No. 17-2678

In the United States Court of Appeals for the Third Circuit

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

v.

STEAK 'N SHAKE OPERATIONS, INC.,
Defendant-Appellant.

On Appeal from an Order of the United States District Court
for the Western District of Pennsylvania Granting Class Certification
Case No. 15-cv-180
Hon. Robert C. Mitchell, United States Magistrate Judge

BRIEF FOR PLAINTIFFS-APPELLEES

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 12188 because the claims of Plaintiffs-Appellees Christopher Mielo and Sarah Heinzl (“Appellees”) were premised on Defendant-Appellant Steak ‘N Shake Operation, Inc.’s (“Appellant” or “Steak ‘N Shake”) violations of Title III of the American with Disabilities Act (“ADA”). (JA086, 89, 94-95).

This Court has jurisdiction under 28 U.S.C. § 1292(e) because Appellant filed a petition for permission to appeal under Fed. R. Civ. P. 23(f), which this Court granted. (JA001, 57).

STATEMENT OF ISSUES

1. Whether the District Court erred in holding that Fed. R. Civ. P. 23's requirements were satisfied because Appellees had more likely than not established the facts necessary to satisfy those requirements?

2. Whether the District Court erred in holding that the ADA requires places of public accommodation to maintain all accessible features of their facilities, including parking lots and paths of travel ("parking facilities")?

3. Whether the District Court abused its discretion in finding that this case presents common questions of law and fact based the contention that Appellant's common policies and practices, which are employed uniformly at the restaurants Appellant owns or controls, lead directly to architectural barriers that Appellant fails to identify or remediate?

4. Whether the District Court abused its discretion in finding a class consisting millions of potential customers was so numerous that joinder is impracticable?

5. Whether the District Court abused its discretion in finding Appellant acted or failed to act in a manner generally applicable to the Class because Appellant uniformly applies the same policies and practices to the restaurants it owns or controls?

6. Whether the District Court erred in finding Appellees had standing to challenge Appellant's common policies and practices because Appellees had been harmed by those policies and practices, and would be harmed in the future as a result of their close proximity to, past visits of, and affinity for Appellant's business?

STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellees state that this case has not been before the Court previously and that they are unaware of any cases pending that are related to this appeal.

STATEMENT OF THE CASE

Appellees filed their complaint on February 10, 2015, and Appellant answered on April 6, 2015. (JA078, Dkt. Nos. 1, 7). In late 2015, the parties agreed to mediation. (JA079, Dkt. No. 21). After that mediation was unsuccessful, the parties engaged in a second, unsuccessful mediation. (JA080, Dkt. No. 33).

On November 4, 2016, Appellees filed their motion for class certification. (JA081, Dkt. No. 44). The motion was granted on April 27, 2017, (JA084, Dkt. No. 73), and the following class was certified under Rule 23(b)(2):

> All persons with qualified mobility disabilities who were or will be denied the full and equal enjoyment of the goods services, facilities, privileges, advantages or accommodations of any Steak 'n Shake restaurant location in the United States on the basis of a disability because such persons encountered accessibility barriers at any Steak 'n Shake restaurant where Defendant owns, controls and/or operates the parking facilities.

(JA075).

Appellant filed a petition for permission to appeal, which this Court granted on July 28, 2017. (JA084, at Dkt. Nos. 77-78). The District Court stayed the case pending appeal. (JA085, Dkt. Nos. 83-85).

STATEMENT OF FACTS

Appellant's restaurants and parking facilities

Appellant is a restaurant chain with 562 restaurants, each of which have a parking facility, and 417 of which Appellant owns or controls. (JA550-51 ¶¶5-6, 8). Appellant is aware that the physical features of its parking facilities "can change over time." (JA553-54 ¶12; JA148-49). A variety of factors can cause these changes. (*Id.*). It is impossible to know when change will occur, (JA553-54 ¶12), but it can occur rather quickly, (JA149 (stating change can take place over single winter season)).

Appellant's construction and maintenance practices

When building a restaurant, Appellant hires and relies on architects, engineers and contractors to design and build its restaurants and parking facilities. (JA553 ¶11). Appellant is aware that that "slope ratios may change from … the settling of the earth beneath sidewalks and parking spaces following construction," (*Id.* at ¶12), but, does not conduct any post-construction audit or inspection specific to ADA-compliance to ensure architectural barriers do not exist. (JA140).

After construction, Appellant does not conduct ADA-specific assessments at any of its restaurants to ensure that the restaurants remain ADA compliant. (JA157-58; JA138). Instead, Appellant relies on its customers to identify access

issues and conducts ADA-related audits "[o]nly in response to specific complaints." (JA139).

Appellant's established maintenance procedures similarly ignore the ADA. Appellant tasks certain employees to ensure restaurants are generally maintained, (Def. Br. at 7), but no portion of this process is geared towards parking facility-related ADA compliance. Appellant's facility inspection sheet never mentions the ADA or its access requirements respecting parking facilities. (JA606). This is compounded by Appellant's admission that maintenance employees do not receive *any* training with regard to ADA compliance issues, thus making it unlikely that ADA-related issues would be identified on an ad hoc basis. (JA147).

The lack of direction to look for ADA issues, and lack of training needed to identify such issues (or even know what they are), belie any contention that Appellant's maintenance employees are capable of identifying ADA violations as they arise and ensuring barriers are remediated promptly. Even Appellant and its expert admit that only "very well trained" or "experienced inspectors" are capable of completing visual ADA-compliance inspections effectively, (JA149; JA584 ¶8), experience and training Appellant's maintenance employees unquestionably lack, (JA147; JA606).

Put simply, the policies and practices at issue cannot identify architectural barriers as they arise, and do not concern ADA compliance at all. Instead,

Appellant places the responsibility of identifying architectural barriers onto customers, and conducts ADA-related inspections "[o]nly in response to specific complaints." (JA139). These policies and practices, along with the above-identified deficiencies, are uniform for all restaurants at which Appellant has responsibility over its parking facilities. Appellant does not dispute these central facts on appeal, and did not dispute them before the District Court.

Appellees' experience and the condition of Appellant's restaurants

Appellees are college graduates whose permanent residences are located in Pittsburgh, Pennsylvania. (JA163-64; JA189-92). As a result of paraplegia, they both use wheelchairs to ambulate. (JA173-74; JA202-03; JA086 ¶2, JA089 ¶¶15-16). Appellees have long advocated for individuals with disabilities, including participation in various youth groups and community organizations, and numerous other fundraising and volunteer activities. (JA167-72; JA193-201).

Appellees visited numerous restaurants owned and operated by Appellant and had difficulty accessing those restaurants as a result of access barriers in the parking facilities. (JA090 ¶¶19-20; JA175-84; JA204-08). Mr. Mielo experienced difficulty accessing a Steak 'N Shake located in East Munhall, Pennsylvania due to an excessively sloped parking space and access aisle. *Id.* Ms. Heinzl found it difficult to access a Steak 'N Shake located in Pleasant Hills, Pennsylvania due to excessive slopes in the parking spaces, access aisles, and in the route to the

restaurant. (*Id.*). An investigation by counsel found similar barriers in the parking facilities of other restaurants owned and operated by Appellant. (JA090-92 ¶¶19-21; JA488-530).

Appellant conceded during discovery that it had not identified any of the barriers Appellees experienced, or any of the other barriers identified by Appellees' counsel. (JA150-54). That admission is consistent with Appellant's practice of conducting ADA-specific inspections "[o]nly in response to specific complaints." (JA139).

Importantly, Appellant admitted that, following the filing of Appellees' Complaint, Appellant confirmed access violations at each of the eight properties identified in Appellees' Complaint. (JA595 ¶11). While Appellant contends these violations were minor, it conveniently omitted from the record any evidence regarding the violations identified or what steps were taken to fix them. (*Id.*). Regardless, Appellant admits that each of the restaurants identified in Appellee's Complaint as being in violation of the ADA were, in fact, in violation of the ADA; that the barriers those restaurants contained went unidentified by Appellant until this lawsuit was filed; and that such barriers were scheduled for remediation only due to inspections prompted by this lawsuit. (JA150-54; JA595 ¶11).

STANDARD OF REVIEW

Class certification orders are reviewed for abuse of discretion. *Williams v. Jani-King of Phila. Inc.*, 837 F.3d 314, 319 (3d Cir. 2016). "A district court abuses its discretion if its decision 'rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *Id.*

Legal standards applied by district courts are reviewed de novo. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161 (3d Cir. 2015).

De novo review is applicable to the first two issues identified in the Statement of Issues, and the abuse of discretion standard is applicable to the third, fourth, fifth and sixth issues identified in the Statement of Issues.

