plaintiffs challenge only one feature -- the slope of accessible parking spaces -- at each restaurant. This distinguishes the present case from *Castaneda v. Burger King Corporation* -- on which Defendant repeatedly relies, SnS Br. at 44, 52, 53 -- as the plaintiffs there challenged all barriers to people with mobility impairments at each of 92 restaurants and also sought damages for class members, *see Castaneda v. Burger King Corp.*, 264 F.R.D. 557, 560, 567 (N.D. Cal. 2009).

Similarly, Defendant's objection that its restaurants are "subject to varying terms concerning responsibility" for their parking lots, SnS Br. at 6, is irrelevant, as the class certified by the District Court was limited to restaurants "where Defendant owns, controls and/or operates the parking facilities," *Mielo v. Steak 'N Shake Operations, Inc.*, No. 15-180, 2017 WL 1519544, at *1 (W.D. Pa. Apr. 27, 2017), parking lots in which Defendant is legally responsible for compliance, *see*

42 U.S.C. § 12182(a) (prohibiting disability discrimination "by any person who owns, leases (or leases to), or operates a place of public accommodation"). Liability for restaurants patronized by the class as certified will not require analysis of legal responsibility for the parking lots at issue.

Ultimately, however, this "unique architecture" argument is a red herring. Rule 23(a)(2) asks whether there are "questions of law or fact common to the *class*" (emphasis added), not common to the facilities the class may patronize. In *Moeller v. Taco Bell Corporation*, the court explained that "[t]he 'unique architecture' argument ha[d] been rejected by a number of courts in disability cases." *Id.* 220 F.R.D. at 609. Plaintiffs in *Moeller* sought certification of a class of people with mobility disabilities challenging a range of barriers at over 200 fast food restaurants. Like Defendant here, Taco Bell argued that commonality could not exist because the restaurants had different designs. 220 F.R.D. at 609. The court rejected that argument, holding,

> the state of such elements at Defendant's restaurants, and the legal adequacy of such elements, are issues of fact and law common to all class members. Factually, this case involves a homogeneous class of plaintiffs (individual wheelchair or scooter users) who are bringing multiple but common factual claims that will be determined pursuant to a common legal backdrop.

Id.[7] Here, each Steak 'N Shake parking lot presents factual and legal issues common to the class.

Nor will this case require a "mini-trial" for each restaurant, as Defendant asserts. *See* SnS Br. at 44, 52; *see also* NRF Br. at 16, 19, 21. Determining whether the challenged barriers exist is a matter of placing a level on the handful of accessible parking spaces at each restaurant. Determining whether these barriers constitute violations of Title III requires consideration of the date of construction -- available from each certificate of occupancy -- and, if prior to 1993, consideration of whether barrier removal is "readily achievable."[8] This second question is evaluated based on headquarters-level -- and thus common -- financial factors. *See* 28 C.F.R. § 36.104 ("readily achievable" considers "the overall financial resources of any parent corporation"); *see also Arnold*, 158 F.R.D. at 449 (holding commonality existed in a Title III class action based in part on the fact that liability "hinge[d], in part, on various corporation-wide factors such as the availability of resources."). The idea that this analysis is too difficult for federal courts that routinely analyze questions of immense mathematical, economic, and scientific

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[7] Although this case was decided before the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), certification of the injunctive class was reaffirmed following that decision, *Moeller v. Taco Bell Corp.*, No. C 02-5849-PJH-NC, 2012 WL 3070863, at *4 (N.D. Cal. July 26, 2012).

[8] Title III requires facilities built after January 26, 1993, to be fully accessible, 42 U.S.C. § 12183(a), and requires removal of barriers where it is "readily achievable" at facilities built prior to that time, *id.* § 12182(b)(2)(A)(iv).

complexity -- for example, in securities, environmental, patent, product liability, and antitrust cases -- is simply implausible.

It is not ultimately necessary to survey each parking lot to determine that an injunction is necessary. As the Ninth Circuit held, in evaluating a multi-facility ADA case, a systemic injunction is appropriate where there is "symptomatic" evidence of a widespread discriminatory practice, including "individual items of evidence as representative of larger conditions or problems." *Armstrong*, 275 F.3d at 871 (citation omitted); *see also Californians for Disability Rights, Inc.*, 249 F.R.D. at 345 (rejecting argument that proof of a discriminatory practice requires each class member to prove each instance of discrimination they allegedly suffered).

