No. 17-2678

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STEAK 'N SHAKE OPERATIONS, INC.,

Appellant-Defendant,

v.

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

Appellees-Plaintiffs.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL GROCERS ASSOCIATION, AND FOOD MARKETING INSTITUTE IN SUPPORT OF APPELLANT-DEFENDANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute each state that they have no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

Respectfully submitted,

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The National Association of Convenience Stores (NACS), headquartered in Alexandria, Virginia, is an international trade association that represents both the convenience and fuel retailing industries, with more than 2,200 retail and 1,800 supplier company members. The U.S. convenience industry has more than 154,000 stores across the United States. About 63 percent of the stores in the industry are owned by single-store operators. NACS is the pre-eminent representative of the interests of convenience store operators.

The National Grocers Association (NGA) is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating a variety of formats. The independent grocery sector is accountable for close to one percent of the nation's overall economy and is responsible for generating $131 billion in sales, 944,000 jobs, $30 billion in wages, and $27 billion in taxes. NGA members include over 1,400 member retail companies, representing approximately 7,000 store fronts across the United States. Approximately 1,100 of NGA's members are small businesses.

The Food Marketing Institute (FMI) proudly advocates on behalf of the food retail industry, which employs nearly five million workers and represents a combined annual sales volume of almost $800 billion. FMI member companies

operate nearly 33,000 retail food stores and 12,000 pharmacies. FMI membership includes the entire spectrum of food retail venues; single owner grocery stores, large multi-store supermarket chains, pharmacies, online and mixed retail stores. In addition, FMI has almost 500 associate member companies that provide products and services to the food retail industry.

Amici's member companies include places of public accommodation that are subject to the requirements of Title III of the Americans with Disabilities Act of 1990. *Amici* seek to ensure that lawsuits brought under Title III address actual barriers to the ability of customers with disabilities to access public accommodations, not hypothetical noncompliance issues identified by lawyers and their paid staff. As *Amici's* members operate within the Third Circuit and have been targeted in similar litigation, this appeal is of significant interest to them.

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties have consented to its filing.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), no party's counsel authored this brief in whole or in part. No party, nor any party's counsel, nor any person other than *amici*, their members, or their counsel contributed money to fund preparing or submitting this brief.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

Whether Plaintiffs have standing to bring a nationwide class action asserting systematic accessibility violations of the Americans with Disabilities Act (ADA) and seeking injunctive relief applicable to hundreds of restaurant locations when Plaintiffs visited only two locations and rely on visits to six other locations by a paid employee "investigator" of the Plaintiffs' law firm to allege violations that they did not personally encounter at locations that they never visited.

INTRODUCTION AND SUMMARY OF ARGUMENT

The number of ADA disability access lawsuits has spiked. This surge in litigation does not stem from restaurants, convenience stores, supermarkets, or other places of public accommodation suddenly abandoning their responsibility to provide an environment accessible to all of their customers. Rather, as cases such as this show, the lawsuits are a result of attorney-generated litigation that has become a cottage industry.

Here, the District Court certified a class action that would impose obligations on hundreds of Steak 'N Shake restaurants when the Plaintiffs visited just two locations and an "investigator"—an employee of the Plaintiffs' law firm—visited the other six. *Amici* respectfully submit this brief to place this case in the broader context of ADA litigation and amplify why Plaintiffs lack standing to

challenge any purported accessibility limitations at the six locations that they did not visit, but were only visited by Plaintiffs' investigators.[2]

First, these types of "drive-by" ADA lawsuits are plaguing businesses large and small. *See Drive-by Lawsuits*, CBS News, 60 Minutes, Dec. 4, 2016, *at* https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/. They are brought by a small number of law firms, often with the same individuals repeatedly serving as plaintiffs. There are thousands of ADA requirements—ranging from the height of a mirror in a bathroom to the angle at which water can come out of a drinking fountain. *See generally* U.S. Dep't of Justice, 2010 ADA Standards for Accessible Design (Sept. 15, 2010), *at* https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf. If a failure to fully comply with each of these requirements is to potentially serve as the basis for a nationwide class action lawsuit, then, at the very minimum, there must be an actual injury to an individual who falls within the ADA's protective scope. This demand, which is a requirement of Article III standing, is critical to ensuring that the ADA continues to address real problems and is not misused to make extortionate demands on businesses.