SUMMARY OF ARGUMENT

Appellant employs common maintenance policies and practices at each of the more than 400 restaurants it owns or controls. These policies and practices, Appellees claim, lead directly to access barriers in violation of the ADA and Appellees' rights under the statute. Appellees contend Appellant's policies and practices are deficient because Appellant employs a maintenance staff that is neither trained nor directed to identify ADA violations. Instead, Appellant places responsibility for identifying ADA violations onto its customers and remediates ADA violations only if and when customers complain about access issues after experiencing them.

Appellees contend Appellant's common policies and practices, through their specific, system-wide deficiencies, result in repeated access violations in the parking facilities of Appellant's restaurants. To remedy these failures, Appellees sought certification of a class so that the underlying policies and practices at issue could be changed for the benefit of all individuals with disabilities who might seek to visit Appellant's restaurants either now or in the future.

After discovery, substantial briefing, and oral argument, the District Court certified the case as a class action under Fed. R. Civ. P. 23(b)(2) to permit Appellees the opportunity to prove, and the District Court to decide, whether the common and uniform policies and practices at issue do, in fact, result in

unidentified and unremediated architectural barriers, and whether Appellant's policies and practices impermissibly encumber Appellant's customers with Appellant's obligation to proactively maintain its restaurants. In certifying the class, the District Court found that the evidence sufficiently established the existence of common policies and practices, and that those policies and practices were applied uniformly to each of the restaurants Appellant owns or controls. Based on these key (and undisputed) findings, the District Court properly exercised its discretion in finding that the propriety of Appellant's generally applicable policies and practices should be adjudicated on a class wide basis and on behalf of a class of individuals who have been or in the future may be denied full and equal access as a result of access barriers existing in Appellant's parking facilities.

On appeal, Appellant takes a "kitchen sink" approach and claims the District Court's ruling was in error because the District Court: 1) improperly assumed that Rule 23's requirements were met; 2) incorrectly interpreted the ADA in violation of its plain language, the constitution, and the will of Congress; 3) abused its discretion in finding commonality because Appellees failed to prove their case, and must prove individual instances of discrimination to demonstrate the impropriety of Appellant's policies and practices; 4) abused its discretion in finding numerosity because Appellees failed to specifically enumerate the members of the class; 5) abused its discretion in finding that Appellees satisfied the requirements of Rule

23(b)(2) because Appellant's actions are not generally applicable to the class and no single injunction would provide the members of the class relief; and 6) erred in finding Appellees had standing because there was no evidence Appellees would return to Appellant's stores at the time this case was filed, and Appellees have not experienced discrimination at all of Appellant's restaurants.

Appellant's buckshot serves a single purpose: it obfuscates the simplicity of applying Rule 23 to the facts of this case. Despite complexity Appellant attempts to create, the District Court's order represents a garden-variety application of Rule 23 and, in particular, Rule 23(b)(2). Appellant applies common policies and practices in uniform ways to each of the restaurants it owns or controls. Challenging these common policies and practices, and their uniform application on behalf of a class of persons with mobility disabilities who are similarly affected by those policies and practices is precisely the type of matter that Rule 23(b)(2) was intended to address. In fact, refusing to certify a class of individuals challenging a single set of policies and practices that suffer from specific, system-wide deficiencies would be an abuse of discretion and require reversal under this Circuit's established precedent.

In sum, Appellant's arguments are many, but their substance is nil. This case is a run of the mill class action, and the District Court properly interpreted the ADA in finding that Appellant has an affirmative duty to maintain all features of

its restaurants addressed under the ADA, *including* its parking facilities. In making its unremarkable ruling, the District Court made appropriate factual findings, grounded in record evidence to ensure the requirements of Rule 23 of the Federal Rules of Civil Procedure and Article III of the constitution were met. For these reasons, and as more fully explained below, the Court should reject all of Appellant's arguments, affirm the District Court's class certification order, and remand this case to the District Court for further proceedings consistent with the District Court's ruling.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT RULE 23 ANALYSIS

The District Court's opinion is in line with, and properly applied, the correct Rule 23 standards. Yet Appellant argues that the District Court created a "general presumption" in favor of class certification. (Def. Br. at 20). In support, Appellant cites the following single sentence from the District Court's opinion: "when doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed." (*Id.*). An actual examination of the opinion, however, demonstrates that, despite that single sentence, the District Court's reasoning clearly set-forth and properly applied the correct Rule 23 standards.

As an initial matter, the District Court explicitly recognized that class certification requires a "rigorous analysis" that "entail[s] some overlap with the merits" and "involves considerations that are enmeshed in the factual and legal issues" of the case. (JA066 quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). It then noted that, "[t]o certyify a class[,] the court must … find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." (JA067 quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008)). Appellant does not dispute, but rather agrees that this standard is correct. (Def. Br. at 18-19).

After setting forth what both parties agree is the correct standard, the District Court applied that standard to find that the evidence, more likely than not, established each fact necessary to meet Rule 23's requirements. Regarding the numerosity requirement of Rule 23(a)(1), the District Court found: "Plaintiffs have shown sufficient circumstantial evidence specific to the problems, parties, and geographic areas actually covered by [the] class definition" such that "[j]oinder of individual claims and parties would simply not be practicable given the specific facts of this case[.]" (JA069). And, regarding the commonality requirement of Rule 23(a)(2), the District Court found: "the evidence suggests that this case should proceed as a class action, as the exploration of [Appellant's] policy will produce common questions with common answers." (JA070).

In sum, the District Court did not rely on an incorrect Rule 23 standard. Rather, it applied the correct Rule 23 standard to the evidence presented. This Court should reject Appellant's attempt to cherry pick a single sentence and use it to rewrite the entirety of the District Court's well-reasoned findings.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE ADA AND ITS IMPLEMENTING REGULATIONS REQUIRE MAINTENANCE OF ALL ACCESSIBLE FEATURES

The main challenge Appellant makes on appeal has little to do with the requirements of Rule 23. Instead, Appellant's primary argument is grounded in an assertion that Appellee's case is premised on an improper application of law.

Specifically, Appellant claims that the District Court erred in finding that 28 C.F.R. § 36.211 ("Section 211"), along with the broader requirements of the ADA, require public accommodations to maintain *all* accessible features of their stores, including parking facilities. (Def. Br. 23-35). Appellant claims 1) Section 211 does not require maintenance of parking facilities; 2) the District Court's interpretation of Section 211 violates the Constitution's due process clause; and 3) private individuals cannot enforce Section 211. (*Id.*). Each argument lacks merit.

A. Both Section 211 and the ADA Require Maintenance of All Features of Facilities Required to Be Accessible Under the ADA

The District Court held that the ADA requires public accommodations to remove architectural barriers from existing facilities, construct and alter facilities in a manner that is readily accessible to and usable by individuals with disabilities, and maintain those features of facilities that are required to be readily accessible to and usable by individuals with disabilities. (JA061-65). Appellant contends the District Court erred because the ADA does not require public accommodations to maintain the accessible features of their parking facilities after construction, alteration or barrier removal. (Def. Br. at 23-30). This argument is contrary to the plain language of the ADA and its implementing regulations. Moreover, such an interpretation would create an enormous hole in ADA enforcement that would permit easy avoidance of some of the ADA's most basic and vital requirements.

i. The plain language of the ADA requires maintenance of accessible features

Title III of the ADA broadly states that public accommodations shall not discriminate against any individual on the basis of disability in the "full and equal enjoyment" of any goods, services or facilities. 42 U.S.C. § 12182(a). This generally prohibits, among other things, denying individuals with disabilities the opportunity to participate in or benefit from, or providing individuals with disabilities an unequal opportunity to participate in or benefit from, any good, service or facility. *Id.* at §§ 12182(b)(1)(i), (ii).

In order to "flesh out the details" of Title III's "full and equal enjoyment" mandate, "Congress charged the Attorney General with … promulgating regulations clarifying how public accommodations must meet the[ir] statutory obligations." *U.S. v. AMC Ent., Inc.*, 549 F.3d 760, 763 (9th Cir. 2008); *see generally U.S. v. Hoyts Cinemas Corp.*, 380 F.3d 558, 562 (1st Cir. 2004). The Attorney General ultimately adopted the ADA Accessibility Guidelines ("ADAAG"). *AMC Ent., Inc.*, 549 F.3d at 763.

