No. 13-55862

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNDA BUTLER,
Plaintiff-Appellant,

vs.

WINCO FOODS, LLC,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
The Honorable Percy Anderson, District Judge, Presiding
Case No. 12-CV-00980 - PA

AMICUS BRIEF OF THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, THE DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS TEXAS, THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, AND LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT

Amy F. Robertson
Civil Rights Education and Enforcement Center
104 Broadway, Suite 400
Denver, CO 80203
303.757.7901
arobertson@creeclaw.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

STATEMENT PURSUANT TO RULES 26.1 AND 29(C)(1): CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* state that they are private 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 PURSUANT TO RULE 29(a) AND CIRCUIT RULE 29-3: CONSENT TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), *Amici* have obtained consent from all parties to file this brief.

STATEMENT PURSUANT TO RULE 29(C)(5): AUTHORSHIP AND PAYMENT

Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, the undersigned certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or any other person other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici Curiae are all organizations that represent and advocate for the rights and interests of people with disabilities. *Amici* have an interest in this case because of the potential of the district court's decision to undermine

enforcement of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* ("ADA").

The American Association of People with Disabilities ("AAPD"), founded in 1995 and headquartered in Washington, D.C., is the largest national nonprofit disability rights organization in the United States. AAPD promotes equal opportunity, economic power, independent living, and political participation for people with disabilities. Its members, including people with disabilities and family, friends, and supporters, represent a powerful force for change. Service animals such as implicated in this case can be an integral part of an individual's services and supports system to ensure their health and wellbeing, maintain their independence at home, and have a meaningful life as a valued member of their community. AAPD and its members work to uphold the civil rights of Americans with disabilities under the ADA that embodies the values of independent living.

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization whose mission is to defend human and 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 the provision of reasonable accommodations to permit individuals with disabilities to patronize places of

public accommodation with service animals and ensuring that Title III of the ADA can be effectively enforced.

Disability Law & Advocacy Center of Tennessee ("DLAC") is a private, nonprofit organization designated as the protection and advocacy system for the State of Tennessee. In accordance with its federal mandate, DLAC has the authority to pursue administrative, legal, and other appropriate remedies to ensure the protection of rights of persons with disabilities. DLAC serves individuals with disabilities throughout Tennessee. The agency's mission is to advocate for the rights of Tennesseans with disabilities to ensure they are provided with an equal opportunity to be productive and respected members of our society. The agency works to end discrimination and protect the civil rights of persons with disabilities. Among other activities, DLAC assists persons with disabilities in enforcing their rights under Title III of the ADA.

The Disability Rights Education & Defense Fund ("DREDF"), based in Berkeley, California, is a national non-profit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the community it represents. Recognized for its expertise in the interpretation of federal

disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts.

Disability Rights Texas ("DRTX"), formerly known as Advocacy, Inc., is a nonprofit organization authorized to protect the legal rights of people with disabilities under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001 *et seq*.; the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801 *et seq*.; and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973, 29 U.S.C. § 794e. The Governor of Texas has designated DRTX as the protection and advocacy system for the State of Texas, and in accordance with its federal mandate, the organization has the authority to pursue legal remedies to ensure the protection of rights of persons with disabilities. 42 U.S.C. § 6042(2); 42 U.S.C. § 10805(a)(1). One of the DRTX priorities is to prevent discrimination by public accommodations, including ensuring that they modify policies so that persons with disabilities have equal access. DRTX has filed numerous briefs as *amicus curiae* in state and federal courts.

Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law is a national nonprofit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, training and

education, the Center works to promote equal opportunities for individuals with mental disabilities in all aspects of life, including education, employment, housing, community living, voting, family rights, and access to places of public accommodation. The Center's work focuses in large part on enforcing the ADA, including its provisions concerning public accommodations. The Center has participated as amicus in numerous ADA cases heard by the U.S. Supreme Court and federal appeals courts.

Legal Aid Society - Employment Law Center ("LAS-ELC") is a public interest legal organization that advocates to improve the working lives of disadvantaged people. LAS-ELC represents clients faced with discrimination on the basis of their disabilities, including those with claims brought under Title III of the ADA and Unruh Civil Rights Act. LAS-ELC files amicus briefs in cases of importance to the disability community, and provides comment on disability rights legislation and implementing regulations, including regulations related to service animals.