[2] *Amici* agree with, and fully join, Steak 'N Shake's standing arguments as to the two visited locations. Plaintiffs lack standing as to these two locations because, as Steak 'N Shake demonstrates, they are unlikely to return to those locations and an injunctive relief would not prevent future harm. *See* Appellant's Opening Br. at 55-57.

Second, Plaintiffs have manufactured standing for a nationwide class action by visiting only one Steak 'N Shake location each, retaining hired guns to generate reports as to other locations, and then claiming that they are deterred from visiting locations they had no interest in patronizing in the first place. Here, the investigator visited each location for five to ten minutes each and completed a "checklist" developed by the Plaintiffs' firm. Based on this cursory and formulaic observation, he found that one or more of the restaurants' accessible parking spaces, access aisles, or routes to the store entrance had slopes that he measured as exceeding 2.1%. Yet there was no cognizable injury: a disabled plaintiff never visited these restaurants, let alone encountered a problem there. And nothing in the record suggests that the investigator was an individual with a disability.

Amici seek to ensure that standing is not gamed by way of this strategic bootstrapping, that a personal stake remains the touchstone of Article III standing, and that only proper plaintiffs with personal encounters with accessibility barriers are able to activate the power of the federal courts. The practical consequence of the District Court's ruling is to invite law firms to pursue relief that is well beyond the scope of their client's personal injuries. It raises the specter that courts may reach matters outside of the well-placed limits of the courts' Article III authority and threatens to promote litigation against countless restaurants and retailers for alleged violations found not by customers who use the establishments, but by

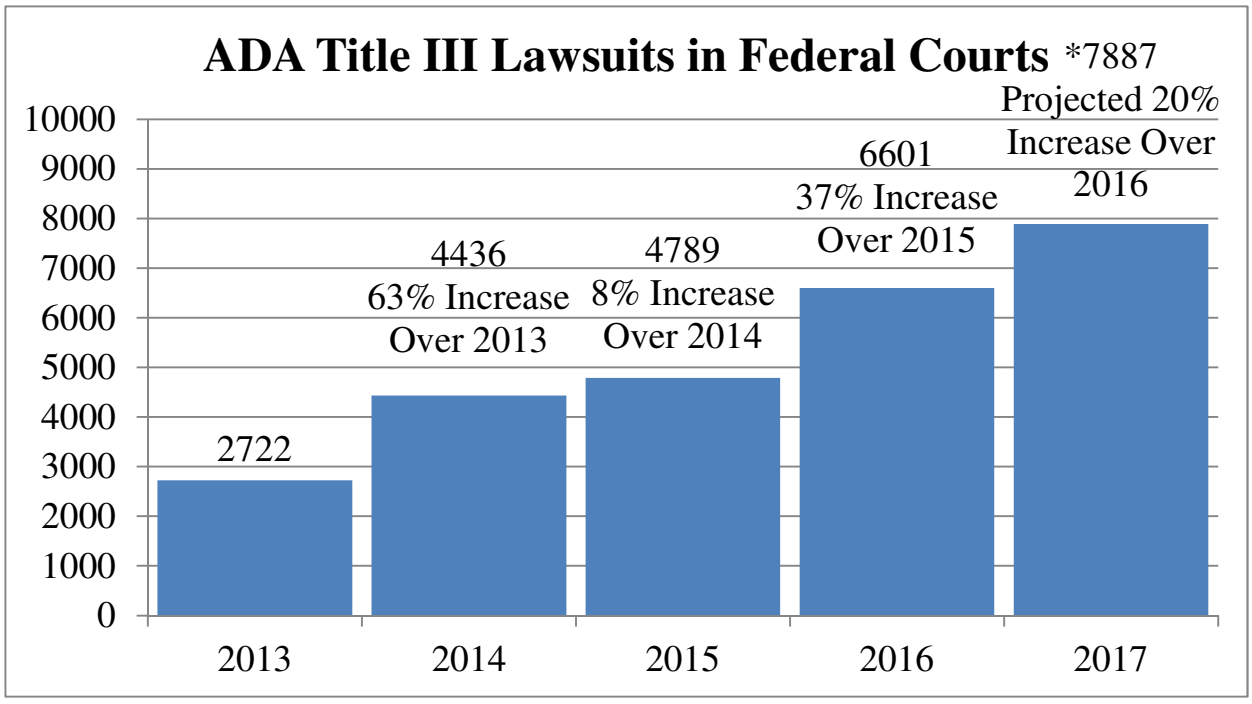
nondisabled law firm-paid detectives taking measurements. The District Court's ruling unleashes nationwide class action litigation where, at most, there are individual claims involving single locations. The District Court's ruling must be reversed, lest standing be handed to investigators under the guise of proper plaintiffs.