The ADAAG establishes the technical structural standards that define whether a facility is readily accessible to and usable by individuals with disabilities. *Chapman v. Pier 1 Imports (U.S.) Inc. ("Chapman I")*, 631 F.3d 939, 947 (9th Cir. 2011); *Chapman v. Pier 1 Imports (U.S.) Inc. ("Chapman II")*, 779 F.3d 1001, 1006 (9th Cir. 2015). In relevant part, the ADAAG requires the

presence of signage and various slope requirements with respect to parking facilities, access aisles, ramps and paths of travel. *See* 36 C.F.R. § pt. 1191, App. D, §§ 403.3, 405.2, 405.3, 502.5, 502.6, (setting forth the 2010 ADAAG Standards); 28 C.F.R. § pt. 36, App. D, §§ 4.3.7, 4.6.3, 4.6.4, 4.8.2, 4.8.6 (setting forth the 1991 ADAAG standards).

"Because the ADAAG establishes the technical standards required for 'full and equal enjoyment,' if a barrier violating these standards relates to a plaintiff's disability, it will impair the plaintiff's full and equal access, which constitutes 'discrimination' under the ADA." *Chapman I*, 631 F.3d at 947; *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir. 2011) ("If a particular architectural feature … is inconsistent with the ADAAG, a plaintiff can bring a civil action claiming that the feature constitutes a barrier that denies the plaintiff full and equal enjoyment of the premises in violation of the ADA.").

Here, the District Court was correct in holding that the ADA requires public accommodations to maintain parking facilities in accordance with the ADAAG because, without such maintenance, individuals with disabilities will experience architectural features inconsistent with the ADAAG and be denied "full and equal enjoyment" of a public accommodation's goods, services and facilities. Accordingly, the ADA's statutory text supports the District Court's holding. The Court should reject Appellant's contrary position.

ii. Section 211 expressly requires maintenance of *all* accessible features

Recognizing that maintaining accessibility is of paramount importance and required by the ADA's statutory text, the DOJ promulgated Section 211, which states that public accommodations must "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[.]" 28 C.F.R. § 36.211(a). After "notic[ing] that some covered entities d[id] not understand what [th]is required," the DOJ issued guidance clarifying that Section 211 "broadly covers *all* features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage." Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities ("Department Comments"), 73 Fed. Reg. 34508, 34523 (June 17, 2008) (emphasis in original).

Given Section 211's unambiguous language, *and* the DOJ's unambiguous statement clarifying Section 211's scope, the District Court was correct in holding that public accommodations must maintain the accessible features of their parking facilities. (JA061-65). Nonetheless, Appellant argues that the DOJ did not intend for Section 211 to cover all accessible features of facilities. (Def. Br. at 23-30). Instead, Appellant claims the "DOJ's central intent" in promulgating Section 211 was "to maintain machines and equipment 'in operable working condition.'" (*Id.* at 24).

The DOJ, however, has already considered and rejected Appellant's argument by making clear that Section 211 "broadly covers *all* features that are required to be accessible under the ADA[.]" Department Comments, 73 Fed. Reg. at 34523. Appellant attempts to explain away this inconsistency by claiming "*all*" does not mean "all." (Def. Br. at 29-30). This is absurd and unreasonable. Given the plain language of Section 211 and the DOJ's explicit guidance on Section 211's all-encompassing scope, the District Court was correct in rejecting Appellant's narrow reading of Section 211. This Court should as well.

Another error in Appellant's argument is that it lacks consistency. Appellant tries to put parking facilities outside the reach of Section 211 by observing that "[p]oured concrete or asphalt … does not 'work' (or not) in the way an elevator or piece of equipment 'works.'" (Def. Br. at 24). But Section 211 plainly applies to non-mechanical things, as the DOJ stated that Section 211 "broadly covers *all* features that are required to be accessible … from accessible routes … to … signage."[1] Department Comments, 73 Fed. Reg. at 34523. Like parking spaces, accessible routes and signage "do[] not 'work' (or not)," demonstrating that Appellant's application of the word "work" was not intended by the DOJ.

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[1] Appellant cites to these, and other common examples of Section 211 violations, claiming they serve to limit the scope of Section 211. (Def. Br. at 25-26, 29-30). Examples are intended to serve as examples, not limitations. If the DOJ intended to limit Section 211 to certain features, it would *not* have stated that Section 211 "broadly covers *all* features that are required to be accessible under the ADA[.]"

Further illustrations of inconsistency are provided by a DOJ website—cited by Appellant—which recommends "maintaining curb ramps and sidewalks," (Def. Br. at 28), and states that parking facilities must be maintained. (JA269 ("If key elements – often including the parking, … – are not maintained, then access is reduced or eliminated.")).[2] If the DOJ's "central intent" in promulgating Section 211 was to maintain features that can "'work' (or not)," the DOJ would not have identified accessible routes, signage, sidewalks, curb ramps and parking facilities as examples of features that must be maintained. This Court should reject Appellant's attempt to replace the DOJ's guidance with its own.

Finally, Appellant argues it is relieved of liability as a result of the DOJ's failure to enumerate specific maintenance procedures that it must follow.[3] (Def. Br. at 27). That argument misrepresents the gravamen of this lawsuit. Appellees do not base liability on a failure to adopt specific procedures. Rather, liability is premised on the fact that Appellant's current policies and practices directly result in unidentified access violations that are addressed only when individuals with disabilities complain—and on the violations themselves. Appellees seek to impose

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[2] The website Appellant cites also is irrelevant because it is intended to "identif[y] *ways* that businesses can maintain their investment in access *with little or no extra cost*." (JA269) (emphasis added). That statement speaks for itself, as the District Court correctly recognized. (JA065).

[3] The DOJ rejected the itemization of specific maintenance procedures because Section 211 already "establishe[d] the general requirement for maintaining access," making "more detailed[] requirements … [un]necessary." (Def. Br. at 27).

certain procedures not because such practices are required by Section 211, but because they are necessary to remediate the past effects of Appellant's conduct and prevent like discrimination in the future. Consistent with that fact, the District Court certified the Class to determine: 1) whether Appellant's policies and practices result in discrimination; and 2) what remedies are appropriate to repair and prevent any past or future effects of Appellant's policies and practices. The contention that Section 211 does not require the adoption of policies or practices is a red herring.[4]

For each of these reasons, Appellant's interpretation of Section 211 is incorrect, and the Court should affirm the District Court's holding.

iii. The interpretation advanced by Appellant would permit a massive evasion of the ADA's requirements

Finally, Defendant's position is contrary to common sense. If the ADA and Section 211 do not require maintenance of accessible features, businesses could

[4] Appellant's discussion of Title II's "self-evaluation" and "transition plan" regulations is similarly misleading. (Def. Br. at 24-25). Those sections of Title II of the ADA were promulgated to ensure public entities took proactive measures to bring their existing services and facilities in compliance with the ADA *upon its passage*. *See* 28 C.F.R. § 35.105(a) (requiring self-evaluation "within one year of effective date" of the ADA); 28 C.F.R. § 35.150(d) (requiring development of transition plan "within six months of January 26, 1992," which was the ADA's effective date). The regulations say nothing about ongoing obligations following transition. Significantly, the DOJ promulgated 28 C.F.R. § 35.133 to appraise public accommodations of their ongoing maintenance obligations under Title II. Section 35.133, like Section 211, requires ongoing maintenance of "those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities." 28 C.F.R. § 35.133(a).

ignore myriad features that were once required to be constructed or altered in an accessible manner, allowing those features to deteriorate over time. Businesses also could skirt liability for construction and alteration violations by arguing that non-compliant features arose, not from construction or alteration, but from a failure to maintain. Under Appellant's interpretation, businesses would be incentivized not to maintain their facilities in a usable manner, and provided with a liability loophole to escape responsibility for other conduct that violates the ADA. It is hard to believe Congress intended to hamper the ADA's overarching goal of "full and equal enjoyment" by creating the massive statutory and regulatory loophole advocated for by Appellant. For these additional reasons, the Court should reject Appellant's arguments and affirm the District Court's holding.

B. The District Court's Interpretation of Section 211 Does Not Violate Due Process

Appellant claims the District Court's interpretation of Section 211 fails to give "fair warning" of Appellant's obligations, or "ascertainable certainty" of its rights under the law. (Def. Br. at 31). This argument was not raised below. (JA236-67; JA755-91). "[A]rguments not raised before the District Court are waived on appeal." *DIRECTV Inc. v. Seijas*, 508 F.3d 123, 125 n. 1 (3d Cir. 2007). While this rule "may be relaxed whenever the public interest or justice so warrants," Appellant's opening brief "has not identified any public interest or explained why justice would warrant relaxing the rule[.]" *Veverka v. Royal Caribbean Cruises*

Ltd., 649 Fed. Appx. 162, 166 (3d Cir. 2016); *cf. Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 250 (3d Cir. 2013) ("[A] party can waive a waiver argument by not making the argument below or in its briefs."). For these reasons, the Court should not consider Appellant's due process argument now.

