Nos. 08-55867 & 08-55946

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAURIZIO ANTONINETTI,

Plaintiff, Appellant, and Cross-Appellee,

vs.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant, Appellee, and Cross-Appellant.

Appeal from the United States District Court
for the Southern District of California
The Honorable Napoleon A. Jones, United States District Judge
Case No. 05 CV 1660J (WMc)

BRIEF OF *AMICI CURIAE* DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS CALIFORNIA, DISABILITY RIGHTS LEGAL CENTER, COLORADO CROSS DISABILITY COALITION, NATIONAL DISABILITY RIGHTS NETWORK, AND AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES IN SUPPORT OF REVERSAL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations and Commentary

Legislative History

STATEMENTS OF INTEREST OF *AMICI*

American Association of People with Disabilities (AAPD) is a national nonprofit membership organization of people with all types of disabilities, their family members and supporters. Founded on the fifth anniversary of the Americans with Disabilities Act, AAPD has a strong interest in the full enforcement and implementation of this landmark law.

Colorado Cross Disability Coalition (CCDC), is a Colorado nonprofit corporation whose members are persons with disabilities and their nondisabled allies. CCDC's mission is to work for systemic change that promotes independence, self-reliance, and full inclusion for people with disabilities in the entire community. CCDC's membership consists of over 3,000 individuals with disabilities, their friends, family members and colleagues who support CCDC's mission and purpose. As part of that mission and purpose, CCDC seeks to ensure that persons with disabilities have access to -- and do not encounter discrimination in -- places of public accommodation, like quick-serve restaurants.

Disability Rights Advocates (DRA) is a non-profit legal center whose mission is to ensure dignity, equality and opportunity for people with all types of disabilities throughout the United States and worldwide. Making facilities

throughout the country accessible to individuals with disabilities through negotiation and litigation is one of DRA's primary objectives.

Disability Rights California (formerly known as Protection and Advocacy, Inc.), is a private non-profit agency established under federal law to protect, advocate for and advance the human, legal and service rights of Californians with disabilities.[1] Disability Rights California works in partnership with people with disabilities, striving towards a society that values all people and supports their rights to dignity, freedom, choice and quality of life. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. In the last year, Disability Rights California directly assisted more than 24,000 individuals with disabilities, many of whom were requesting assistance because they were experiencing accessibility barriers at places of public accommodation and public services within their communities, despite longstanding federal and state accessibility requirements.

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[1] Disability Rights California provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801, the Rehabilitation Act, 29 U.S.C. § 794e, the Assistive Technology Act, 29 U.S.C. § 3007, the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. § 1320b-20, the Children's Health Act of 2000, 42 U.S.C. § 300d-53, and the Help America Vote Act of 2002, 42 U.S.C. § 15461-62.

Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights law and policy organization dedicated to securing equal citizenship for Americans with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws.

The Disability Rights Legal Center (DRLC) is a non-profit organization that promotes the rights of people with disabilities and the public interest in, and awareness of, those rights by providing legal and related services. DRLC accomplishes this mission through several programs, including the Cancer Legal Resource Center (a joint program with Loyola Law School), Education Advocacy Project, Options Counseling, Lawyer Referral Service, and the Civil Rights Litigation Project. Since 1975, DRLC has handled disability rights cases, including numerous employment, housing, and access cases, under California and federal civil rights laws. DRLC has been class counsel in numerous cases on behalf of individuals with disabilities, and works to ensure the advancement of the rights of persons with disabilities on both a state and national level.

The National Disability Rights Network (NDRN) is the membership association of protection and advocacy ("P&A") agencies that are located in all 50

states, the District of Columbia, Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. The P&As routinely advocate and litigate on behalf of individuals with disabilities to enforce the Americans with Disabilities Act's accessibility requirements for state and local governments as well as in public accommodations.

* * *

This case is of particular importance to *Amici* because their members and constituents are individuals with disabilities who seek to ensure that Title III of the Americans with Disabilities Act ("ADA") is implemented to ensure full and equal enjoyment of places of public accommodation, including equal treatment and full integration of individuals with disabilities. *Amici* are very concerned that the novel approach adopted by the district court -- that customer service policies can

substitute for required physical access -- will foster precisely the dependence, segregation, and unequal treatment that the ADA was enacted to eliminate.

CORPORATE DISCLOSURE STATEMENT

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

INTRODUCTION

This case implicates the central principles of Title III of the ADA: the evolution of the built environment toward full accessibility; and the concomitant increase in the integration, independence, and self-sufficiency of people with disabilities.

The purposes of the ADA include "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities. 42 U.S.C. § 12101(a)(8). To achieve these purposes in the built environment, Congress designed a tiered system: facilities in existence when the statute was enacted are required to remove barriers only where doing so is "readily achievable," *id.* § 12182(b)(2)(A)(iv), while new construction is required to be

fully "readily accessible to and usable by individuals with disabilities," *id.* § 12183(a)(1). By ensuring that all new construction is readily accessible, "[t]he ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception." H. R. Rep. No. 101-485, pt. 3, at 63, *reprinted in* 1990 U.S.C.C.A.N. 445, 486.

