

July 6, 2016

Honorable Trent Franks
Chair, Subcommittee Constitution and Civil Justice
House Judiciary Committee
2435 Rayburn House Office Building
Washington, DC 20515

Honorable Steve Cohen
Ranking Member, Subcommittee Constitution and Civil Justice
House Judiciary Committee
2404 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks and Ranking Member Cohen:

The Disability Rights Education & Defense Fund (DREDF) is a leading national law and policy center focusing on the rights of people with disabilities.

We strongly oppose the ADA Education and Reform Act of 2015, H.R. 3765. This bill is designed to limit the ability of people with disabilities to enforce their rights under the Americans with Disabilities Act (ADA) to access places of public accommodation in the same manner as all other citizens. Twenty-six years after the ADA was enacted, businesses should be expected to know and comply with their obligations under the law. Permitting the continued exclusion of people with disabilities from the mainstream of society unless and until *they themselves* demonstrate to businesses that those businesses are violating the law is absurd and unacceptable.

What is being forgotten by those supporting this bill are the everyday experiences of millions of ordinary people with disabilities who cannot shop, enjoy recreation, transact personal business, and do many things that most Americans take for granted. Why should a wheelchair user be unable to join her family at a restaurant, just because its owner has resisted for 25 years to install a ramp? H.R. 3765 has its priorities profoundly skewed, and goes against the very principles that undergird what America is all about.

The ADA Notification Bills Would Eliminate Any Reason for Businesses to Comply with the Law Before Receiving Notification

These bills would remove all incentive for businesses, social service establishments, and other places of public accommodation to comply with the ADA's accessibility requirements unless and until an individual with a disability recognizes that the place of public accommodation is out of compliance with the ADA's requirements and provides the entity with written notice in precisely the right manner. Businesses could employ a "wait and see" approach, continuing to violate the law with impunity and excluding

countless people with disabilities from their goods, services, facilities, and accommodations until a person with a disability determined that the business was out of compliance with the ADA and provided the business with the proper notification. Even then, the business would face no penalty or consequence for having violated the law for months, years, or decades, if the business then took advantage of the months-long period to remedy the violation before a lawsuit was permitted.

In short, the premise of this bill is that *businesses* should not be responsible for knowing their obligations to comply with a law that has been in effect for 26 years,¹ but *people with disabilities* should be responsible not only for knowing the accessibility requirements of that law, but also for determining when a business is not in compliance (including when that determination depends on information available to the business but not to the public), and for knowing the precise requirements of the notice that they must provide.

The message of this bill—that people with disabilities should be treated as second-class citizens—could hardly be clearer.

This Bill Is Not Necessary and Will Not Achieve Its Asserted Purpose

In addition to having a flawed premise, this bill is unnecessary and, if passed, would not achieve its purported purpose. One of the primary justifications for this bill is to protect businesses from large monetary awards from courts or in settlement agreements. *Such awards, however, have nothing to do with the ADA.* Title III of the ADA does not authorize damages; only injunctive relief is available for violations of public accommodation accessibility requirements.

All of the lawsuits highlighted in this Committee's hearing involved monetary damages authorized under *state* law. Indeed, the small number of "serial" ADA litigants filing numerous Title III cases has been based in states with accessibility laws that authorize damages—such as California, Florida, and others. The proposed modifications to the ADA *would do nothing* to eliminate the prospect of monetary damages for violations of these state law accessibility requirements.

Moreover, legal mechanisms already exist to address the filing of legal claims in bad faith or on fraudulent bases. Rule 11 of the Federal Rules of Civil Procedure authorizes courts to sanction attorneys and unrepresented parties for filing frivolous complaints. The Rule provides that by signing a pleading to the court, an attorney or unrepresented party is certifying that the pleading is not being filed for an improper purpose and is supported by the law and the facts. Courts may impose monetary sanctions where a pleading violates the rule. Second, while prevailing defendants generally do not recover fees from plaintiffs, if a lawsuit is frivolous or without foundation, the defendant may not only avoid paying the plaintiff's attorney's fees but also recover its own attorney's fees from the plaintiff. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). State bars are also well equipped to deal with members who file abusive litigation.

In addition, Article III of the Constitution, which limits federal courts to hearing “cases or controversies,” requires plaintiffs seeking injunctive relief to demonstrate that they are likely to be injured in the future (in the case of ADA Title III claims, that they are likely to be denied access to the covered entity in the future). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Absent a showing that the plaintiff has “standing” to sue, Title III claims would be dismissed.

Furthermore, any attorneys’ fees incurred by a business sued for violations of Title III would be minimal if the business was already in compliance or took immediate steps to bring itself into compliance. If, as the proponents of these bills claim, the violations in question are minor, “technical” violations, such violations would be easily fixable with minimal effort and cost. And if a business that was sued for violations of the ADA’s accessibility requirements fixes those violations while the lawsuit is pending, the plaintiff cannot seek his or her attorneys’ fees from the business. *See Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598, 600 (2001).