In the event the Court deems consideration proper, Appellant's contention has no merit. Section 211 and the ADA provide workable, definite standards that give public accommodations fair warning of their obligations and responsibilities with regard to maintenance of structural features.

First, Section 211's language and the DOJ's unambiguous guidance state that Section 211 covers "those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities[.]" 28 C.F.R. § 36.211(a); Department Comments, 73 Fed. Reg. at 34523 (stating that Section 211 "broadly covers *all* features that are required to be accessible under the ADA") (emphasis in original). This straightforward language—published in 1991 and 2008, respectively—alerts public accommodations to the requirement that any feature that must be accessible must have its accessibility maintained.

Furthermore, the ADAAG specifically and comprehensively defines what physical characteristics of features are necessary to provide individuals with disabilities full and equal enjoyment under the ADA. *See* 36 C.F.R. § pt. 1191, App. D (setting forth the 2010 ADAAG Standards); 28 C.F.R. § pt. 36, App. D

(setting forth the 1991 ADAAG standards). A feature having characteristics inconsistent with the ADAAG "constitutes a barrier that denies [individuals] full and equal enjoyment … in violation of the ADA." *Oliver*, 654 F.3d at 905; *Chapman I*, 631 F.3d at 947. Since features deny individuals with disabilities "full and equal enjoyment" when they do not comply with the ADAAG, the ADAAG standards, read in conjunction with Section 211 and the ADA, provide unambiguous guidance requiring maintenance of facilities in compliance with the ADAAG. To do otherwise restricts an individual's right to full and equal access. (JA062); *Chapman I*, 631 F.3d at 947; *Oliver*, 654 F.3d at 905. Contrary to Appellant's contentions, Section 211 and the ADA provide definite standards through which to judge compliance.

Finally, Section 211 expressly allows for "isolated or temporary interruptions in service or access due to maintenance or repairs," 28 C.F.R. § 36.211(b), but prohibits repeated maintenance failures, inadequate or dilatory remediation, or inaccessibility to persist for unreasonable periods of time, *see* 28 C.F.R. pt. 36 app. C § 36.211; Department Comments, 73 Fed. Reg. at 34523; (JA062-63) (restating this exact standard).

In other words, the regulation is founded on reasonableness. Isolated and temporary maintenance failures are a fact of life, but routine, repeated or long-lasting maintenance failures are unacceptable. The question of whether Appellant's

policies and practices result in the former or later, are even capable of identifying ADA violations, or place Appellant's maintenance obligation onto customers, are the central questions the District Court certified this case to decide and which this Court should permit Appellees to explore on remand.

In sum, the ADA sets forth objective and quantitative standards that give Appellant fair notice of its obligations under the law. Appellant has flexibility in choosing how to meet these obligations, but it cannot employ policies or practices that place those obligations onto its customers, or result in unidentified and unremediated access barriers that deny individuals with disabilities their right to full and equal enjoyment of Appellant's goods, services and facilities. For all of the foregoing reasons, the Court should reject Appellant's argument and affirm the District Court's holding.

C. Section 211 Is Privately Enforceable

Appellant contends that the District Court erred in basing its decision on Section 211 because the regulation is not privately enforceable. (Def. Br. at 32-35). Like its due process argument, Appellant failed to raise this claim below, (JA236-67; JA755-91), and fails to identify any public interest that warrants consideration of this argument on appeal. *Seijas*, 508 F.3d at 125 n. 1; *Veverka*, 649 Fed. Appx. at 166; *Freeman*, 709 F.3d at 250. The Court should not consider this contention as a result, but, if it does, should reject it for the reasons explained below.

First, Appellant's argument ignores a number of cases that have granted summary judgment based on Section 211 violations, or denied mootness arguments based on Section 211's requirements. *See Kalani v. Starbucks Coffee Co.*, 698 Fed. Appx. 883, 886 (9th Cir. 2017) (affirming order granting summary judgment based on Section 211 violation); *Chapman II*, 779 F.3d at 1009 (same); *Crandall v. Starbucks Corp.*, 249 F. Supp. 3d 1087, 1111 (N.D. Cal. 2017) (granting summary judgment based on Section 211 violation); *Curtis v. Home Depot U.S.A., Inc.*, No. 13-cv-1151, 2015 WL 351437, at *6 (E.D. Cal. Jan. 23, 2015) (same); *Pereira v. Ralphs Grocery Co.*, 329 Fed. Appx. 134 (9th Cir. 2009) (overturning order finding case moot where the defendant remediated structural features, including parking facilities); *Lozano v. C.A. Martinez Fam. Ltd. Partn.*, 129 F. Supp. 3d 967, 973 (S.D. Cal. 2015) (denying mootness argument based on Section 211); *Sawczyn v. BMO Harris Bank Nat. Ass'n*, 8 F.Supp.3d 1108, 1115 (D. Minn. 2014) (same); *Nat'l Alliance for Accessability, Inc. v. McDonald's Corp.*, No. 12-cv-1365, 2013 WL 6408650, at *7 (MD. Fla. Dec. 6, 2013) (same with respect to a number of features, including parking facilities); *Moeller v. Taco Bell Corp. ("Moeller II")*, 816 F. Supp. 2d 831, 860-62 (N.D. Cal. 2011) (same). These cases implicitly recognize that Section 211 is privately enforceable.

Additionally, Section 211 itself demonstrates that it is privately enforceable because it "construe[s] a[] personal right that [the ADA] creates." *Three Rivers*

Ctr. for Indep. Living v. Hous. Auth. of City of Pittsburgh, 382 F.3d 412, 425 (3d Cir. 2004). As previously stated, the ADA grants all persons with disabilities the right to "full and equal enjoyment" of any goods, services or facilities. 42 U.S.C. §§ 12182(a), (b)(1). This right is unqualified; individuals do not lose it after a facility is constructed or altered, or after barriers are removed. To ensure that the ADA's accessibility mandate is continuous and not isolated, Section 211 properly construes that mandate by requiring public accommodations to "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[.]" 28 C.F.R. § 36.211(a).

Appellant seeks to avoid compliance with Section 211 by arguing that the regulation "focuses on the regulated entity, not protected individuals." (Def. Br. at 35).[5] This is misleading. Although Section 211 focuses on the obligation of public accommodations to maintain the accessible features of their facilities, it does so to ensure individuals with disabilities are afforded their personal right to full and

[5] Appellant also claims courts have held that Title II's analogous "inspect-and-repair" obligation is not privately enforceable. (Def. Br. at 35 n. 6). That is not true. Title II's maintenance obligation is found at 28 C.F.R. § 35.133. The case Appellant cites does not mention this regulation. *See generally Cherry v. City Coll. of S.F.*, No. 04-cv-4981, 2005 WL 2620650 (N.D. Cal. Oct. 14, 2005). It instead concerns "self-evaluation" and "transition plan" regulations under 28 C.F.R. §§ 35.105(a), 35.150(d). *Cherry*, 2005 WL 2620650, at *2. It is inaccurate to claim that *Cherry* says anything with respect to the enforceability of 28 C.F.R. § 36.211 since *Cherry* did not analyze Title II's comparable provision.

equal access. If a public accommodation fails to comply with Section 211, individuals with disabilities are necessarily denied full and equal access because they will experience architectural barriers that deny them access to a public accommodation's goods, services and facilities. *Chapman I*, 631 F.3d at 947; *Oliver*, 654 F.3d at 905.

This distinction is crucial and renders inapposite *Three Rivers*, a case in which the plaintiff was attempting to enforce regulations that 1) did not relate to "individual instances of discrimination," 2) were "not concerned with whether the needs of any particular person have been satisfied," and 3) could be violated without "deny[ing] access to a disabled individual." 382 F.3d at 429-30. Here, by contrast, Section 211 seeks specifically to protect against individual instances of discrimination, and a violation of Section 211 will necessarily result in personal injury because it will cause the development and/or persistence of features that prevent full and equal enjoyment. By requiring maintenance of accessible features, Section 211 is protecting the personal rights of all individuals with disabilities by ensuring that their access needs are maintained after facilities are constructed or altered, or after barriers are removed. Accordingly, Appellant's reliance on *Three Rivers* is misplaced.