C. Barriers Encountered by the Class as Certified Can Be Remedied by a Single Injunction.

It is very common for multi-facility Title II and Title III cases to be resolved through a single consent decree or settlement, demonstrating that the barriers challenged in the present case would be easily addressed in a single injunction. This includes, for example, cases in which the Individual *Amicae* have been representative plaintiffs. *See, e.g.*, *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK (D. Colo. July 27, 2006), ECF 235 (order approving class action settlement addressing all barriers to people who use wheelchairs at approximately 1,500 department stores); *Moeller v. Taco Bell Corp.*, No. C 02 5849 PJH NC (N.D. Cal.

Sept. 24, 2014), ECF 809 (order approving class action settlement addressing maintenance of access for people who use wheelchairs at over 100 fast food restaurants); *Farrar-Kuhn v. Conoco, Inc.*, No. 99-cv-02086-MSK-PAC (D. Colo. Sept. 11, 2002), ECF 77[9] (order approving class action consent decree addressing all barriers to people who use wheelchairs at gas stations in five states). *Amicus* CREEC has recently settled several class action cases addressing curb ramps throughout a given city -- settlements that require (among other measures) what would be required of Defendant here: placing a level on a paved area and remedying any noncompliance. *See, e.g., Reynoldson v. City of Seattle*, No. 2:15-cv-01608-BJR (W.D. Wash. Nov. 1, 2017), ECF 61 (order approving class action settlement requiring survey and remediation of curb ramps throughout the city of Seattle); *Denny v. City and County of Denver*, 2016CV030247 (Den. Dist. Ct. Sept. 9, 2016)[10] (same with respect to curb ramps throughout the city of Denver). Similarly, the DOJ has entered a number of settlements that, while by definition not class actions, require the owner or operator of multiple related facilities to bring them all into compliance.[11]

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[9] Text of consent decree available at http://www.foxrob.com/pdfs/conoco/consentdecree.pdf (last visited Jan. 22, 2018).

[10] Text of settlement agreement available at https://creeclaw.org/wp-content/uploads/2016/03/2016-01-28-Denver-Settlement-Agreement.pdf (last visited Jan 22, 2018).

[11] *See, e.g., United States v. AMC Entm't, Inc.*, No. CV 99-01034 SJO (SHx) Continued.

It is contradictory for Defendant to complain simultaneously about its perceived need for "mini-trials" and its perception that the only possible injunction is an "obey the law" injunction. *See* SnS Br. at 44, 52-53; *see also* NRF Br. at 16, 19, 21, 24. Compliance, for Defendant, is either too complex or too general. Like Goldilocks, however, the district court should not have difficulty formulating an injunction that is *just right*: one that requires Defendant, based on complete or symptomatic evidence, to remediate noncompliant parking spaces; and to promulgate a policy to include this in existing maintenance procedures. *Cf. Shields v. Walt Disney Parks & Resorts US, Inc*., 279 F.R.D. 529, 558 (C.D. Cal. 2011) ("[T]here is no need to conduct a mini-trial as to which potential remedies constitute reasonable accommodations. It suffices to say that the necessity of providing multiple ameliorative measures within a single injunction does not preclude certification of the [class].")

(C.D. Cal. Nov. 29, 2010), ECF 544 (settlement addressing accessible seating at over 250 movie theaters); Settlement Agreement Between the United States of America and Doctor's Assocs., Inc. and Subway Real Estate Corp., DJ 204-32-44 (Jul. 31, 2007) (settlement with owner of approximately 20,000 fast food restaurants requiring, among other things, survey and remediation of barriers at all such restaurants and promulgation of a policy to maintain access), available at https://www.ada.gov/subwayrest.htm (last visited Jan. 22, 2018).