ARGUMENT

I. THE SURGE OF ADA LITIGATION MAKES IT PARTICULARLY IMPORTANT TO PRECLUDE CLAIMS THAT ARE NOT ROOTED IN ACTUAL INJURIES TO INDIVIDUALS WITH DISABILITIES

Unless courts strictly require ADA accessibility claims to fulfill the basic requirements of Article III standing, law firms will bring increasingly speculative claims where no individual with a disability experienced an actual harm.

The number of lawsuits filed under Title III of the ADA in federal courts has nearly tripled over the past five years and is set to break another record in 2017, according to an analysis of federal dockets by the Seyfarth Shaw LLP. *See* Minh N. Vu et al., *2017 Federal ADA Title III Lawsuit Numbers 18% Higher than 2016*, ADA Title III News & Insights, May 9, 2017, *at* https://www.adatitleiii.com/2017/05/2017-federal-ada-title-iii-lawsuit-numbers-18-higher-than-2016/; Minh N. Vu et al., *ADA Title III Lawsuits Increase by 37 Percent in 2016*, ADA Title III News & Insights, *at* https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/. These numbers do not capture the numerous demand letters



Source: Seyfarth Shaw data based on PACER. *2017 Projection based on filings between January and April 2017.

law firms send to businesses asserting accessibility claims and the extraordinary legal and settlement cost they impose on businesses. *See* Toni Cannady, *Avoiding the Website Accessibility Shakedown*, ABA Banking J., vol. 2, no. 2, Feb. 6, 2017, at 51, *available at* 2017 WLNR 8527414 (reporting evolution of ADA accessibility claims from physical barriers to ATMs to websites and indicating many cases settle after receipt of a demand letter without a lawsuit being filed).

Nearly ninety percent of these types of lawsuits are concentrated in federal courts in just nine states. *See* Vu, *ADA Title III Lawsuits Increase by 37 Percent in 2016*. Pennsylvania is among the ADA litigation "hot spots," placing eighth in the

nation. *See id.* This concentration stems from certain law firms in those jurisdictions that have developed a practice of generating ADA claims, often relying over and over on the same individuals to serve as class representatives. *See, e.g.*, Amy Shipley & John Maines, *Region Leads Disability Lawsuits*, Sun Sentinel, Jan. 12, 2014, at 1A, *available at* 2014 WLNR 938769 ("Just five attorneys and a handful of plaintiffs brought almost two-thirds of the nearly 700 disabled-access suits in Florida's southern district in 2013."). It is not because restaurants, convenience stores, and grocery stores in these states ignore their legal obligations. While states such as California draw many ADA accessibility lawsuits because of state statutes that authorize plaintiffs to recover compensatory or statutory damages in addition to seeking injunctive relief, *see* Cal. Civ. Code § 52(a), use of the class action mechanism and the prospect of recovering attorneys' fees under federal law provide alternative incentive to bring such litigation.