III. THE DISTRICT COURT CORRECTLY FOUND COMMON QUESTIONS OF LAW AND FACT EXIST

The District Court was within its discretion to find that Rule 23(a)(2)'s commonality requirement was met based on the existence of common policies and practices that are applied in uniform ways to all of the restaurants Appellant owns or controls because, whether Appellant's common policies and practices result in barriers that are not identified or remediated by Appellant, is an issue capable of resolution through common proof.

Appellant challenges the District Court's holding by arguing that the court abused its discretion by failing "to decide whether Steak 'N Shake's purported maintenance policy and practice results in systemic, class-wide discrimination." (Def. Br. at 37). According to Appellant, this failure abdicated the duty of the court to "reach the merits" of Appellees' claims. (*Id.*). Appellant also contends the District Court abused its direction because Appellees' claims and the claims of the class are too individualized to satisfy the commonality requirement of Rule 23(a)(2). (*Id.* at 37-44). Both arguments are meritless.

A. The District Court Correctly Refused to Decide the Merits of the Claims of Appellees and the Class Members

i. The District Court applied black-letter law in finding that Rule 23(a)(2) was satisfied

To satisfy the commonality requirement of Rule 23(a)(2), "the named plaintiffs [must] share at least one question of fact or law with … the prospective

class." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 397 (3d Cir. 2015) (citing *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir.2013)). "The bar is not high." *Id.* It simply requires a "common contention … capable of classwide resolution." *Id.* at 397-98 (citing *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 335 (3d Cir. 2011)). What matters is "the capacity of a classwide proceeding to generate common *answers*[.]" *Id.* at 398 (emphasis in original) (citing *Wal-Mart*, 564 U.S. at 350).

In deciding whether a single common question exists, courts must evaluate the nature of the evidence relevant to the merits of the claims at issue, and decide whether that evidence is common to the class. *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 260 (3d Cir. 2016) ("[T]he nature of the evidence that will suffice to resolve a question determines whether the question is common[.]"). A common question exists when "the same evidence will suffice for each [class] member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The commonality inquiry may require courts to "consider some merits-related issues," but does not permit courts to reach a "decision on the merits." *Jani-King*, 837 F.3d at 322 (citing *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 466 (2013)); *see also Tyson Foods*, 136 S. Ct. at 1047.

A plaintiff's burden in demonstrating commonality at the class certification stage is properly summarized as follows:

> Plaintiffs' burden … is not to prove the element[s of their case], … . Instead, … [they must] demonstrate that the element[s of their case are] ***capable of proof at trial through evidence that is common to the class*** rather than individual to its members. Deciding this issue calls for … rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove [their case] at trial.

In re Hydrogen Peroxide, 552 F.3d at 311-12 (citing Fed. R. Civ. P. 23 advisory committee's notes, 2003 Amendments) (emphasis added).

Here, the District Court was within its discretion to certify the class because the nature of the evidence relevant to the claims of Appellees is common to the class. The District Court found that the record evidence established that Appellant employs "the same ADA maintenance policies and practices in a uniform way to the restaurants it owns and controls." (JA070). Since Appellees and class members are challenging the same policies and practices that are applied uniformly, the District Court was correct in holding that exploration of these policies and practices will "produce common questions with common answers." (*Id.*).

Indeed, the common policies and practices either result in discrimination through their inability to identify and remediate architectural barriers, or they do not. The evidence needed to prove this is common to Appellees and the Class. *See Moeller II*, 816 F. Supp. 2d at 859 ("[A] court can [enjoin policies or practices]

based on evidence that is symptomatic of the defendant's violations, including … evidence … representative of larger conditions or problems."); *see also Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (stating system-wide injunctive relief proper where evidence shows "the injury is the result of violations of a statute … that are attributable to policies or practices pervading the whole system").

In line with the District Court's ruling, numerous district courts have certified architectural barrier cases where common policies and practices are challenged. *See, e.g.*, *Moeller v. Taco Bell Corp. ("Moeller III")*, No 02-cv-5849, 2012 WL 3070863, at *4 (N.D. Cal. July 26, 2012) (declining to decertify class where court previously found, in *Moeller II*, that defendant employed common policies and practices); *Gray v. Golden Gate Nat. Recreational Area*, 279 F.R.D. 501, 508-20 (N.D. Cal. 2011) (finding commonality satisfied where plaintiffs identified common policies and practices); *Californians for Disability Rights, Inc. v. California Dept. of Transp. ("CALTRANS")*, 249 F.R.D. 334, 344-46 (N.D. Cal. 2008) (similar); *Lucas v. Kmart Corp.*, No. 99-cv-01923, 2005 WL 1648182, at *1 (D. Colo. July 13, 2005) (certifying class challenging access barriers across 1,500 locations because defendant had "centralized policies and practices that created architectural and related barriers and impeded the ability of wheelchair-bound shoppers from using or enjoying access to Kmart").

ii. Appellant is mistaken in claiming the District Court was required to decide the merits of Appellees' claim in order to satisfy Rule 23(a)(2)

Appellant's repeated protest that the District Court should not have certified the class because Appellant's policies and practices allegedly do not result in access violations only serves to reinforce the District Court's holding. If Appellees and the Class members fail to show that Appellant's policies and practices result in ADA violations through a failure to identify and remediate access barriers, then this case will end "for one and for all; no claim w[ill] remain in which individual issues could potentially predominate." *Amgem*, 568 U.S. at 468. The "fatal similarity" on which Appellant's appeal is premised is properly addressed at "summary judgment, not class certification." *Tyson Foods*, 136 S. Ct. at 1047.

Appellant's confusion over what Rule 23(a)(2) requires is due largely to a misreading of *Wal-Mart v. Dukes*, a case in which concerned the propriety of certifying a class of persons asserting gender discrimination under Title VII of the Civil Rights Act. 564 U.S. 338. The Supreme Court recognized two ways in which commonality could be established:

> First, if the employer used a bias testing procedure … a class action on behalf of every[one] who might have been prejudiced by the test clearly would satisfy the commonality … requirement[.] Second, significant proof that an employer operated under a general policy of discrimination conceivably could justify a class … if the discrimination manifested itself … in the same general fashion[.]

Id. at 353.

The *Wal-Mart* plaintiffs failed in establishing commonality under the first method because "Wal-Mart ha[d] no testing procedure or other companywide evaluation method that c[ould] be charged with bias." *Id.* "The only corporate policy … establish[ed] [wa]s Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters," which was "the opposite of a uniform employment practice that would provide the commonality needed for a class action[.]" *Id.* at 355. The *Wal-Mart* plaintiffs also failed in establishing commonality under the second method because they did not "identif[y] a common mode of exercising discretion that pervade[d] the entire company." *Id.* at 356. Since there was no common policy, and the only identified policy was one of discretion, the plaintiffs were required to show that the discretion was exercised in a common way, which they did not. *Id.* at 354-58.

The Seventh Circuit correctly summarized the holding of *Wal-Mart* as follows:

> *Wal–Mart* holds that if employment discrimination is practiced by the employing company's local managers, exercising discretion granted them …, rather than implementing a uniform policy … to govern the local managers, a class action by more than a million current and former employees is unmanageable; the incidents of discrimination … do not present a common issue that could be resolved efficiently in a single proceeding.

McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 488 (7th Cir. 2012); *Floyd v. City of New York*, 283 F.R.D. 153, 173 (S.D.N.Y. 2012) (stating *McReynolds* stands for the proposition that, "even after *Wal-Mart*, Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member").

In contrast to *Wal-Mart*, Appellees here are not basing their motion for class certification on a policy of allowing discretion. Instead, the District Court held, and Appellant does not contest, that Appellant implements *uniform policies and practices* governing maintenance of their facilities. Appellees' challenge is based on the contention that employees who are not trained in ADA compliance and who are not directed to look for ADA-related access issues, cannot identify those issues as they arise, leading directly to unidentified and unremediated barriers in Appellant's parking facilities. Appellees contend that Appellant effectively is engaged in a companywide practice of pushing its obligation to maintain the accessibility of its restaurants onto customers. "[C]hallenging th[ese] policies [and practices] in a class action is not forbidden by the *Wal–Mart* decision; rather that decision helps … to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls." *McReynolds*, 672 F.3d at 482.

In fact, *Wal-Mart* supports the District Court's decision by expressly recognizing that the identification of a companywide policy or practice that can be charged with discrimination "would *clearly* satisfy the commonality … requirement[] of Rule 23(a)." 564 U.S. at 353 (emphasis added). Put differently, under *Wal-Mart*, Appellees "need to show that the policies and practices they challenge are common, not (yet) that the common policies and practices are [unlawful]." *Braggs v. Dunn*, 317 F.R.D. 634, 655-56 (M.D. Ala. 2016). To the extent a Title VII case that focuses on "the alleged reasons for [challenged employment] decisions," *Wal-Mart*, 564 U.S. at 352, is even applicable to a Title III ADA claim premised on architectural discrimination, the District Court's finding that Appellant employs the same policies and practices in uniform ways to each of the restaurants Appellant owns or controls is sufficient to meet the commonality requirement of Rule 23(a)(2). The Court should reject Appellant's contentions to the contrary, and affirm the District Court's certification order.