ISSUE PRESENTED IN THE BRIEF OF *AMICI CURIAE*

Amici write to address a single issue:[1] Whether a defendant can render moot a claim for injunctive relief under Title III of the ADA through post-litigation voluntarily cessation of the allegedly discriminatory conduct as to the

[1] This issue corresponds to the first issue presented for review in the Appellant's Opening Brief. (*See id.* at 2-3.)

plaintiff only while retaining -- and defending the legality of -- the challenged policy.

INTRODUCTION

Amici write to prevent erosion of the remedy for violations of Title III of the ADA: an injunction to cease discriminatory conduct. 42 U.S.C. § 12188(a). If a claim for a Title III injunction can be mooted with a post-complaint, one-person exception to a challenged policy, the ability of Title III to prevent and remedy a wide variety of disability discrimination by places of public accommodation will be undermined.

Fortunately, this is not the law. To the contrary, it is well established that "voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2013). Such conduct can render a claim moot only where the defendant can satisfy a "heavy burden" to show that "'subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted). Even a post-complaint policy change cannot meet this heavy standard;

Defendant's post-complaint one-person exception to an allegedly discriminatory policy certainly cannot meet this standard.

The two circuits to have directly addressed the question have held that post-complaint changes in policies and practices do not moot claims under Title III of the ADA. *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007); *Feldman v. Pro Football, Inc.*, 419 F. App'x 381 (4th Cir. 2011). *Amici* respectfully urge this Circuit to follow suit, especially where, as here, the ostensible policy change was in fact a one-person carve-out of a challenged policy.[2]

SUMMARY OF FACTS RELEVANT TO *AMICUS* BRIEF

Amici incorporate by reference the recitation of facts in the Appellant's Opening Brief. (*See id.* at 5-22.) By way of summary, Plaintiff-Appellant Lynda Butler has a disability that requires her small service dog to remain close to her upper body to reliably alert and assist with her seizures. She challenges the policy of Defendant-Appellee WinCo Foods, LLC ("WinCo") -- a grocery chain -- prohibiting service animals from riding in the stores' shopping carts. After rejecting Ms. Butler's pre-suit requests to change this policy, and losing --

[2] This Circuit has applied the voluntary cessation doctrine to a Title III claim for architectural barriers, holding (in an unpublished decision) that remediation of barriers across a chain of stores did not moot the plaintiff's claim under that statute. *Pereira v. Ralph's Grocery Co.*, 329 F. App'x 134 (9th Cir. 2009), *rev'g Pereira v. Ralph's Grocery Co.*, 07-cv-00841-PA-FFM, 2007 WL 7543254 (C.D. Cal. Oct. 25, 2007).

on summary judgment -- its attempt to have the court endorse the policy as a matter of law, WinCo created a one-person exception to the policy, permitting Ms. Butler -- and only Ms. Butler -- to have her service dog in her shopping cart in a dog carrier. On these grounds, the district court dismissed Ms. Butler's claim as moot.

Prior to the one-person policy exception on which WinCo based its mootness motion, WinCo personnel had adamantly defended its policy prohibiting service animals in carts. WinCo's policy was -- and remains -- that "no animals are allowed in carts -- no exceptions." ER 113, 131.[3] WinCo's Fed. R. Civ. P. 30(b)(6) designee testified in December, 2012, that service dogs were not allowed in shopping carts under any circumstances. ER 113-14. In fact, he testified, under WinCo's policies, it would not have made any difference if a customer had asked to be allowed to have a service dog in a carrier in the shopping cart seat. ER 114. WinCo required employees acknowledge in writing that service dogs were not allowed in WinCo carts even if they were in carriers. ER 131. Finally, WinCo informed Ms. Butler on at least two occasions that her dog would not be permitted in a shopping cart, on one occasion rejecting the precise accommodation on which it now bases its

[3] References to "ER" are to the pages numbers of Appellant's Excerpts of Record.

mootness argument: permitting the dog to ride in a shopping cart in a carrier. ER 115-16, 121.

WinCo continued to assert and defend this policy through its motion for summary judgment, stating "Plaintiff cannot identify a single statute, regulation, guideline, or executive policy that even remotely suggests that WinCo must modify its store policy to allow Plaintiff's dog to ride in its grocery carts." ECF 51-1 at 2; *see also* ECF 86 at 15.[4] However, just two weeks after the district court denied WinCo's motion for summary judgment, ECF 116, and one month before trial, WinCo created a one-person exception to its otherwise inviolable policy, permitting Ms. Butler to carry her service dog in a carrier in WinCo's carts. ER 23 ("This is an exception to WinCo's policy and applies only to Ms. Butler.") WinCo then moved to dismiss the case on grounds of mootness, while continuing to defend -- even in its motion to dismiss -- the policy to which it had made an exception. ECF 133 at 5-6.