III. The Policy Arguments of Defendant's *Amici* are Irrelevant, Unsupported, and Contrary to the Intent of Title III.

The NASC and NRF *Amici* make a number of policy arguments all predicated on demonizing people with disabilities who enforce their rights under Title III of the ADA. These arguments are unsupported by any evidence that the cases about which they complain in fact lacked merit, and are particularly irrelevant to the present case, in which Defendant has admitted that that the "issues noted" by Plaintiffs were "confirmed" by Defendant's Corporate Facilities Director (JA 595, ¶ 11), and there is no allegation that Mr. Mielo, Ms. Heinzl, or their counsel has acted in any way improperly.

Plaintiffs and their counsel are playing an important role, intended by Congress, in the enforcement of the ADA. In contrast, the arguments of Defendant's *amici* threaten to undermine such enforcement and prolong the exclusion of people with disabilities from the "equality of opportunity, full participation, independent living, and economic self-sufficiency" that comprise one of the central goals of the ADA, *see* 42 U.S.C. § 12101(a)(7).

A. Congress Intended Title III to Be Enforced Through Private Lawsuits.

The enforcement provision of Title III of the ADA incorporates by reference that of Title II of the CRA, which prohibits discrimination in places of public accommodation on the basis of race, color, religion, and national origin, 42 U.S.C.

§ 2000a. *See* 42 U.S.C. § 12188(a)(1) (remedial provision of Title III incorporating by reference 42 U.S.C. § 2000a-3(a)). The ADA, like Title II of the CRA and other civil rights statutes, permits prevailing plaintiffs to recover attorneys' fees. 42 U.S.C. § 12205 (ADA); 42 U.S.C. § 2000a-3(b) (Title II of the CRA).

Early in the history of the CRA, the Supreme Court explained that fee shifting provisions were intended to *encourage* private litigation to ensure that important federally-protected civil rights were vindicated:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. ***If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority***. . . . . Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968) (emphasis added).

Two Circuits have recognized that, by incorporating the remedial provisions of Title II of the CRA into Title III of the ADA, Congress similarly enlisted private litigants in the effort to enforce Title III. *See Nanni*, 878 F.3d at 457 (quoting *Newman* for the proposition that "our country will be obliged 'to rely in part upon

private litigation as a means of securing broad compliance'" with civil rights laws); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003) (same). *Cf. Am. Bus Ass'n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000) ("As the Supreme Court has explained, a [CRA] plaintiff primarily seeks not redress of his own injury, but to vindicate the policy of the United States government."). The Ninth Circuit has recognized that, "[f]or the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (internal citations omitted).

Defendant's supporting *amici* devote a good deal of space to criticism of these committed individuals who bring serial litigation to help secure broad compliance with Title III. Absent from this criticism is any evidence that the serial cases *amici* criticize lacked merit, and the Fourth and Ninth Circuits have recognized that such criticism is inappropriate. In *Nanni*, decided just last month, the Fourth Circuit responded to criticism of serial Title III plaintiffs in resounding terms: "a citizen's 'right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and is granted and protected by the Federal Constitution.' . . . [T]he identification of public accommodation facilities that flout the ADA is obviously an important activity." 878 F.3d at 457 (internal citations

omitted)*; see also D'Lil*, 538 F.3d at 1040 (holding "use of past litigation to prevent a litigant from pursuing a valid claim in federal court warrants our most careful scrutiny"); *Kittok v. Leslie's Poolmart, Inc*., 687 F. Supp. 2d 953, 959 (C.D.Cal. 2009) ("The persistence of plaintiffs in bringing multiple lawsuits alleging unequal access to places of public accommodation does not demonstrate wrongdoing by plaintiffs any more than it shows a hesitation of businesses to comply with the law.").

The NASC *Amici* also complain about the amount of attorneys' fees in Title III cases, ignoring the fact that this is often within the defendant's control. Their only cite is to the plaintiff's unopposed motion for preliminary approval of the class settlement in *Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 2:14-cv-1455, 2016 WL 1761963 (W.D. Pa. Apr. 29, 2016). *See* NASC Br. at 11. A quick review of the docket in that case demonstrates the reasonableness of the plaintiff's attorneys' fees. Before agreeing to survey its parking lots and bring them into compliance with the then-24-year-old Standards, Cracker Barrel filed the following motions, objections to magistrate's recommendations, and oppositions to plaintiff's motions -- ***all unsuccessful***, but each requiring a response from the plaintiff: motion to dismiss, ECF 10, 15, 16, 35; three motions for protective orders, ECF 20, 30, 36, 37, 91, 96; three motions for stays, ECF 32, 37, 71, 82, 131, 134, 137; a motion to compel, ECF 55, 62; a motion for summary judgment, ECF 64, 74, 82,