B. The Central Issue of Appellee's Claims Does Not Require Individualized Analysis and Appellant's Arguments to the Contrary Are Incorrect and Misleading

Appellant further contends commonality is lacking because, in order to establish the existence of an architectural barrier, the District Court must analyze the barrier itself and determine whether it constitutes a violation of the ADA. (Def. Br. at 41-44). While true, this argument is irrelevant.

Appellant's argument ignores the fact that Appellees' claims are based on the contention that Appellant's current policies and practices are incapable of identifying and promptly remediating access violations as they arise, and that Appellant is improperly placing its obligation to identify architectural barriers onto its customers. In order to demonstrate that these policies and practices result in discrimination, Appellees must demonstrate that architectural barriers exist and that they have not been identified or scheduled for remediation prior to customer complaints. That observation, however, does nothing to disturb the District Court's finding that this matter was appropriate for class treatment.[6]

Contrary to Appellant's contention, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong*, 275 F.3d at 868; *see also Thorpe v. D.C.*, 303 F.R.D. 120, 145-48 (D.D.C. 2014) (finding commonality satisfied because "plaintiffs

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[6] Appellant spends about four pages arguing the merits of Appellees' investigation. (Def. Br. at 37-41). Appellees make two points in response. First, the discovery process still has a merits and remedies stage, meaning more evidence will be assembled to support those portions of the case. Second, despite Appellant's critique of Appellees' preliminary investigation, Appellant admitted all eight restaurants identified as in violation of the ADA in Appellees' preliminary investigation were, in fact, in violation of the ADA. (JA595). Appellant contends the issues were relatively minor, but conveniently excluded from the record what remediations were completed or scheduled, and what accessibility issued it identified and confirmed. (*Id.*). Nevertheless, Appellant admits it independently identified issues at all eight restaurants after this lawsuit was filed. (*Id.*). Appellees are unsure why Appellant criticizes their investigation while admitting its findings were correct.

allege widespread wrongdoing by a defendant[and] a uniform policy or practice that affects all class members"). "In such circumstances, individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." *Armstrong*, 275 F.3d at 868; *see also Baby Neal v. Casey*, 43 F.3d 48, 60-62 (3d Cir. 1994) (finding district court abused its discretion in failing to certify class where the class members' individual circumstances differed, but the class members challenged the defendant's overarching common and centralized policies and practices).

"[T]he essence of [Appellant's] argument—that in order to prove the existence of the forest [Appellees] must individually prove the existence of each tree—is anathema to the very notion of a class action." *CALTRANS*, 249 F.R.D. at 345. "Taken to its logical conclusion … no civil rights class action would ever be maintainable, because, in order to prove the existence of a discriminatory … practice, each class member would have to individually prove the highly individualized factors relating to each instance of discrimination they allegedly suffered." *Id.* "This would simply obviate the concept of the class action lawsuit." *Id.*; *see also Gray*, 279 F.R.D. at 516 ("[T]he Court disagrees that it will necessarily need to undertake a barrier-by-barrier, accommodation-by-accommodation evaluation, and instead finds that a common question of whether

GGNRA has taken reasonable steps to comply with the Rehabilitation Act and accommodate the disabled by remedying access barriers allows for certification.”).

Regardless of where a parking facility is located, its date of construction or alteration, or the types of barriers it contains, the fact remains that Appellant employs uniform policies and practices that allegedly cannot identify barriers as they arise and remediate them promptly. Appellees and all class members, regardless of location visited or barrier experienced, are challenging the same uniform policies and practices, and thus, require the same evidence to prove that these policies and practices result in unlawful discrimination. The Court should affirm the District Court’s certification order and reject Appellant’s position.

IV. THE DISTRICT COURT CORRECTLY HELD THAT THE NUMEROISTY REQUIREMENT OF RULE 23(a)(1) WAS MET

A. The District Court’s Finding That Numerosity Had Been Established Is Supported by the Record Evidence

This case seeks to challenge the same policies and practices that are applied uniformly to approximately 417 restaurants. The most current population statistics demonstrate that there are between 14.9 million to 20.9 million persons with mobility disabilities who live in the United States. (JA117-18; JA711; JA722-24). These individuals are potential Steak ‘N Shake customers. Appellant even admitted it is “fair to say that thousands of people with disabilities utilize [its] parking

facilities and visit [its] stores every year." (JA155-56). Based on this evidence, the District Court properly exercised its discretion in finding numerosity. (JA069).

Supporting the District Court's holding are the holdings of numerous courts relying on cenus data and common sense when addressing numerosity. *See Colo. Cross Disability Coal. v. Abercrombie & Fitch Co. ("CCDC"*, 765 F.3d 1205, 1214-15 (10th Cir. 2014) (holding district court did not abuse discretion in finding numerosity by comparing census data to number of stores operated); *Gray*, 279 F.R.D. at 508 (finding numerosity by comparing population percentage of individuals with disabilities to number of annual facility visits); *Kurlander v. Kroenke Arena Co., LLC*, No. 16-cv-02754, 2017 WL 5665127, at *5 (D. Colo. Aug. 31, 2017) (relying on census data to find numerosity); *CALTRANS*, 249 F.R.D. at 346-47 (same); *Park v. Ralph's Grocery Co.*, 254 F.R.D. 112, 120 (C.D. Cal. 2008) (same); *Nat'l Fedn. of Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1199-1200 (N.D. Cal. 2007) (same); *Moeller v. Taco Bell Corp. ("Moeller I")*, 220 F.R.D. 604, 608 (N.D. Cal. 2004) (same); *Access Now, Inc. v. Ambulatory Surgery Ctr. Grp., Ltd.*, 197 F.R.D. 522, 525 (S.D. Fla. 2000) (same); *Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994) (same).

Appellant argues the District Court abused its discretion because Appellees "did nothing to prove that other individuals with disabilities experienced barriers at Steak 'N Shake restaurants[.]" (Def. Br. at 48). This argument is wrong.

There are at least 14.9 to 20.9 million persons with mobility disabilities who may patronize Appellant's over 400 restaurants at any time. Since Appellant uniformly applies the same policies and practices to its restaurants, each of these individuals is subject to the same policies and practices at issue. Certifying a class to decide whether Appellant's uniform policies and practices are capable of protecting the rights of these vastly numerous individuals by way of timely identifying and remediating architectural barriers was not an abuse of discretion.

Moreover, that Appellees have not identified which of the 14.9 to 20.9 million class members have or will visit Appellant's restaurants is inconsequential. "Visiting a fast food restaurant, as opposed to a hotel or professional office, is not the sort of event that requires advance planning or the need for a reservation." *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1079 (D. Haw. 2000). "[P]atrons visit such restaurants at the spur of the moment." *Id.* Recognizing these realities, the District Court certified a class of both present and future class members, (JA075), to ensure that their choice to visit Appellant's restaurants is not negatively affected by Appellant's inability to identify and remediated architectural barriers in parking facilities, and its practice of relying on individuals with disabilities to complain about inaccessible conditions before anything is done to fix them. The District Court was well within its discretion to do so.

Finally, specific enumeration of class members in Rule 23(b)(2) cases is antithetical to the Rule 23(b)(2) procedural device, which was created specifically for cases where, like here, "a party is charged with discriminating … against a class, *usually one whose members are incapable of specific enumeration*." *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015) (emphasis in original). Rule 23(b)(2) certification "is appropriate even if the defendant's action or inaction 'has taken effect or is threatened only as to one or a few members of the class, provided it is based on *grounds* which have general application to the class." *Neale v. Volvo Cars of N. Amer.*, 794 F.3d 353, 367 (3d Cir. 2015) (emphasis in original); *Floyd*, 283 F.R.D. at 173. "Technically speaking, … (b)(2) class members may not have suffered a legal injury[.]" *Neale*, 794 F.3d at 367-68.

Consistent with findings in these matters, this case seeks to protect the rights of 14.9 to 20.9 million individuals with mobility disabilities who have visited or may visit any of Appellant's stores, all of which are subject to Appellant's centralized policies and practices. Each member of the Class is impacted by the Appellant's policies and practices in the same way: through an inability to identify and remediate architectural barriers, and by requiring customers to complain in order to remediate access violations rather than proactively ensuring such violations do not occur. A class of 14.9 to 20.9 million individuals subject to and

similarly affected by the same policies and practices are sufficiently numerous to meet the requirements of Rule 23(a)(1).