The district court granted WinCo's motion and dismissed the case as moot. ECF 172.

[4] References to "ECF" are to the docket numbers in the district court's docket.

ARGUMENT

I. DEFENDANT'S POST-COMPLAINT POLICY EXCEPTION DOES NOT MOOT PLAINTIFF'S CLAIM

A. WinCo Bears a Heavy Burden to Show That its Challenged Conduct Will Not Recur.

WinCo's post-complaint one-person policy exception cannot satisfy its "heavy burden" to show that it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth*, 528 U.S. at 189 (citations omitted). This standard is "stringent," *id.*; *Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013); "[o]therwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off." *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 727 (2013); *see also Knox*, 132 S.Ct. at 2287 ("dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed"); *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1166 (9th Cir. 2013) ("[W]hen the basis for mootness is defendant's voluntary conduct, a federal court is not 'deprive[d] . . . of its power to determine the legality of the practice,' leaving the defendant 'free to return to [its] old ways.'" (quoting *Friends of the Earth*, 528 U.S. at 189 (other internal quotation marks and citations omitted)).

Defendant's promises of future compliance, standing alone, "cannot suffice to satisfy the heavy burden of persuasion which [the Supreme Court

has] held rests upon" a party urging mootness. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968); *see also Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982) ("A promise to refrain from future violations is . . . not sufficient to establish mootness."). "The possibility that [the defendant] may change its mind in the future is sufficient to preclude a finding of mootness." *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983).

"Once a defendant has engaged in conduct the plaintiff contends is unlawful and the courts have devoted resources to determining the dispute, there is Article III jurisdiction to decide the case as long as 'the parties [do not] plainly lack a continuing interest . . .'" *Demery v. Arpaio*, 378 F.3d 1020, 1026 (9th Cir. 2004). "It is no small matter to deprive a litigant of the rewards of its efforts . . .. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).

B. WinCo's Post-Complaint Policy Change Cannot Satisfy Its Heavy Burden to Show Mootness.

Circumstances that the Supreme Court and this Circuit have held insufficient to support mootness demonstrate that WinCo's post-complaint, one-person exception to the challenged policy cannot possibly do so. For

example, the Supreme Court has held that a plaintiff's suit challenging her confinement in an institution and seeking services in the community was not moot even though the defendant, after the complaint was filed, had transferred the plaintiff to a community-based program. *Friends of the Earth*, 528 U.S. at 191 (citing *Olmstead v. L.C.*, 527 U.S. 581, 594, n.6 (1999)).

In two cases this past year, this Circuit has held that public entities -- a city and a prison -- that instituted new policies mid-suit did not moot the plaintiffs' respective claims. The fact that this Circuit has held that public entities cannot rely on post-complaint policy changes to moot claims is significant in light of the fact that such entities are granted deference in the mootness context. *See Am. Cargo Transp. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("'[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.'" (internal quotations omitted)); *see also Sheely*, 505 F.3d at 1184 ("Although government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur, private citizens are not entitled to this legal presumption."). The cases discussed below demonstrate definitively that a private entity such as WinCo cannot moot a plaintiff's claims by changing its policy in the middle of litigation, much less through a one-person exception to a challenged policy.

In *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013), the plaintiffs challenged two ordinances that prohibited camping and sleeping outdoors in the City of Boise under certain circumstances. After the suit was filed, the Boise chief of police issued a "special order" modifying the conditions under which the sleeping ordinance would be enforced, ostensibly to meet and resolve the plaintiffs' objections and thus moot their claims. *Id.* at 894-95. The district court held that this mooted the Plaintiffs' claims. *Id.* at 895.

This Court reversed, noting that while state legislative enactments could support mootness, "[b]y contrast, . . . repeal or amendment of an ordinance by a local government or agency does not necessarily 'deprive a federal court of its power to determine the legality of the practice.'" *Id.* at 899 (quoting *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006)). This Court concluded that "[e]ven assuming Defendants have no intention to alter or abandon the Special Order, the ease with which the Chief of Police could do so counsels against a finding of mootness, as 'a case is not easily mooted where the government is otherwise unconstrained should it later desire to reenact the provision.'" *Bell*, 709 F.3d at 900 (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 928 (9th Cir. 1991)).

