No. 17-2678

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CHRISTOPHER MIELO and SARAH HEINZL, *et al.*,

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* Disability Rights Pennsylvania and the National Disability Rights Network in support of Plaintiffs-Appellees

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* Disability Rights Pennsylvania and the National Disability Rights Network state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

Statement of Interest of *Amici Curiae*

Disability Rights Pennsylvania ("DRP") is the protection and advocacy system designated by the Commonwealth of Pennsylvania pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15041-15045, the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10827, and the Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e. DRP's mission is to protect the rights of and advocate for Pennsylvanians with disabilities so that they may live the lives they choose, free of abuse, neglect, discrimination, and segregation. Equal access to public accommodations, such as restaurants, theaters, stores, and businesses, is vitally important for people with disabilities so that they can fully participate in and benefit from community life. Architectural barriers at public accommodations preclude the ability of people with mobility disabilities, including those who use wheelchairs,

from equal access to the services and benefits offered by those public accommodations. DRP thus has an interest in vigorous enforcement of Title III of the Americans with Disabilities Act, including when appropriate through class action litigation.

National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States. Because architectural barriers prevent people with mobility disabilities, including those who use wheelchairs, from equally accessing the services and benefits offered by public accommodations, NDRN has an interest in effective and efficient

enforcement of Title III of the Americans with Disabilities Act, including, when appropriate, through class action litigation.

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

Nearly 28 years ago, Congress found that "individuals with disabilities continually encounter various forms of discrimination, including … the discriminatory effects of architectural, transportation, and communication barriers, …[and] failure to make modifications to existing facilities." 42 U.S.C. § 12101(a)(5). Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals," 42 U.S.C. § 12101(a)(7), and, to that end, enacted Title III of the Americans with Disabilities Act ("ADA"). Nearly three decades later, Appellant argues that it has had

insufficient notice that, having been required by the ADA to make its parking lots accessible, it must also maintain them in accessible working order.

Statement of the Issues; Statement of the Case; Statement of Facts

Amici incorporate by reference the Statement of the Issues, Statement of the Case, and Statement of Facts in the Brief for Plaintiffs-Appellees.

Argument

Appellant argues that this Court should undermine the substance of key aspects of the ADA in order to avoid having to address the adequacy of its own chain-wide parking lot maintenance policy in a single case. Instead, it claims to prefer to address the same question in separate cases involving each of its over 400 restaurants. The Due Process question has not properly been preserved, has no basis, and does not eliminate the common questions of law and fact existing in this case. In fact, the Due Process argument raises an additional question of law that is common to the class. Similarly, *amici* for Appellant argue that private enforcement, and class actions in particular, is somehow inappropriate and unduly burdensome and vexatious. In truth, as addressed in the brief of *amici curiae* Julie Farrar-Kuhn *et al.*, class actions are particularly appropriate and important to implementation of the physical accessibility requirements of the ADA in cases like this one, where they reduce trial burdens and increase efficiency for all parties.

I. Steak 'N Shake's Companywide Policies Create Common Issues of Fact and Law.

Appellant concedes that the violations identified by the Named Plaintiffs existed in its parking lots. (JA595 ¶11.) Whether this represents a failure of its maintenance policy or a pattern of violations, it creates questions of law and fact common to the class. Defendant raises, for the first time on appeal, arguments going to due process and private right of action. For the reasons set forth in the Brief for Plaintiffs-Appellees, these arguments should be disregarded. Defendant-Appellant also misconstrues both Rule 23 and the maintenance requirements of Title III.

A. Steak 'N Shake's Obligation to Maintain Accessible Features is Part and Parcel of Its Ongoing Statutory Obligation to Remove Barriers.

Title III of the ADA prohibits discrimination on the basis of disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). The statute specifically defines such discrimination to include failure to construct or alter facilities to be "readily accessible to and useable by" people with disabilities, *id.* § 12183(a), and failure to remove barriers in existing facilities where "readily achievable" to do so, *id.* § 12182(b)(2)(iv). The statute required the DOJ to issue implementing regulations as well as the Standards for Accessible Design. 42 U.S.C. § 12186(b).