113, 126;[12] and opposition to class certification, ECF 103, 108, 113, 116, 126.[13] Cracker Barrel also attempted to obstruct discovery, first refusing to provide class-wide discovery, requiring the plaintiff to file a motion to compel and later a motion for sanctions to enforce it, ECF 27, 36, 41, 41-2, 47, then withholding evidence from production, requiring another motion to compel, ECF 76, 93.[14]

It is the experience of the current *Amici* that this approach to Title III litigation is not unusual. When presented with tape-measure evidence of non-compliance, businesses challenge standing, limit or withhold discovery, move to compel and for protective orders, resist class certification, move to stay the litigation, seek summary judgment, and only then -- after years of litigation and hundreds of thousands of dollars in fees on both sides -- agree to comply. Indeed, 14 months into the litigation that Defendant's *amici* hold up as an example of abusive *plaintiffs*, Cracker Barrel admitted that "the subject properties contained barriers to access that were in need of remediation," *see Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. 2:14-cv-1455, 2016 WL 2347367, at *11 (W.D. Pa. Jan. 27, 2016), yet continued to litigate for another year.

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12 *Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 2:14-CV-1455, 2016 WL 1761963 (W.D. Pa. Apr. 29, 2016).

13 *Id.*

14 *Heinzl v. Cracker Barrel Old Country Store, Inc.*, No. 2:14-CV-1455, 2015 WL 6604015 (W.D. Pa. Oct. 29, 2015).

B. Testers Have Played An Important Role in Enforcing Civil Rights Laws.

The NASC *Amici* recognize, as they must, that the Supreme Court has long recognized that civil rights testers have standing. NASC Br. at 13-15. That recognition extends farther back even than *Havens Realty Corporation v. Coleman*, 455 U.S. 363, 374 (1982), cited in that brief. As early as 1958, the Supreme Court held that an African-American plaintiff who rode a segregated bus for the purpose of instituting litigation had standing. *Evers v. Dwyer*, 358 U.S. 202, 204 (1958). In 1967, the Court held that African-American ministers who had used a whites-only waiting room in Jackson, Mississippi with the expectation of being arrested had standing.

> It is necessary to decide what importance should be given . . . to the substantially undisputed fact that the petitioners went to Jackson expecting to be illegally arrested. We do not agree with the Court of Appeals that they somehow consented to the arrest because of their anticipation that they would be illegally arrested, even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated public accommodations. . . . The petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983.

Pierson v. Ray, 386 U.S. 547, 558 (1967).

Despite this long history, the NASC *Amici* characterize disabled testers as "fishing for accessibility problems." NASC Br. at 15. To the contrary, ADA testers continue this proud and essential role in the enforcement of civil rights

laws, and their standing has been upheld by every circuit to have considered it. *Nanni*, 878 F.3d at 457 (4th Cir. 2017); *Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1102 (9th Cir. 2017); *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211-12 (10th Cir. 2014); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1334 (11th Cir. 2013).

C. Insults In Lieu of Analysis

Because the Standards are so clear, Defendant's supporting *amici* turn to insults in lieu of analysis. People with disabilities enforcing their civil rights are a "nuisance,"[15] "gam[ing]"[16] or "plaguing"[17] the system, engaged in "drive-by,"[18] "abusive,"[19] or "shakedown"[20] litigation with "hired guns"[21] in service of a "cottage industry,"[22] that "make[s] extortionate demands on businesses."[23]

With no suggestion that Mr. Mielo, Ms. Heinzl, or their counsel have acted improperly or unethically, the NASC *Amici* urge the court to consider that two other ADA plaintiffs have been deemed "vexatious litigants,"[24] thus tarring the

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15 NASC Brief at 11.
16 *Id.* at 5.
17 *Id.* at 4.
18 *Id.*
19 NRF Br. at 25.
20 NASC Br. at 7.
21 *Id.* at 5.
22 *Id.* at 3; NRF Br. at 12.
23 NASC Br. at 4.
24 *Id.* at 10.

entire enterprise of private Title III enforcement with the brush of these two bad actors.