The plaintiff in *Hazle v. Crofoot*, 727 F.3d 983 (9th Cir. 2013), challenged the revocation of his parole for refusal to participate in a religion-based drug

treatment program. After he filed his complaint, the state department of corrections issued a directive that parolees could not be compelled to attend a religion-based program. *Id.* at 988-89. The district court held that this rendered the plaintiff's claims for injunctive relief moot. *Id.* at 989.

This Court reversed, explaining that a policy change may render a claim moot only where it is "'a permanent change' in policy that is 'broad in scope and unequivocal in tone' and 'fully supportive'" of the rights at issue, and holding that there was insufficient evidence that the defendants had "taken any concrete steps to prevent other parolees from suffering the same constitutional violations [the plaintiff] suffered." *Hazle*, 727 F.3d at 998-99 (internal citation omitted); *see also Logan*, 722 F.3d at 1166 (holding that dismissal of challenged foreclosure action prior to appeal did not moot appeal); *Seneca v. Arizona*, 345 F. App'x 226, 227-28 (9th Cir. 2009) (holding that post-complaint change in prison policy did not moot challenge); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 963 n.1 (9th Cir. 1999) (holding that school district's pre-complaint policy change did not moot challenge); *Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (holding that post-litigation change in prison policy did not moot the plaintiffs' claims challenging the original practices); *Armster v. United States District Court*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("The bare assertion by the Justice Department in its mootness motion that this situation

will not recur .... [is not] sufficient to deprive this Court of its constitutional power to adjudicate this case.").

Far from broad, unequivocal, fully-supportive policies and concrete steps undertaken by a public entity, WinCo -- a private entity -- offered only a late, grudging, and narrowly-drawn exception to a policy it continued to defend, supported only by conclusory declarations by WinCo personnel. In light of the cases cited above, the district court erred when it concluded that WinCo's declarations "demonstrate[d] a substantial and permanent commitment to the exception granted to Plaintiff," and thus rendered the plaintiff's claims moot. ECF 172 at 5.

C. This Circuit Should Follow The Eleventh and Fourth in Holding Post-Complaint Policy Changes Do Not Moot Claims Under Title III of the ADA.

In *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (11th Cir. 2007), the Eleventh Circuit addressed a situation similar to the one before this Court: a post-complaint change to a service animal policy -- albeit one not limited to a single individual -- challenged under Title III of the ADA. The district court held that the new policy rendered the plaintiff's claim moot. *Id.* at 1182. The Eleventh Circuit reversed, focusing on three factors that suggested the challenged conduct would recur and thus militated against mootness:

> (1) whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability.

Id. at 1184. The court concluded, applying those three factors to the facts before it, that the case was not moot.

The facts of the present case dictate the same result: (1) far from isolated, the challenged conduct is enshrined in WinCo's general policy prohibiting service animals in shopping carts; (2) the exception was precisely timed to anticipate -- indeed react to -- Plaintiff's lawsuit; and (3) WinCo has in no way acknowledged liability; indeed, it continued to defend the policy in its motion to dismiss for mootness. ECF 133 at 5-6. On a record similar to the present, the Eleventh Circuit concluded that the defendant "cannot establish (indeed, has not even come close to establishing) that 'it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Sheely*, 505 F.3d at 1188 n.15 (quoting *Friends of the Earth*, 528 U.S. at 190).

The Fourth Circuit rejected a similar mootness argument under Title III in *Feldman v. Pro Football, Inc.*, 419 F. App'x 381 (4th Cir. 2011), in which the

plaintiffs -- deaf football fans -- sued the Washington, DC, franchise of the National Football League and the stadium where it plays to force the defendants to provide captioning for aural content broadcast in the stadium. Before the district court and on appeal, the defendants argued that the case was moot because they had begun to provide captioning. The Fourth Circuit rejected this argument:

> While we commend defendants for providing most of the relief that plaintiffs requested and for engaging with plaintiffs on the benefits and burdens of particular auxiliary aids, we agree with the district court that defendants have not discharged their heavy burden of showing no reasonable expectation that they will repeat their alleged wrongs. Although defendants were investigating possible auxiliary aids years before plaintiffs' lawsuit, they did not actually provide captioning until after plaintiffs filed their complaint.