The DOJ recognized that accessibility requirements in the Standards would be chimerical if accessibility features, once installed, were not maintained. Indeed, the requirement to maintain accessible features is part and parcel of the requirement to remove barriers on an ongoing basis. 42 U.S.C. §12182(b)(2)(iv); 28 C.F.R. § 36.304. Therefore, the implementing regulations, issued in 1991, require, sensibly, "A public accommodation shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." 28 C.F.R. § 36.211 ("Section 211"). It is disingenuous for Steak 'N Shake to assert, nearly twenty-seven years later, that the regulation did not provide it sufficient notice that it had to take steps to maintain the accessible features of its parking lots as part of its statutory ongoing barrier removal obligations.[1]

[1] Appellant argues, in a footnote, that there is no private right of action to enforce Section 211 because there is no private right of action to enforce the requirement in Title II of the ADA that state and local governments undertake a self-evaluation and transition plan. The Title II transition plan regulation was a paperwork exercise that some courts found did not directly benefit individuals with disabilities or directly implement the statute's requirements to achieve the "program access" obligation under Title II. By contrast, Section 211's requirement to maintain required accessible features is a substantive one that directly implements the statutory requirements to construct and alter facilities to be accessible, 42 U.S.C. § 12183(a) and the requirement to remove barriers to accessibility on an ongoing basis, 42 U.S.C. § 12182(b)(2)(iv), in addition to directly implementing the statutory mandate to ensure "full and equal enjoyment of

B. The District Court Did Not Create an Independent Obligation to "Inspect-and-Repair," but Looked to Appellant's Own Deficient Maintenance Policies and Procedures as Evidence Supporting Commonality.

Defendant argues that the District Court misconstrued Section 211 and argues that it does not require public accommodations to have a policy or procedure to inspect and repair accessible features. This is true: as long as facilities are, in fact, maintained to be accessible, it does not matter how that is accomplished. The question before the District Court was not whether Section 211 required a particular policy, but whether Appellant's existing companywide policy for maintaining its parking lots supported commonality under Rule 23(a)(2). In this case, Appellant relies on a set policy and procedure for inspecting and repairing its parking lots as its method for ensuring maintenance, yet it failed and/or refused to include accessibility review and remediation as part of that policy and procedure. Having chosen to adopt and utilize a companywide policy and procedure for maintenance, Appellant cannot now complain about the district court's ruling that the adequacy of this policy and procedure to maintain required accessibility provides a common question of law or fact, as well as a common remedy.

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the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

The Plaintiffs alleged -- and the district court found sufficient to support class certification -- that the Appellant's *existing process* for maintaining its facilities failed to meet its obligation to maintain accessible features and to remove barriers to accessibility. While Appellant has a policy and procedure to inspect and repair some aspects of its parking lots, it relies on individuals with disabilities to bring parking accessibility issues to its attention. (JA595 ¶¶6-8, 10.) Rather than imposing a requirement to have a particular policy or procedure, the District Court focused on Appellant's existing companywide policy for maintaining its parking lots and found there was sufficient evidence -- indeed, Appellant does not dispute this -- that the policy did not address the maintenance of accessible features or ensure readily achievable barrier removal, resulting in undisputedly noncompliant slopes.

Notably, Appellant does not dispute that accessible parking spaces and access aisles are required to be level, ADA Standards for Accessible Design, 28 C.F.R. Part 36, Subpart D ("ADA Standards") § 502.4, and that accessible routes are required to have running slopes no greater than 1:20 and cross slopes no greater than 1:48, *id.* § 403. The fact that Appellant's own maintenance policy and process does not provide for the identification or removal of those barriers is a question common to the class members. As the District Court explained, "the exploration of defendant's policy will produce common questions with common

answers." *Mielo v. Steak 'N Shake Operations, Inc.*, No. CV 15-180, 2017 WL 1519544, at *6 (W.D. Pa. Apr. 27, 2017) (JA at 12).

Commonality for purposes of class certification may be based either on a common legal or factual question. Therefore, even if Appellant's argument that its own maintenance policy were irrelevant, it would still face a class action regarding whether the barriers occurring in Appellant's parking lots are readily achievable to remove. The remedy would be the same – amendment of the maintenance policy and process that *Defendant itself has established*. As Rule 23(b)(2) recognizes, and as the Supreme Court has confirmed, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011), class actions are appropriate in cases where, as here, a common injunctive remedy is applicable to the class.