Litigation by insult is not uncommon in the Title III context and may, again, stem from the fact that liability is so easily established. Rather than surveying their facilities and bringing them into compliance -- or raising legitimate, civilly-argued defenses -- many businesses resort to the type of name-calling present in the Defendant's *amicus* briefs here. The undersigned searched Westlaw's "Trial Court Documents - Civil Trial Documents" database for pleadings filed in Title III cases since 2002 that used one or more of the following terms: "vexatious;" "shakedown;" "abusive;" "serial;" "bilk;" "cottage;" "extort!;" or "drive-by." The search returned over 1,200 results. In many cases, identical sentences or even paragraphs appeared in pleadings in different cases involving different parties and different barriers -- but filed by the same defense counsel with, apparently, the same language ready to copy and paste from one pleading to the next.

D. Irrelevant Statistics.

The NASC *Amici* devote a good deal of their brief to reciting ADA case statistics sourced largely from blog posts by an ADA defense firm.[25] For example,

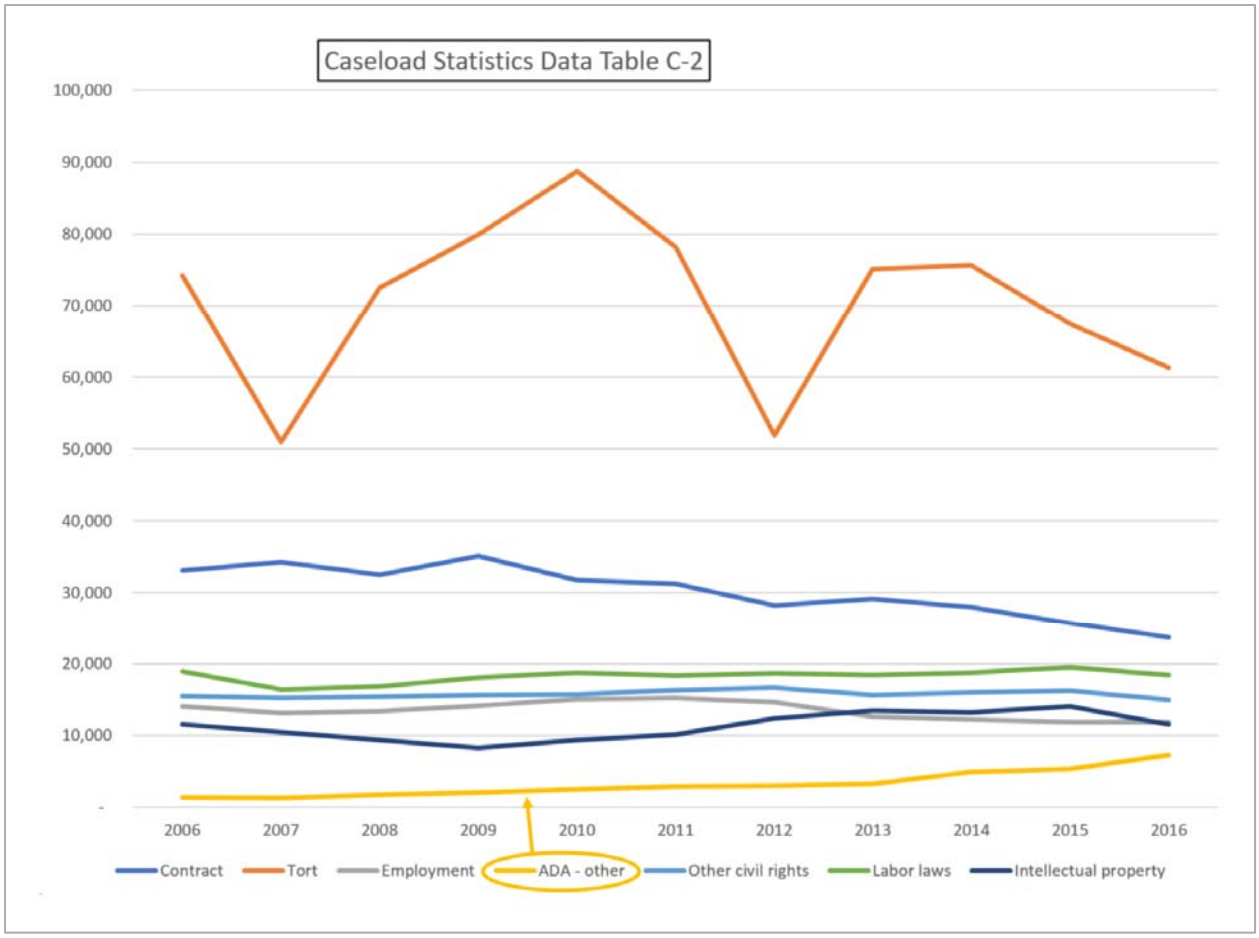
[25] NASC Br. at 6-7 (citing Minh N. Vu *et al.*, *2017 Federal ADA Title III Lawsuit Numbers 18% Higher than 2016*, https://www.adatitleiii.com/2017/05/2017-federal-ada-title-iii-lawsuit-numbers-18-higher-than-2016/ and Minh N. Vu et al., *ADA Title III Lawsuits Increase by 37* Continued.