For example, according to Seyfarth Shaw's analysis, 21 of the 135 Title III lawsuits filed in federal court in Pennsylvania in 2014 were filed on behalf of one of the plaintiffs in this case, Christopher Mielo. *See* Minh N. Vu & Susan Ryan, *ADA Title III Lawsuits Surge by More than 63%, to Over 4400, in 2014*, ADA Title III News & Insights, Apr. 9, 2015, *at* https://www.adatitleiii.com/2015/04/ada-title-iii-lawsuits-surge-by-more-than-63-to-over-4400-in-2014/. Many of

Pennsylvania's ADA accessibility lawsuits are filed in the Western District because Carlson Lynch Sweet Kilpela & Carpenter, the Plaintiffs' firm here, is based in Pittsburgh. *See* Carrie Salls, *Website ADA Complaince Cases Spike*, Pa. Rec., Oct. 5, 2016, *at* https://pennrecord.com/stories/511014844. A PACER search indicates that this firm has filed at least 150 ADA accessibility lawsuits in federal courts in recent years, including dozens with the same class representatives. *See also* Jon Schmitz, *Unfinished Business*: *Landmark Legislation has Changed Standards and Improved Lives*, Pittsburgh Post-Gazette, May 3, 2015, at A1, *available at* 2015 WLNR 12873704 (reporting R. Bruce Carlson has filed more than 100 ADA accessibility lawsuits in recent years against banks and retailers).

Law firms and their clients often identify a particular type of accessibility issue, and then bring the same claim over and over against different businesses. *See, e.g., Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. 14-cv-1455, 2016 WL 2347367, at *6 (W.D. Pa. Jan. 27, 2016) (recommending certification of nationwide class action alleging Cracker Barrel had inadequate ADA compliance policies based on sloped handicapped parking space where plaintiff visited single location and Carlson Lynch investigators then visited locations across seven states). A PACER search reveals that the class representatives in this case through their counsel have filed similar lawsuits alleging excessive slopes or other accessibility issues in parking lots against drug stores, such as Walgreens and

CVS; restaurants, such as Applebee's, Bob Evans, Boston Market, Cracker Barrel, Darden Restaurants (Olive Garden), McDonald's, and Starbucks; retailers such as AutoZone, Best Buy, Dollar Tree, HHGregg, and Staples; supermarkets, such as Giant Eagle, gas stations including Sunoco and Kwik-Fill, and many others. Even local family-owned businesses such as Levin Furniture and Kuhn's Market have faced such claims.

Occasionally, the number of demand letters, lawsuits, and baseless allegations reaches such an extraordinary level that courts have named serial plaintiffs as "vexatious litigants" and imposed sanctions on the law firms that file them. *See, e.g.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007) (involving plaintiff who had filed about 400 ADA accessibility lawsuits in California's federal district courts); *see also* David Barer, *State Bar Sues ADA Lawyer Omar Rosales for Professional Misconduct*, KXAN-TV, Sept. 12, 2017, *at* http://kxan.com/2017/09/12/state-bar-sues-ada-lawyer-omar-rosales-for-professional-misconduct/ (reporting Texas State Bar action against attorney who peppered healthcare providers with letters asserting their websites violated ADA accessibility standards and demanded $2,000 to settle unfiled lawsuits).

More often, these lawsuits end with a confidential individual settlement, which does not necessarily mean that the business has corrected the issue identified in the lawsuit. *See* Helia Garrido Hull, *Vexatious Litigants and the ADA:*

Strategies to Fairly Address the Need to Improve Access for Individuals With Disabilities, Cornell J. L. & Pub. Pol'y 71, 74 (2016) ("Often, attorneys bringing the lawsuits are paid fees and costs while the underlying ADA violation that gave rise to the suit is left uncorrected."). Rather, a private settlement indicates that the class representative will receive a modest sum and the attorneys who brought the case will receive several thousand dollars in fees. *See* Jim Boyle, *Eight Plaintiffs Filing 61 Percent of Americans with Disabilities Act Lawsuits in Pennsylvania*, Pa. Rec., Feb. 3, 2015, *at* https://pennrecord.com/stories/510554426.