It is also worth noting that the District Court could easily have based class certification on the fact that allegedly Defendant relied solely on individuals with disabilities to identify deteriorating accessibility features in its parking lots. Utilizing a policy that shifts the responsibility for barrier identification and removal to individuals with disabilities would equally have violated Section 211's affirmative obligation to "maintain" accessible features.

The District Court did not read a requirement to "inspect-and-repair" into Section 211. Rather, Defendant chose to develop and implement a companywide maintenance policy that ignored longstanding statutory barrier removal obligations.

Having done so, it cannot now complain that the District Court is reviewing the adequacy of its maintenance policy and procedure. As discussed in Section II, such a review does not create a Due Process violation. Notably, such a Due Process issue, if raised with the district court, would be an additional question of law common to the class.

C. Section 211 Does Not Exempt Slope Requirements from the Maintenance Obligation.

Appellant argues that the language of Section 211 exempts some required accessibility features from the maintenance obligation. This argument is contradicted by the plain language of the regulation, which applies to "those features of facilities… that are required to be … accessible." The preamble to the regulation explains: "This section recognizes that it is not sufficient to provide features such as accessible routes, elevators, or ramps, if those features are not maintained in a manner that enables individuals with disabilities to use them." 28 C.F.R. pt. 36, App. C, § 36.211. Because accessible parking spaces, access aisles, and accessible routes in parking lots are required to be accessible under the ADA, as Appellant does not dispute, they are clearly required by Section 211 to be maintained in usable condition.

Appellant focuses on the word "operable" in Section 211, arguing that only mechanical equipment, such as elevators, can be said to be "operable," so other accessibility features are not required to be maintained. This argument stretches

credulity. If there were any doubt, the DOJ has put it to rest in the preamble to the regulation. 28 C.F.R. Pt. 36, App. B at 220 (1991 Section-By-Section Analysis), available at:

https://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.pdf.

("Failure of the public accommodation to ensure that accessible routes are properly maintained and free of obstructions… would also violate this part.") Further debunking Defendant's position, technical assistance materials published by the DOJ use the term "operable working condition" when describing a public entity's obligation to maintain the accessibility of non-mechanical features - including curb ramps, parking spaces and ramps. *See* U.S. Department of Justice, *ADA Guide for Small Towns*, Civil Rights Division, Disability Rights Section (April 2000), available at https://www.ada.gov/smtown.htm#anchor19789. Finally, accessibility features recognized by courts as required to be maintained pursuant to Section 211 have included non-mechanical features such as parking space markings, *Lozano v. C.A. Martinez Fam. Ltd. Partn.*, 129 F. Supp. 3d 967 (S.D. Cal. 2015), and the stable, firm and slip resistant floor and ground surfaces of an accessible roll-in shower, *Pollard v. TMI Hosp. GP, LLC*, No. 16-11281, 2017 WL 1077682 (E.D. Mich. Mar. 22, 2017).

Appellant also argues that the DOJ intended only for accessible routes to be kept free of obstructions and not to be kept accessible in other ways. To the

contrary, the DOJ made clear that accessible routes and other features must be both "maintained *and* free of obstructions." 28 C.F.R. Pt. 36, App. B at 220 (emphasis added). Moreover, here again, DOJ technical assistance materials directly contradict Defendant's attempts to narrow its obligations. In "Maintaining Accessible Features in Retail Establishments," the "maintenance list" for accessible parking includes "[m]aintain curb ramps and sidewalks to prevent large cracks and uneven surfaces from forming." ("Maintenance Guidance") (JA268-275) Further, the DOJ has recognized these types of maintenance obligations in consent decrees it has reached. *See e.g.,* Consent Decree reached in *United States of America v. Chris Ybarra, Barbara Ybarra and Blalock, Harris & Martin, Inc. d/b/a Cotton's Restaurant*, available at: https://www.justice.gov/sites/default/files/usao-sdal/pages/attachments/2015/04/23/cottonscd.pdf (Requiring that "[p]roper maximum cross slopes and parallel slopes shall be maintained in all accessible parking spaces, aisles, ramps and walkways.").