the NASC *Amici* urge alarm that there were 6,601 Title III lawsuits in 2016 and that that number is projected to be 7,887 in 2017. The cited blog posts provide estimates that even the blog author warned "may not be bullet proof." *See* Mihn Vu *et al*., *2014 May Be a Banner Year for ADA Title III Lawsuit Filings*, https://www.adatitleiii.com/2014/08/2014-may-be-a-banner-year-for-ada-title-iii-lawsuit-filings/ (last visited on Jan. 11, 2018).

Even taking these numbers at face value, a bit of context reveals that there is no cause for alarm. The chart below, based on statistics published on www.uscourts.gov by the Administrative Office of the U.S. Courts, [26] shows that the number of cases filed under Titles II and III of the ADA (PACER's "ADA - Other" category) have increased gradually but remain consistently very low in contrast to other types of cases.

Percent in 2016, https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/).

[26] U.S. Courts Caseload Statistics Data Table C-2 for the period ending December 31 of each of the years in the chart. http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=c-2&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D= (last visited Jan. 11, 2018). Table C-2 compiles statistics for the number of various types of cases filed in federal court. These statistics only separately identified the category "ADA - Other" starting in 2006.



From 2006 to 2016, the percentage of "ADA - Other" cases in the federal civil caseload has varied from less than one percent to 2.5%.[27]

Ultimately, Defendant's *amici*'s recitation of insults and statistics lacks one crucial element: any evidence that these cases lack merit. To the contrary, as the Individual *Amicae* have experienced, even 27 years after the ADA, significant barriers remain common, and people with disabilities could not possibly stop their lives to file suit challenging each one. Instead, they often accept the discriminatory

[27] *Id.*

exclusion and find other, more welcoming, businesses. This has the effect -- as appears to be the case here -- that well-financed business chains feel safe ignoring the barriers at their facilities, waiting to remediate them until they hear from a disabled person with enough time and resources to complain or file a lawsuit.

The NASC *Amici* assert that these lawsuits do not occur because businesses are "suddenly abandoning their responsibility" to provide access. NASC Br. at 3. As the experiences of the Individual *Amicae* suggest, it may in fact be because many businesses never shouldered those responsibilities in the first place.

E. The Class Action Mechanism is Uniquely Well-Suited to Address the Concerns of Defendant's *Amici.*

Class certification addresses and prevents precisely the issues Defendant's *amici* warn of. The NASC *Amici* express concern that serial litigation results in "confidential individual settlement[s]" that "do[ ] not necessarily mean that the business has corrected the issue identified in the lawsuit." NASC Brief at 10. While this oddly condemns plaintiffs for defendants' insistence on confidential settlements and failure or refusal to remediate their discrimination, these problems are avoided when a class is certified: Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any class settlement which is, by definition, public, and most class settlements contain monitoring provisions, ensuring that the defendant complies.