B. The Fact That Appellees Seek Only Injunctive Relief Further Buttresses the District Court's Finding That Numerosity Was Properly Established

Appellant also contends the District Court improperly "relaxed" the class certification standards applicable to Rule 23(a)(1). (Def. Br. at 21). That is not the case, as the record shows that the certified class of current and future visitors contains so many individuals that joinder is impracticable.

Nevertheless, this Court recently stated that claims for injunctive and declaratory relief affect the numerosity analysis. *See In re Modafinil*, 837 F.3d at 253 (identifying as relevant for numerosity "whether the claims are for injunctive relief or for damages"); *see also Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (same). And, this Court previously explained:

> In most cases where a plaintiff seeks injunctive relief against discriminatory practices …, the defendant will not be prejudiced if the plaintiff proceeds on a class action basis … because the requested relief generally will benefit … all other persons subject to the practice under attack. A judicial determination that a particular practice infringes upon protected rights … will prevent its application ... against many persons not before the court. Thus rigorous application of the numerosity requirement would not … appear to be warranted.

Weiss v. York Hosp., 745 F.3d 786, 808 (3d Cir. 1984); *see also Sueoka v. U.S.*, 101 Fed. Appx. 649, 653 (9th Cir. 2004).

Based on these authorities, the District Court was correct in holding that the fact that this case seeks solely injunctive relief under Rule 23(b)(2) factored positively into the numerosity analysis for Appellees. *See Hill v. City of New York*, 136 F. Supp. 3d 304, 353 (E.D.N.Y. 2015) (finding numerosity is relaxed in cases seeking injunctive and declaratory relief); *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (same); *Jackson v. Danberg*, 240 F.R.D. 145, 147 (D. Del. 2007) (same).

For each of the reasons, the District Court did not abuse its discretion in finding Appellees satisfied their burden under Rule 23(a)(1). The District Court's ruling should be affirmed.

V. THE DISTRICT COURT WAS CORRECT IN CERTIFYING THE CLASS UNDER RULE 23(b)(2)

Certification of a Class seeking injunctive relief is appropriate when a common practice or policy has impacted and continues to impact a group of individuals in a similar manner. Courts routinely certify class actions to address such claims. Appellant argues, however, that the District Court abused its discretion in certifying the class because Appellant has not acted or failed to act on grounds generally applicable to the class, and because there is no single injunction that would provide relief to each class member. (Def. Br. at 49-53). Neither argument holds weight.

A. Appellant's Common Policies and Practices Are Generally Applicable to the Class As a Whole

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). This requirement "*is almost automatically satisfied* in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58.

Rule 23(b)(2) certification is proper where the alleged harms "stem from central and systemic failures" on part of the defendant. *See Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997). This "does not … require that the defendant's conduct be directed or damaging to every member of the class." *Baby Neal*, 43 F.3d at 58. To the contrary, Rule 23(b)(2) is "unquestionably" met "when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014).

Here, the District Court was correct in finding Rule 23(b)(2)'s "general applicability" requirement satisfied because Appellees are challenging common policies and practices that are applied uniformly to each restaurant Appellant owns or controls. These policies and practices affect Appellees and each class member in the same way: Appellant's common policies and practices result in unidentified and unremediated architectural barriers, forcing Appellees and each of the class

members to complain in order to identify such barriers and schedule them for remediation. The challenged policies and practices do not operate differently between stores or based on the identity of any class member. The District Court was within its discretion in finding that Appellant's actions are generally applicable to the class as a whole.

Appellant's contention that it is not required to institute any specific policies or practices under the ADA or Section 211 is irrelevant. (Def. Br. at 50-51). Appellant *is* required to maintain accessibility, and the generally applicable policies and practices identified by the District Court are alleged to violate this obligation. The uniform application of the common policies and practices at issue is sufficient to meet the "general applicability" requirement of Rule 23(b)(2).

Appellant also is mistaken in arguing that a practice is generally applicable only if it is shown to cause discrimination. (Def. Br. at 51). Regardless of whether Appellees and the class ultimately prove their case, the fact remains that Appellant uniformly applies the same policies and practices at each of its stores. That is the quintessential definition of "generally applicable." The District Court did not abuse its discretion and this Court should reject Appellant's contentions.

B. A Single Injunction Against Appellant's Common Policies and Practices Will Provide Relief to Appellees and Each Class Member

"Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 361; *Baby Neal*, 43 F.3d at 59 ("[T]he relief sought by the named plaintiffs should benefit the entire class."). "[I]njunctive actions, seeking to define the relationship between the defendant and the 'world at large,' will usually satisfy this requirement." *Baby Neal*, 43 F.3d at 59.

In *Baby Neal*, this Court considered an order denying the certification of a Rule 23(b)(2) class where the plaintiffs alleged that system-wide deficiencies associated with the defendant's foster care system "cause[d] the [defendant] to violate various mandates under federal statutory and constitutional provisions." 43 F.3d at 64. This Court held that the district court *abused its discretion by refusing to certify the class*, stating that the district court erred in finding that it was "impossible to conceive of an Order [that] could … address the specific case-by-case deficiencies in [the defendant's] performance." *Id.* This Court stated that the district court was not required to make "individual, case-by-case determinations in order to assess liability or order relief" because the district court could "fashion precise orders to address specific, system-wide deficiencies and then monitor compliance relative to those orders." *Id.*

Just as in *Baby Neal*, certification is proper here, and the District Court would have abused its discretion had it refused to certify the class, because precise orders can be fashioned to address the specific, system-wide deficiencies identified in Appellant's policies and practices. For example, the District Court could "order [Appellant] to develop training protocols for its [maintenance employees]" to ensure they are aware of the ADA's structural requirements and know how to identify access violations for prompt repair. *Baby Neal*, 43 F.3d at 64. The District Court also could order Appellant to conduct annual ADA-specific inspections to ensure accessibility has been maintained. Finally, the District Court could order Appellant to refrain from engaging in its current practice of conducting ADA-specific inspections "[o]nly in response to specific complaints," (JA139), so individuals with disabilities are relieved from having to discharge the maintenance obligation that is Appellant's responsibility. These and similar orders are not "obey the law" injunctions; they are targeted and designed expressly to correct the specific, system-wide deficiencies that are alleged to infect Appellant's maintenance system.

Ignoring *Baby Neal*, Appellant attempts to liken this case to *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009). In doing so, Appellant conveniently omits two crucial differences between *Castaneda* and this case. First, the plaintiffs in *Castaneda* sought massive statutory damages under state law, but

attempted to certify a class under Rule 23(b)(2), not Rule 23(b)(3). *Castaneda*, 264 F.R.D. at 570-71. As *Castaneda* recognized, and as *Wal-Mart* later affirmed, claims for damages cannot proceed under Rule 23(b)(2). Second, and more importantly, the *Castaneda* plaintiffs failed to identify any common policy or practice that was employed in a uniform way. To the contrary, *Castaneda* involved over 90 restaurant franchises supervised by different entities with different policies and practices. *Id.* at 568 ("[I]t is clear here that the franchisees/lessees made individualized decisions relating to 96 different restaurants across California over many years[.]"). Without any common policy or practice that could be charged with discrimination, the only available injunctive relief was removal of individual barriers, which necessarily required an analysis of each barrier and each store. *Id.* at 569-70.

Here, the District Court identified, and Appellant does not contest, that common policies and practices exist, and that specific, system-wide deficiencies in those policies and practices are challenged. Injunctive relief targeting these uniform policies and practices and the specific deficiencies they contain would provide relief to each member of the class by unencumbering them of Appellant's maintenance obligation and ensuring architectural barriers are identified and scheduled for remediation as they arise. This case is not analogous to *Castenada*, it

is analogous to *Baby Neal* and the District Court did not abuse its discretion in certifying the Class to address Appellant's common policies and practices.

VI. THE DISTRICT COURT CORRECTLY HELD APPELLEES ESTABLISHED STANDING UNDER ARTICLE III

Appellant's final challenge to the District Court's ruling claims the District Court erred in certifying the class because neither Appellee has standing to pursue this lawsuit. (Def. Br. at 53-58). Appellant first argues that Appellees have not demonstrated an intent to return to Appellant's restaurants, (*Id.* at 55-57), and then contends that Appellees lack standing to pursue claims with respect to restaurants they have not visited. (*Id.* at 57-58). Neither argument is persuasive.