Businesses threatened with these lawsuits understand that if a court turns a customer's experience at a single location into a nationwide class action, what could have been a small nuisance settlement becomes a far more costly demand. *See, e.g.*, Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, *Heinzel v. Cracker Barrel Old Country Store, Inc.*, No. 14-cv-1455 (W.D. Pa. May 12, 2017) (Doc. 164) (requiring Cracker Barrel to implement a national ADA compliance policy for parking facilities for 600 stores, pay class representative $7,500, and pay plaintiffs' lawyers $830,000 in fees and expenses).

II. ARTICLE III STANDING RESTRICTS ADA ACCESSIBILITY LAWSUITS TO CLAIMS THAT WILL REMEDY ACTUAL BARRIERS TO ACCESS TO DISABLED PLAINTIFFS; IT DOES NOT PERMIT INVESTIGATOR-GENERATED CLAIMS

For at least two reasons, the District Court erred in holding that Plaintiffs' standing reaches the six locations that Plaintiffs did not visit, but that were visited by Plaintiffs' investigator: (1) a cognizable injury-in-fact must be predicated on the personal experiences of those protected by the challenged statute, yet Plaintiffs did not visit the six locations in question and, for their part, the investigators are not covered by Title III, and (2) to the extent that a plaintiff may be deterred from visiting a facility, Plaintiffs have not visited and have no identifiable interest in visiting the six additional locations.

A. Plaintiffs Did Not Personally Encounter Any Discrimination at the Six Locations Solely Visited by the Investigators

A plaintiff must have standing in order to activate the power of the federal courts. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing is "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Id*. "[T]he irreducible constitutional minimum of standing contains three elements": first, "the plaintiff must have suffered an injury in fact," second, "the injury has to be fairly . . . trace[able] to the challenged action of the defendant," and third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555,

560-61 (1992) (internal quotes and citations omitted; alterations in original). The party seeking to invoke the power of the federal courts bears the burden of proving the existence of these elements. *See id.* at 561. These elements are an "indispensable part of the plaintiff's case," *id.*, that must be present "at all stages of the litigation," *Public Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997).

The Supreme Court and federal circuit courts have applied these general standing principles in the context of investigators and testers. *See Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (Posner, J.) (recognizing investigators are paid testers). The Court has explained that the testers' experiences can support standing only when the testers (1) have personally experienced harm, and (2) are protected by the statute in question.

For example, in *Havens Realty Corporation v. Coleman*, an African-American tester – who posed as a home renter or purchaser to collect evidence of potential discriminatory housing practices – was wrongly told that no apartments were available, while white testers were advised that apartments were so available. 455 U.S. 363, 374 (1982). The Court held that this African-American tester had standing to bring suit under the Fair Housing Act ("FHA"), which prohibits discrimination in housing on the basis of race. *Id.* at 372-79.

That the tester herself was personally and directly subject to discriminatory actions reflects the Supreme Court's long-standing requirement that an injury-in-fact be predicated on a personal harm. *See Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a personal stake in the alleged dispute, and that the alleged injury suffered is particularized as to him."); *see also DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006) ("A plaintiff must allege personal injury") (internal quotes and citation omitted); *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979) ("In order to satisfy Art. III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."); *Warth*, 422 U.S. at 502 ("Petitioners must allege and show that they personally have been injured."); *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972) (recognizing injury-in-fact "requires that the party seeking review be himself among the injured").

Moreover, that the tester in *Havens Realty* also was protected by the FHA is consistent with the Supreme Court's long-standing constitutional and prudential requirements that an individual must be covered by a statute to be harmed in a cognizable sense. *See Lujan*, 504 U.S. at 560 (finding an injury-in-fact must implicate a "legally protected interest"); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (recognizing an alleged harm must be

within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."); *see also Dwivedi*, 895 F.2d at 1526 (finding "someone whose substantive rights have *not* been invaded" lacks an injury-in-fact) (emphasis in original).