Class treatment obviates the need for serial litigation by ensuring uniform chain-wide compliance, and makes such litigation less likely through the binding *res judicata* effect of a class judgment or settlement.[28] Class actions can address barriers systemically -- chain by chain -- and speed up the process of ensuring full and equal enjoyment of places of public accommodation.

As *Amica* Julie Reiskin explained, in an email to the undersigned, "Being a class representative is a significant commitment that I and others take seriously. Class actions are often the most appropriate way to resolve cases efficiently -- they allow for a global and permanent solution, the business can fix the problem, the terms of monitoring are agreed upon, and there is clarity on all sides. I am grateful to my peers who take on this role, and am honored to be the representative when it is appropriate. It is not a role anyone takes lightly and no attorney I know files class action litigation without a lot of thought."

CONCLUSION

For the reasons set forth above, *Amici Curiae* Katherine Corbett, Julie Farrar-Kuhn, Carrie Ann Lucas, Julie Reiskin, and the Civil Rights Education and Enforcement Center respectfully request that this Court affirm the decision of the district court.

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[28] *Cf. Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 318 (3d Cir. 2011) (noting that members of a class certified pursuant to Rule 23(b)(2) will be "bound by such judgment in the subsequent application of principles of *res judicata*.").

Respectfully submitted,

/s/ Amy Farr Robertson
Amy Farr Robertson
Colorado Bar No. 28980
Civil Rights Education and Enforcement Center
104 Broadway, Suite 400
Denver, CO 80203
303.757.7901

Counsel for *Amici Curiae* Katherine Corbett, Julie Farrar-Kuhn, Carrie Ann Lucas, Julie Reiskin, and the Civil Rights Education and Enforcement Center

Required Certifications

The undersigned counsel certifies as follows:

1. As required by Rule 32(g) of the Federal Rules of Appellate Procedure, that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains at most 6,300 words.

2. that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point type.

3. As required by Third Circuit Local Appellate Rules 28.3(d) and 46.1(e), that I am a member of the bar of this Court.

4. As required by Third Circuit Local Appellate Rule 31.1(c), that the text of the electronic brief is identical to the text in the paper copies, and a virus detection program Webroot Secure Anywhere version 9.0.19.36 has been run on the file and no virus was detected.

/s/ Amy Farr Robertson
Amy Farr Robertson
January 23, 2018

Certificate of Service

I certify that, on January 23, 2018, a true and correct copy of the foregoing Brief of *Amici Curiae* Katherine Corbett, Julie Farrar-Kuhn, Carrie Ann Lucas, Julie Reiskin, and the Civil Rights Education and Enforcement Center in support of Plaintiffs-Appellees was filed using the Court's electronic filing system and was served on the following individuals by FedEx overnight delivery:

Edwin J. Kilpela
ekilpela@carlsonlynch.com
Benjamin J. Sweet
bsweet@carlsonlynch.com
R. Bruce Carlson
bcarlson@carlsonlynch.com
Stephanie K. Golden
sgoldin@carlsonlynch.com
Carlson Lynch Sweet Kilpela & Carpenter, LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222

Counsel for Plaintiffs-Appellees

Teresa L. Jakubowski, Esq.
teresa.jakubowski@btlaw.com
Barnes & Thornburg
1717 Pennsylvania Ave., N.W.
Suite 500
Washington, DC 20006

Counsel for the National Retail Federation, International Council of Shopping Centers, National Federation of Independent Business, the Restaurant Law Center, Retail Litigation Center, Inc., and Chamber of Commerce of the United States of America

Maria G. Danaher, Esq.
maria.danaher@ogletreedeakins.com
Patrick J. Fazzini, Esq.
patrick.fazzini@ogletree.com
David H. Raizman, Esq.
david.raizman@ogletreedeakins.com
Ogletree Deakins
One PPG Place, Suite 1900
Pittsburgh, PA 15222

Counsel for Defendant-Appellant

Cary Silverman, Esq.
csilverman@shb.com
Shook Hardy & Bacon
1155 F Street NW
Suite 200
Washington, DC 20004

Counsel for the National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute

/s/ Amy Farr Robertson
Amy Farr Robertson