Appellant then argues that Section 211 fails to specifically mention slopes or use of a slope meter, implying that the failure to list every accessible feature and every tool for measuring accessibility means that the unenumerated items are not required at all. To the contrary, the Standards provide requirements for slopes on accessible routes and in accessible parking spaces and access aisles -- along with

ten chapters of standards governing most aspects of the built environment. The DOJ need not enumerate each of the specific requirements in each of the ten chapters of the Standards in order to be clear that each of them is required to be maintained, that barriers regarding all the Standards are required to be removed if readily achievable, and that altered areas must comply with all the Standards that apply to the altered area. Indeed, the DOJ took the opposite approach throughout the regulations, making clear that all the Standards are applicable unless an exception is specifically provided. Thus, if the DOJ wanted to exempt slopes from the maintenance requirement, it knew how to do so, just as it exempted newly constructed and altered public accommodations that are less than three stories or less than 3,000 square feet per story from the requirement to install an elevator. *See* Standards § 206.2.3.

Appellant also argues that the DOJ's Maintenance Guidance does not mention slopes and, therefore, does not require accessible slopes to be maintained. The technical assistance does mention "the parking, building entrance, route into and through the establishment, access to the store's goods and services, restrooms, cashier stations, and egress," but Appellant would, again, insist that the DOJ list every individual feature in order to bring it within Section 211's broad language. This is not consistent with the DOJ's approach to technical assistance, which leaves out numerous elements that are required to be accessible, such as restroom

stalls (2010 Standards § 603-604), accessible doors (2010 Standards § 404), carpet (2010 Standards §302.2), and dozens, if not hundreds, of other items that did not make the list of the most common maintenance failures.

II. An Inspect-and-Repair Obligation to Maintain Accessible Features Would Not Violate Due Process or Exceed the ADA's Statutory Mandate.

Even if Section 211 required Defendant to have a policy and procedure to periodically inspect and repair accessible features, that requirement would not violate Due Process for being unconstitutionally vague, nor would it exceed the ADA's statutory mandate. Moreover, if this constitutional argument were properly raised in the district court, it would constitute an addition question of law common to the class.

A. Section 211 Is not Unconstitutionally Vague.

This Court is required to give deference to the implementing regulations adopted by the DOJ if they are a permissible interpretation of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Cazun v. Attorney General of the United States*, 856 F.3d 249, 255 (3rd Cir. 2017). Appellant makes little attempt to argue that a requirement to maintain accessible features is not a reasonable interpretation of the statutory requirement to make facilities accessible when they are constructed or altered, and on an ongoing basis when they are existing.

As the Supreme Court has noted, and this Court has agreed, "[T]here are limitations in the English language with respect to being both specific and manageably brief." *United States v. Harriss*, 347 U.S. 612, 618 (1954); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3rd Cir. 1992). A prohibition need "not satisfy those intent on finding fault at any cost," in order to survive a void-for-vagueness challenge. *Harriss*, 347 U.S. at 618. Rather, a prohibition "will not be struck down as vague even though marginal cases could be put where doubts might arise." *Id.* This Court has, therefore, "embrace[d] the 'common sense' approach." *San Filippo*, 961 F.2d at 1137. In *San Filippo*, for example this Court found a public college discipline standard prohibiting "failure to maintain standards of sound scholarship and competent teaching", *id.* at 1127, to be sufficiently clear to prohibit a faculty member from exploiting other faculty as domestic servants, stating, "A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal… He would know that the standard did not encompass only actual teaching or research skills… It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers", *id.* at 1137.

It is difficult to refute that Section 211's requirement to "maintain [required accessible features] in operable working order" requires public accommodations to

take some action to identify and remediate features that become inaccessible. This is particularly clear when Section 211 is read in tandem with the obligation to remove barriers to access when doing so is readily achievable. Obviously, such identification and remediation would most easily and effectively be accomplished by having a policy to regularly inspect and repair those features. Indeed, Defendant adopted and implemented exactly such a policy to maintain other features of its parking lots. Such an obvious and reasonable means for meeting Section 211's maintenance requirement, using means actually adopted by the litigant, can hardly be said to be "so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984). Nor has the Appellant here suggested any other means by which it maintains the accessible features of its parking lots. The void-for-vagueness argument should end at this point.[2]

B. Section 211 Does not Exceed the ADA's Statutory Mandate.

Appellant argues that, to the extent the DOJ, in Section 211, made its "massive and internal"[3] obligation to inspect and repair accessible features privately enforceable, it contradicted or exceeded the mandates of the ADA.