These dual principles apply to other anti-discrimination statutes, *see*, *e.g.*, *Kyles v. J.K. Guardian Sec. Servs., Inc.,* 222 F.3d 289, 298-300 (7th Cir. 2000) (following *Havens Realty* to find that African-American testers had standing under Title VII of the Civil Rights Act of 1964), including Title III of the ADA. In *Houston v. Marod Supermarkets, Inc.*, a tester visited a grocery store allegedly to determine if it was complaint with Title III. 733 F.3d 1323 (11th Cir. 2013). Importantly, the tester had twice personally visited the grocery store whose architectural barriers he was contesting, *id*. at 1336, and he was an individual with a disability, specifically a paralyzed man confined to a wheelchair, *id*. at 1325. As a result, the Eleventh Circuit held that the tester had standing. *Id*. at 1328-34. Courts likewise have found standing where individuals, fishing for accessibility problems for purposes of suit under Title III, personally encountered the problems and were themselves individuals with disabilities within the meaning of Title III. *See Tandy v. City of Wichita*, 380 F.3d 1277, 1287 (10th Cir. 2004) (plaintiffs frequently used the bus system, and were blind, deaf, or had mobility limitations).

In this case, the District Court held that Plaintiffs could predicate their Title III suit not only on the two Steak 'N Shake locations that they visited, but also based on the six additional locations visited by Plaintiffs' investigators. (JA 46-47.) This expanded standing, which was used to support nationwide class certification, is inconsistent with the Supreme Court's standing jurisprudence. *See generally Knick v. Township of Scott*, 862 F.3d 310, 318 (3d Cir. 2017) (recognizing "[i]njury in fact . . . is often determinative") (internal quotes and citation omitted).

First, it is undisputed that Plaintiffs did not visit, let alone personally encounter, any accessibility issues at the six locations visited by the investigators. To allow Plaintiffs to contest these accessibility limitations would be to flout Supreme Court precedent, and to sever the critical link between Article III standing and personal stake. Second, Title III prohibits discrimination against individuals with disabilities. 42 U.S.C. § 12182(a); *see also* 42 U.S.C. § 12102 (defining an individual with a disability). There is no indication that the investigator is an individual with a disability within the meaning of Title III. Thus, he is beyond the scope of the class of individuals who can be harmed under Title III and who can be injured for purposes of Article III.

While some courts have authorized plaintiffs to enlarge their Title III suits beyond the specific accessibility barrier they encountered at a place of public

accommodation, those courts have held that a plaintiff who personally encounters an accessibility issue may press additional issues only at *that* single establishment. *See, e.g., Kreisler v. Second Ave. Diner Corp*., 731 F.3d 184, 188 (2d Cir. 2013) ("[O]nce a plaintiff establishes standing with respect to one barrier in a place of public accommodation, that plaintiff may bring ADA challenges with respect to all other barriers on the premises that affect the plaintiff's particular disability."); *Steger v. Franco, Inc.,* 228 F.3d 889, 893-94 (8th Cir. 2000) (same). Plaintiffs here are not only seeking to attack additional accessibility issues at the locations that they visited, as these cases would permit. Their desired expansion is to other locations entirely.

In sum, the Supreme Court's standing jurisprudence, including its ruling in *Havens Realty*, authorizes testers or investigators to support standing only when the testers or investigators are themselves harmed and at a minimum are protected by the challenged statute. Here the District Court unduly expanded Plaintiffs' standing beyond their personal experience, permitting investigators who are not individuals with disabilities to support Plaintiffs' purported injury-in-fact and thereby enabling Plaintiffs to expand their suit beyond the locations that they have visited.

B. Plaintiffs Are Not Deterred from Locations They Have Not Visited and Otherwise Did Not Intend to Visit

Plaintiffs argue that they are deterred from patronizing Defendant's establishments because of the alleged ADA violations. (*See* JA 86-87, 93.) The Supreme Court has suggested that a plaintiff need not engage in the "futile gesture" of visiting an establishment known to have accessibility problems. *See International Bhd. of Teamsters v. United States,* 431 U.S. 324, 365-66 (1977). But to avoid the personal encounter prerequisite to standing, a plaintiff must demonstrate (1) actual knowledge of the accessibility issues at the relevant establishments, and (2) an identifiable intent to visit those specific establishments. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Serv., Inc.,* 528 U.S. 167, 184-85 (2000). For example, courts find standing under a deterrence theory where the plaintiffs are aware of accessibility limitations at the store that they have visited in the past, and to which they intend to return. *See Doran v. 7-Eleven*, 524 F.3d 1034, 1040-41 (9th Cir. 2008) (plaintiff was deterred from visiting a single store that he had been to ten to twenty times); *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) (plaintiff was deterred from visiting a single market that he had visited and intended to re-visit).