***Compliance with the ADA Should Be Treated No Differently
than Compliance with Other Laws***

Establishing and running a business involves compliance with numerous laws, including tax laws, property laws, health and safety laws, environmental laws, civil rights laws, and many others. Compliance with these legal obligations is part of the cost of doing business. It is unthinkable that we would eliminate any consequences for small businesses that failed to pay taxes or failed to meet health and safety codes unless they had received a notice that they were in violation of the law and failed to fix the problems after being given months to do so. Violating the rights of people with disabilities—and denying them the access to places of public accommodation that we all take for granted as American citizens—should be treated no differently.

Title III of the ADA was carefully crafted to take into account the needs of businesses—by ensuring that accommodations must be reasonable, by placing limits on the amount of retrofitting required for facilities built before the ADA, and by limiting remedies to injunctive relief. The restrictions on enforcement contained in these bills go far beyond that compromise and would make the ADA’s promise of equal access a hollow one.

***People with Disabilities Should Not Be Forced
to Wait for Months to Enforce the ADA***

The imposition of a months-long “waiting period”² during which a business may continue to violate the law and deny access to people with disabilities once it has received a notice that it is violating the ADA is unreasonable. Permitting the continued unlawful denial of access by people with disabilities to stores, health care establishments, social service establishments, theaters, schools, transportation terminals, gas stations, day

care centers, senior centers, and other places of public accommodation for months or years until someone with a disability discerns that the business is violating the law and provides the requisite notification—and then disallowing any enforcement for an *additional* period of months once that occurs—conveys that people with disabilities are simply not welcome as full members of society. Moreover, forcing individuals to wait for months to enforce their rights would leave people with disabilities without recourse for particularly grievous harms, such as the inability to receive needed surgery at a specialty hospital that is inaccessible, or the inability to continue attending a private school after a student has developed a disability.

Public Accommodations Must Take Responsibility for ADA Compliance

There have been extensive efforts to educate business owners and other public accommodations about their ADA obligations. Yet the vast majority of the millions of public accommodations in the US have not moved to comply with the law. Businesses that violate the ADA should be held accountable. And efforts of people with disabilities to enforce their rights are no less legitimate if they do not enter, because they can't get in anyway.

Stopping Individuals From Enforcing Rights Against Multiple Businesses Regardless of the Merits of Enforcement Actions Would Reduce Access and Blame Individuals with Disabilities For Widespread Discrimination

The message of this bill that individuals should be stopped from enforcing their rights against multiple businesses is misplaced.

Many businesses violate the ADA's accessibility requirements, creating many challenges and unequal opportunities for people with disabilities. It is perplexing that individuals who enforce their rights against multiple businesses would necessarily be viewed as the problem, and businesses sued for violating a law that has been in effect for many years as victims. It would be unthinkable to limit fees in other contexts in order to limit enforcement of civil rights—for example, to limit fees under the Civil Rights Act of 1964 to reduce the number of lawsuits brought by African Americans challenging discrimination. As noted above, to the extent that a small number of individuals have filed lawsuits for abusive purposes or based on fraudulent claims, many mechanisms already exist to address such litigation. Congress's goal should be to ensure that people with disabilities have access to places of public accommodation, not to ensure that they are stopped from enforcing their rights.

Misperceptions Voiced at the Hearing

While there was a suggestion in the hearing that Title II of the Civil Rights Act contains a notification requirement similar to those proposed in these bills, that suggestion is unfounded. There is no analogous notice requirement in Title II of the Civil Rights Act. The only "notice" requirement in Title II is 42 U.S.C. § 2000a-3, which requires plaintiffs to notify state enforcement authorities of an intent to sue in federal court to allow the

state 30 days to take action itself under similar state law requirements. This notice is not to permit a business to take corrective action before being sued or to limit enforcement by victims of discrimination; it is simply to notify state governments of potential violations and permit them to take enforcement action.

It was suggested at the hearing that businesses have been subjected to ADA litigation based on minor violations of the ADA such as signs that are the wrong color. Nothing in the ADA's accessibility standards requires signs to be any particular color—signs are merely required to have contrast between the characters and the background in order to ensure that they are readable.

In closing, this bill blames people with disabilities for public accommodations' failure to comply with the ADA. Why should we pay the price of an inaccessible environment where we cannot live our lives like everyone else, when the true blame belongs on the heads of business owners who have delayed for over 25 years and done nothing to comply with the ADA?

We appreciate the opportunity to provide this feedback and look forward to working with you to ensure that people with disabilities can enforce their right to access places of public accommodation and be treated as full and equal members of society. Please contact Marilyn Golden, Disability Rights Education & Defense Fund (DREDF) at mgolden@dredf.org or at 510-549-9339.

Sincerely,



Susan Henderson
Executive Director

¹ As the ADA was signed into law on July 26, 1990, businesses have had ample opportunity to learn of its existence and bring themselves into compliance with its accessibility rules. Nor are the ADA's accessibility regulations new; they have been in effect since 1991, and were updated in 2010.

² H.R. 3765 would require individuals to wait as long as six months after providing the requisite notice before being permitted to enforce their rights.