Id. at 387. The court went on to hold that, "[g]iven the ease with which defendants could stop providing captioning, we simply cannot say that they have made an affirmative showing that the continuation of their alleged ADA violations is 'nearly impossible.'" *Id.*

As noted above, *see supra* n.2, this Court has previously applied the voluntary cessation doctrine to reject mootness of Title III claims following architectural fixes. *Pereira v. Ralph's Grocery Co.*, 329 F. App'x 134 (9th Cir. 2009). *Amici* respectfully urge this Court to follow that unpublished ruling, as well as the Eleventh Circuit's decision in *Sheely* and the Fourth Circuit's decision in *Feldman* to hold that post-litigation policy changes cannot moot a claim under Title III of the ADA. Such a holding requires, *a fortiori*, that the one-person exception at issue here cannot moot a Title III claims.

II. PERMITTING POST-COMPLAINT POLICY CHANGES TO MOOT TITLE III CLAIMS WILL SEVERELY IMPEDE ENFORCEMENT.

The district court's decision holding Ms. Butler's claims moot based on WinCo's one-person exception to their challenged policy has the potential to undermine enforcement of Title III of the ADA. That statute prohibits discrimination on the basis of disability in places of public accommodation. 42 U.S.C. § 12182(a). It prohibits separate or unequal goods and services, and requires integration, reasonable modifications of policies and practices, auxiliary aids and services to ensure effective communication, and varying levels of physical access depending on the construction date of the facility in question. *Id.* §§ 12182(b)(1)(A)(i) - (iv), (B), (2)(A)(i) - (iv); 12183(a). There is no damages remedy for violation of Title III; only declaratory and injunctive

relief. *Id.* § 12188(a)(1) (incorporating by reference 42 U.S.C. § 2000a-3(a)); *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1174 (9th Cir. 2010).

Injunctive remedies for Title III violations will often require policy change. The reasonable modification provision is phrased in those specific terms, § 12182(b)(2)(A)(ii), and the regulations enforcing that provision require, for example, modification of policies relating to animals, check-out aisles, hotel reservations, and ticket sales. 28 C.F.R. § 36.302(c) - (f). Accordingly, Title III's remedial provision specifically anticipates policy change as a remedy for both policy and architectural claims. It requires an order to bring facilities into compliance, and states further that, "[w]here appropriate, injunctive relief shall also include requiring . . . modification of a policy." 42 U.S.C. § 12188(a)(2).

The ADA was passed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; [and] to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1), (2). The district court's mootness holding stands in the way of these clear, comprehensive, and consistent standards. WinCo's conduct before and after making an exception for Ms. Butler suggests not only that it would be simple for it to return to its challenged behavior vis-à-vis Ms. Butler but that the

next person with a disability who requests to put his or her service animal in a shopping cart -- indeed, requests any modification of WinCo's policies or procedures which, by definition, would deviate from existing policies and procedures -- will encounter the same resistance that Ms. Butler consistently encountered over the two years prior to WinCo's last-minute exception. *See Hazle*, 727 F.3d at 998-99 (rejecting mootness among other reasons because there was insufficient evidence that the defendants had "taken any concrete steps to prevent other parolees from suffering the same constitutional violations [the plaintiff] suffered").

If, when confronted with a lawsuit challenging any one of the numerous types of violations of Title III, a defendant could avoid liability by simply drafting a new policy -- or even creating an exception to an existing policy -- and submitting it with the declaration of a manager, it would be very difficult to ensure compliance with Title III. Far from clear and consistent national standards, this suggests a series of person-by-person and/or temporary exceptions, leaving other individuals with disabilities to face the same problems, and bring the same lawsuits, in the future. With no damages remedy to encourage compliance and the promise of an easy lip-service dismissal of any policy-based lawsuit, Title III would lack the force necessary to "assure equality of opportunity, full participation, independent living, and

economic self-sufficiency for" people with disabilities by "provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against" such individuals. *See* 42 U.S.C. § 12101(a)(7) & (b)(2).

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court reverse the district court's order holding that Plaintiff's claim under Title III of the ADA was moot.

Respectfully submitted,

CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER

By: /s/ Amy F. Robertson
Amy F. Robertson

Counsel for *Amici Curiae*

Dated: January 17, 2014

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that

1. according to the word count feature of WordPerfect X6, which was used to prepare this brief, this brief complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because this brief contains 4,443 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than one-half the number of words authorized for the Appellant's principal brief; and

2. 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 WordPerfect X6 Calisto MT 14 point type.

/s/ Amy F. Robertson
Amy F. Robertson
Attorney For *Amici Curiae*

Dated: January 17, 2014