Assuming that Plaintiffs have knowledge of the accessibility issues scavenged by the investigators, the District Court erred in holding that Plaintiffs meet the intent prong of deterrence. Plaintiffs allege an interest in visiting only the

two establishments they already visited. (*See* JA 92-93.) Plaintiffs also state that they intend to "return to Defendant's restaurants" without referencing any locations. (*See id.* at 93.) The use of the word "return" suggests, however, that they will visit only those (two) establishments which they already have visited. *See* Webster's Third New International Dictionary 1941 (1966) (defining "return" as "to go back or to come back again").[3]

The District Court noted that Plaintiffs "live in close proximity to some of the Defendants' locations, and enjoy the restaurants' food and service," adding that "the decision to visit such establishments is typically impulsive, supporting a likely intent to return." (JA 47.) Yet the District Court cites no authority for the remarkable proposition that impulse is sufficiently definitive to suffice for an actual or imminent injury-in-fact, or to be anything other than a "some day" intent to visit Steak 'N Shake establishments. *See Lujan*, 504 U.S. at 564 ("'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be" are insufficient to establish an actual or imminent injury-in-fact) (emphasis in original). At a more fundamental level, the nature of an impulse is that it is not susceptible to deterrence or identification;

[3] This theoretical intent to return is also unsupported by the record. As Steak 'N Shake notes, Plaintiff Mielo testified that he encountered slopes at the restaurant in May or June of 2014 or 2015, but had not returned to the restaurant at the time of his 2016 deposition. Plaintiff Heinzl now appears to live in Arizona. *See* Appellant's Opening Br. at 56-57.

it is a spur of the moment action not reflective of deliberation or planning. In other words, by framing Plaintiffs' intent to visit Steak 'N Shake facilities as an impulse, the District Court implicitly recognized the absence of actual or imminent intent.

Even if an impulse is a viable intent in general, the District Court does not tie that impulse to the specific establishments visited by the investigators. The District Court also stated that Plaintiffs live near "some" of Defendant's restaurants, without giving any indication as to which, if any, of the establishments the Court had in mind. Rather than connect Plaintiffs' amorphous intent to identified establishments, the District Court opened up Plaintiffs' standing to all of them. The lack of definitiveness cannot be squared with *Lujan* and its progeny.

An abstract interest in visiting "some" of Defendant's facilities is no meaningful interest at all. One cannot be deterred from visiting a location that one had no intention of visiting in the first place. *See Ervine v. Desert View Regional Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014) (rejecting standing on a deterrence theory, where the plaintiff was allegedly aware of barriers to access at the defendant's facility, but where the plaintiff had "no imminent plans to return"). In other words, Plaintiffs cannot manufacture standing by having investigators visit facilities that the Plaintiffs never visited, only to later argue that they were deterred from visiting those very facilities.

Nor can Plaintiffs claim that a high probability of encountering access issues at Defendant's establishments absolves them from predicating their complaint on personal experience. In limited circumstances, courts have found that a plaintiff will be imminently injured by the defendant's conduct where the likelihood of an injury is significant. For example, a court held that the plaintiffs' actual knowledge of accessibility issues at *each* school precluded the plaintiffs from having to base their complaint on actual or imminent harm. *See Bacon v. City of Richmond*, 386 F. Supp.2d 700, 703 (E.D. Va. 2005). Likewise, a court held that the plaintiffs, golfers, need not have personally encountered disability discrimination at each of the defendant Marriott's twenty-six nationwide golf courses, as the defendant had notified the plaintiffs that there were accessibility limitations at *each* of the locations. *Celano v. Marriott Int'l, Inc.,* No. C 05-4004 PJH, 2008 WL 239306, at *6-7 (N.D. Cal. Jan. 28, 2008); *see also Civil Rights Educ. & Enforcement Ctr. v. Hospitality Properties Trust*, 867 F.3d 1093 (9th Cir. 2017) (finding plaintiffs were deterred from visiting hotels they called, as hotel staff informed them that hotels did not have accessible vans). Moreover, in *Tandy*, the Tenth Circuit did not demand that the plaintiffs, passengers with disabilities, identify specific buses with accessibility limitations, as the plaintiffs presented evidence that a frequent passenger would encounter such limitations during twenty to thirty percent of all rides. 380 F.3d at 1284.