[2] Appellant also appears to argue that it could not have understood that slope requirements were part of the maintenance obligation. This argument is the same as its argument that slope requirements are actually exempt from the maintenance argument, addressed in Section I.C.

[3] Appellant's Opening Brief at 32.

Appellant first argues that Congress, in Title III, did not provide a private right of action at all. However, the ADA's statutory language incorporates by reference the private right of action available for decades under the Civil Rights Act of 1964 and courts across the country have confirmed this private right of action, *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000); *Colorado Cross Disability Coalition v. Hermanson Family Ltd. Partnership I*, 264 F.3d 999, 1001-02 (10th Cir. 2001; *Kalani v. Starbucks Coffee Co.*, 698 Fed. Appx. 883, 885-86 (9th Cir. 2017); *Gomez v. Dade Cty. Fed. Credit Union*, 610 Fed. Appx. 859, 865 (11th Cir. 2015); *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 305, 307 (1st Cir. 2003). *Cf, Burkhart v. Widener Univ., Inc.*, 70 Fed.Appx. 52, 54 (3rd Cir. 2003. Appellant's argument is loosely based on *Alexander v. Sandoval*, 532 U.S. 275 (2001), to the effect that if, as it claims, no requirement for an inspect-and-repair policy is in the statute, a regulatory inspect-and-repair policy cannot be enforced privately. Even this narrower argument fails.

As discussed above, Section 211 does not mandate *how* accessible features must be maintained. Rather, it requires *that* they be maintained. Appellant has chosen to employ an inspect-and-repair process to maintain its parking lots. However, its process is allegedly inadequate because it fails to address accessibility features, including slope requirements for parking lots.

Far from requiring Congress to specifically enumerate every form of discrimination it intends to prohibit in a statute, *Sandoval* merely requires regulations to be within the scope of the statute's general prohibition in order to be privately enforced. Thus, although Title IX of the CRA does not explicitly prohibit retaliation on the basis of sex, the regulation prohibiting such retaliation is privately enforceable because it is a form of intentional sex discrimination broadly prohibited by the statute. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 (2005) ("Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also 'to provide individual citizens effective protection against those practices.' We agree with the United States that this objective 'would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.' If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result.") (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704, 99 S.Ct. 1946, 1961 (1979). Just as regulations prohibiting retaliation directly implement Congress' prohibition of intentional discrimination, Section 211's maintenance obligation directly implements Congress' prohibition of inaccessible facilities.

Title III of the ADA requires public accommodations to ensure that people with disabilities have equal enjoyment of their facilities, and specifically requires public accommodations to (1) ensure that new or altered facilities comply with the Standards and (2) remove accessibility barriers in facilities that pre-date the ADA if it is readily achievable to do so. The DOJ's regulations implementing Title III provide accessibility Standards, provide limitations on when those Standards must be met, and note that required accessibility features must be maintained on an ongoing basis. Surely, Congress did not intend that, having required new and altered facilities to be accessible, and having required existing accessibility barriers to be removed, public accommodations should then be allowed to destroy those accessibility features or ignore them until they became unusable. Far from a statute that forbids intentional discrimination implemented by a regulation forbidding unintentional disparate impacts, as in *Sandoval*, Section 211 directly implements Congress' explicit requirement that accessibility features be incorporated and maintained, and new and existing barriers be removed.

Conclusion

For the reasons set forth above, *Amici Curiae* respectfully request that this Court affirm the decision of the district court.

Respectfully submitted,

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REQUIRED CERTIFICATIONS

Undersigned counsel provides the following certifications required by the Federal Rules of Appellate Procedure and/or Third Circuit Local Appellate Rules:

1. As required by Rule 32(g) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains at most 6,500 words.

2. I certify 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), I certify that I am a member of the bar of this Court.

4. As required by Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text in the paper copies, and the virus detection program Bitdefender Endpoint Enterprise, version 6.2.28.973 has been run on the file and no virus was detected.

/s/ Sharon Krevor-Weisbaum
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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* Disability Rights Pennsylvania and National Disability Rights Network in support of Plaintiffs-Appellees was filed using the Court's electronic filing system and was served on the following individuals by UPS overnight delivery:

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