A. Appellees Have Standing to Pursue Their Claims

Standing is determined "at the time the action commences." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000). It requires that: 1) the plaintiff suffer an injury in fact; 2) there is a causal connection between the injury and the conduct at issue; and 3) there is a likelihood the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In ADA cases seeking injunctive relief, the injury in fact requirement is satisfied "where a plaintiff demonstrates a sufficient likelihood that he will again be wronged in a similar way." *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036–37 (9th Cir. 2008). Plaintiffs can establish standing by showing they

are "deterred from patronizing a public accommodation due to a … failure to comply with the ADA" or are "threatened with harm in the future because of existing or imminently threatened non-compliance with the ADA." *Id.*

It is undisputed that Appellees suffered an injury when they visited Appellant's restaurant and experienced inaccessible conditions that went unidentified by Appellant until this lawsuit was filed. *See Nanni v. Aberdeen Marketplace, Inc.*, No. 16-1638, --- F.3d ---, 2017 WL 6521299, at *6 (4th Cir. Dec. 21, 2017). Appellant instead contends that Appellees cannot seek prospective relief, and the District Court erred in finding they had standing, because Appellees were unlikely to suffer a future injury when this case was filed. (Def. Br. at 55-57). Specifically, Appellant argues Appellees were unlikely to experience inaccessible conditions at Appellant's restaurants because Appellees did not specify when they would return. (*Id.*). This is belied by the record.

Both Appellees maintain permanent residences in Pittsburgh, Pennsylvania, (JA163; JA 189), which lies in close proximity to many of Appellant's restaurants. Although Appellant argues that Appellee Heinzl permanently moved, she actually testified that she had left Pennsylvania only temporarily (to pursue an advanced degree), and that her permanent residence is located in Pittsburgh. (JA189-90).

Appellees also have visited no less than seven of Appellant's restaurants on many different occasions. (JA175-77 (stating Appellee Mielo visited Appellant's

East Munhall, PA restaurant at least two times); JA181, 451 (stating he visited one of Appellant's restaurants located in the area of Murrysville, PA since his visit to the East Munhall location); JA182 (stating he visited one of Appellant's restaurants located in the area of Robinson Township, PA, at least once, and possibly twice, since his visit to the Waterfront location); (JA204-05, 408 (stating Appellee Heinzl visited Appellant's Pleasant Hills, PA location at least three and possibly four times); JA211 (stating she visits the Robinson Township, PA location "very often," and stating she visited others "here and there"); JA213 (stating she visited the Tarentum, PA location); JA214 (stating she is "sure" she has been to other of Appellant's restaurants)).

In addition to their close proximity and many visits to Appellant's restaurants, both Appellees enjoy Appellant's food and services. Appellee Mielo usually does not plan his trips to Steak 'N Shake, but decides to patronize Appellant's business when he gets an urge for their food. (JA740). Appellee Heinzl explicitly testified that she "like[s] Steak 'N Shake," and that she has visited many Steak 'N Shake restaurants as a result. (JA754).

Based on this evidence, the District Court was correct in finding Appellees had standing to seek injunctive relief under the ADA at the time suit was filed: Appellees live close to many Steak 'N Shake restaurants; have visited numerous Steak 'N Shake restaurants on many occasions; enjoy Appellant's food and

business; and wish to patronize Appellant's restaurants at their convenience. That is more than enough to establish standing and demonstrate that Appellees' were under threat of experiencing architectural barriers upon return to Appellant's business.

Nevertheless, Appellant criticizes Appellees for failing to demonstrate any specific plans to return. (Def. Br. at 55-57). That argument ignores the fact that such a showing is impossible based on the nature of Appellant's business. "Fast food patrons visit such restaurants at the spur of the moment." *Parr*, 96 F. Supp. 2d at 1079; *cf. Sawczyn*, 8 F. Supp. 3d at 1113 ("Given the spontaneous nature of ATM visits, Sawczyn need not allege when *specifically* he will return … in order for the Court to consider his professed intent to return credible and definite.") (emphasis in original). "Once a person determines that he or she likes a fast food restaurant, that person's return is on impulse." *Parr*, 96 F.Supp.2d at 1079.

The testimony of Appellees further buttresses their argument. Appellee Mielo actually testified that his visits are "not a planned event," but instead are something he does when he wants to eat Steak 'N Shake food. (JA740). Appellee Heinzl similarly testified that she "likes" Steak 'N Shake's business and has patronized it many times as a result. (JA754). That Appellees don't pre-plan their visits to Steak 'N Shake is irrelevant given their history of past patronage, proximity to Appellant's restaurants, and affinity for Appellant's food and

services. This Court should not establish a standing rule that would be nearly impossible to meet for any matter involving a service industry company like Appellant.

Appellant further criticizes the District Court for finding that Appellees have standing despite the fact that "nothing in the record show[s] any frequency of nearby travel" in relation to Appellant's restaurants. (Def. Br. at 56). This argument is contradicted by the record, which shows that both Appellees frequently travel near Appellant's restaurants, as evidenced by their many past visits to multiple of Appellant's restaurants. (JA175-77, 181-82; JA204-05, 211, 213-14; JA408; JA451). More importantly, such a demonstration is unnecessary because Appellees live in close proximity to numerous of Appellant's restaurants, and enjoy patronizing Appellant's business. The record reflects that Appellees wished and intended to continue patronizing Appellant's restaurants at their convenience.

Finally, the Court should reject adopting Appellant's four-factor standing test, (Def. Br. at 55 n. 9), a test that has been employed inconsistently, because the mechanical counting of Appellant's proposed four-factor analysis "overly and unnecessarily complicates the issue at hand." *Daniels v. Arcade, L.P.*, 477 Fed. Appx. 125, 129 (4th Cir. 2012); *see also Nanni*, 2017 WL 6521299, at *7 (adopting *Daniels* principles). Instead, the Court should "consider the totality of all

relevant facts to determine whether [Appellees] face[] a real and immediate threat of future injury." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1337 (11th Cir. 2013).

Applying the totality of the circumstances test here, as explained above, shows that Appellees live close to Appellant's restaurants, have visited many of those restaurants numerous times, like Appellant's food and services, and wish to return at their convenience. Those facts are sufficient to confer standing under Article III. For this reason and those explained above, the Court should affirm the holding of the District Court.

B. Appellees Are Not Required to Establish Standing Beyond Their Individual Claims

The contention that Appellees' must establish standing at all of Appellant's locations to challenge Appellant's company-wide policies and practices is incorrect. (Def. Br. at 57-58). Appellees' were harmed by Appellant's policies and practices because they experienced architectural barriers at Appellant's facilities, barriers that Appellant admits were not identified before the filing of this lawsuit (because Appellant's policies and practices cannot identify barriers), and only remediated after the filing of this lawsuit (because Appellant only conducts ADA-specific inspections when customers complain). Requiring Appellees to establish standing at all of the locations affected by common policies and practices in order to challenge those common policies and practices makes no sense.

"The question [of] whether an injunction may properly extend to [Appellant's policies and practices] nationwide is answered by asking whether [Appellees] may serve as a representative[s] of a class that seeks such relief. All that is necessary to answer this question is an application of Rule 23." *CCDC*, 765 F.3d at 1213. Again, Appellees were negatively affected by Appellant's policies and practices and, accordingly, have standing to challenge them individually and on behalf of a class of similarly situated individuals. The Court should reject Appellant's arguments and affirm the District Court.

CONCLUSION

For all of the foregoing reasons, Appellees respectfully request that the Court reject Appellant's arguments, affirm the District Court's ruling and remand this case to the District Court for further proceedings consistent with the District Court's class certification order.

Dated: January 16, 2018

Respectfully submitted,

s/ Edwin J. Kilpela

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COMBINED CERTIFICATES

I, Edwin J. Kilpela, signing counsel for Appellees, hereby certify as follows:

1. Pursuant to Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I certify that this Brief of Appellants complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(B):

   a. According to the word count in the word processing system employed in drafting this brief (Microsoft Word 2013), the Brief of Appellee contains 12,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

   b. This Brief has been written in Times New Roman, a proportionally-spaced, 14-point serif font.

3. On January 16, 2018, I filed this brief with the Clerk of the United States Court of Appeals for the Third Circuit via the Court's CM/ECF system, which will cause service on counsel for all parties of record, who are registered CM/ECF Users.

4. I further certify that the E-Brief was scanned for computer viruses using the current version of VirusTotal scanning service, and no virus was detected.

5. I also certify that the text of the hard copies and the E-Brief are identical.

/s Edwin J. Kilpela

Edwin J. Kilpela