Here, by contrast, even if the locations visited by the investigator are included, Plaintiffs have alleged ADA violations at only eight of over 400 locations, or two percent—well short of the 100 percent set forth in *Bacon* and *Celano*, and the twenty to thirty percent set forth in *Tandy*.

Finally, Plaintiffs cannot predicate any cognizable injury on reports conducted by an investigator. In *Chapman v. Pier 1 Imports (U.S.) Inc.*, the Ninth Circuit considered whether a plaintiff could base standing on an accessibility survey that identified several purported federal and state accessibility violations. 631 F.3d 939 (9th Cir. 2011) (en banc). The full court held that, while a Title III plaintiff may ground standing in a personal encounter with discrimination or in a deterrence rationale, the plaintiff did not have standing because the survey did not "connect[] the alleged violations to [the plaintiff's] disability, or indicat[e] whether or not he encountered any one of them in such a way as to impair his full and equal enjoyment of the [defendant's store]." *Id*. at 954. The investigator's reports in this case are similarly hypothetical and speculative, identifying alleged accessibility issues at restaurants that the Plaintiffs did not visit or encounter.

For these reasons, Plaintiffs cannot, consistent with the Supreme Court's standing requirements, bring the six establishments visited by an investigator within the ambit of their complaint against Defendant, or use ADA compliance issues they did not experience to support standing to sue on behalf of a nationwide

class. Under the Supreme Court's standing jurisprudence, injury-in-fact in the tester context only exists as to the two locations visited by Plaintiffs and not the additional six visited by the investigators. Plaintiffs have standing to bring an individual lawsuit to address accessibility issues at those particular locations. They may also have *standing* to bring a class action on behalf of individuals with disabilities who visited those two locations. *See Timoneri v. Speedway, LLC*, 186 F. Supp.3d 756, 762-64 (N.D. Ohio 2016) (striking class allegations with respect to all store locations that the plaintiff had not visited and reserving its ruling on whether Plaintiff could meet Rule 23 prerequisites should he pursue a class action limited to the property Plaintiff visited). Only then, with respect to claims for which there is standing, may a court consider class certification and, as Appellant's Brief shows, even for the two locations visited, the commonality and numerosity requirements are not met. *See* Appellant's Opening Br. at 36-53. Most troubling is the lack of any showing that individuals with disabilities, other than the class representatives, experienced accessibility problems at those locations.

In sum, principles of standing do not permit Plaintiffs to convert their limited claim into a nationwide class action lawsuit. The District Court's ruling to the contrary must be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's decision.

Respectfully submitted,

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Dated: November 20, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify the Brief of *Amici Curiae* National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using MS Word in 14-point Times New Roman.

Pursuant to Local Rule 31.1(c), I hereby certify that the hard copy and the electronic copy of this brief are identical. The electronic copy has been virus-scanned using antivirus software, McAfee, version 8.8.0, and no virus was detected.

/s/ Cary Silverman
Cary Silverman

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d), I hereby certify that I am a member of the bar of this Court.

/s/ Cary Silverman
Cary Silverman

Dated: November 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* National Association of Convenience Stores, National Grocers Association, and Food Marketing Institute with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system on November 20, 2017. Ten paper copies of the brief were deposited in U.S. Mail addressed to the Court. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CF/ECF system.

/s/ Cary Silverman
Cary Silverman

Dated: November 20, 2017