The restaurants at issue here are subject to the ADA's new construction requirements. Nevertheless the district court held, based on the customer service policies of Defendant-Appellant-Cross-Appellee Chipotle Mexican Grill, Inc. ("Chipotle"), that the restaurants need not comply with these requirements. This holding permits companies to frustrate the ADA's goal that access become the rule rather than the exception -- and its goals of independence and integration -- by allowing them to substitute customer service polices for required physical access, that is, it permits them to refuse to make new construction "readily accessible to and usable by individuals with disabilities,"and instead force customers with disabilities to rely on the assistance of employees to use and enjoy their facilities.

ISSUE PRESENTED IN BRIEF OF *AMICI CURIAE*

Amici write to address a single issue:[2] Whether customer service methods that do not constitute "alternative designs and technologies," as required by section 2.2 of the Department of Justice Standards for Accessible Design ("DOJ Standards"), 28 C.F.R. pt. 36, app. A, may be considered "equivalent facilitation" under that section and thereby excuse full architectural compliance with DOJ Standards in facilities built after January 26, 1993.

Amici believe that any one of sections 4.33.3, 5.5, and 7.2 and figure 53 of the DOJ Standards would require Chipotle to lower its counters to provide an equal food-ordering and -viewing experience for its customers who use wheelchairs. This brief addresses only the question whether, given the requirement of lowered counters and equal viewing, Chipotle may construct higher, non-compliant counters, and force its customers with disabilities to rely on ad hoc staff assistance, and justify the move as an "equivalent facilitation" under section 2.2 of the DOJ Standards.

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[2] This issue corresponds to the second issue presented for review in the Appellant's Opening Brief. (*See id.* at 4.)

FACTS

Amici incorporate by reference the recitation of facts in the Appellant's Opening Brief. (*See id.* at 9-20.) By way of summary, Chipotle owns and operates several quick-serve Mexican restaurants all of which were built for first occupancy after January 26, 1993. Customers at Chipotle restaurants place their orders at one end of a food service line, and then proceed along the line observing the assembly of their order, adjusting the order as they go (a bit more chicken; a bit less cheese; on second thought, no beans (they don't look too fresh today)), and pick up and pay for the order at the end of the food service line. Chipotle promotes this ability to see and participate in one's order as the "Chipotle Experience."

The entire Chipotle Experience takes place behind a 44-inch-high counter, which renders the process essentially invisible to Plaintiff/Appellant Maurizio Antoninetti and other Chipotle customers who use wheelchairs for mobility. In lieu of constructing Standards-compliant counters that would permit those customers to observe and adjust their order as all other customers do -- and thus proceed through the line with everyone else -- Chipotle instituted a customer service policy that involved three potential alternative methods: employees could lift small portions of each ingredient in tongs or plastic cups to show customers

who use wheelchairs; employees could bring all of the ingredients to the cash register area and assemble them there; or employees could bring all of the ingredients to a table and assemble them there.

Each of these alternative methods requires assistance from one or more employees, and thus depends on a number of contingent factors from the effectiveness of Chipotle's training program to the employee's attitude when asked to assist. More important, all of the alternatives provide experiences far different from that of nondisabled customers. In no case do wheelchair-using customers see the ingredients in their bins, so they are unable to judge how fresh they are. In the first option, such customers do not get to observe the assembly of their order, so they have no idea if they are getting quantities or even necessarily the ingredients they want. The second two options both require far more time and disruption than the process followed by nondisabled customers. Both have the tendency to hold up the line, making disabled customers potential targets for others' frustration, and both segregate disabled customers from others, including potentially the rest of their party.

ARGUMENT

I. Title III Requires Independent, Integrated, Hassle-Free Access In New Construction.

People with disabilities have always had the ability to depend on others for assistance. Fast food customers did not need a federal law to permit them to ask the guy behind the counter to show them bits of food in tongs or to assemble their order at a table away from the main service line. Long before the ADA was enacted, people with disabilities could ask for help opening a restroom door that was too heavy, ask someone to hold their place in the check-out line while they circled around to avoid an inaccessible lane, or ask a friend for a ride instead of using accessible transit or parking.

People with disabilities did not need the ADA to permit separate, unequal, and disruptive service-based work-arounds at inaccessible facilities. Before there were federal accessibility guidelines, people who used wheelchairs could use the inferior access that just happened to exist, often separating them from friends and family or requiring them to make a big attention-grabbing fuss just to patronize a store or restaurant. They could go through the back-alley kitchen entrance when the front door to the restaurant had steps. They could sit in the far back of the theater or ballpark while friends sat in the risers. They could wait off to the side

when a service counter was too high or otherwise inaccessible or wait by the maitre d' station while tables were rearranged and other diners made to move.

One of the principal goals of the ADA was that people with disabilities should no longer have to rely on ad hoc assistance, no longer have to be served separately from friends and family, and no longer require a big disruption to create access after the fact, but instead could increasingly rely on the built environment to be accessible to them -- from the minute they arrived -- in an integrated and independent fashion. Congress made clear that, "[p]roviding services in the most integrated setting is a fundamental principle of the ADA. Historically, persons with disabilities have been relegated to separate and often inferior services," H. R. Rep. No. 101-485, pt. 2 ("House Report, pt. 2") at 102, *reprinted in* 1990 U.S.C.C.A.N. 303, 385, and that "[f]or new construction . . . the purpose is to ensure that the service offered to persons with disabilities is equal to the service offered to others," H. R. Rep. No. 101-485, pt. 3 ("House Report, pt. 3") at 60, *reprinted in* 1990 U.S.C.C.A.N. 445, 483.

Now, 15 years after the ADA's effective date for new construction, people with disabilities should increasingly be able to count on driving to a place of public accommodation and finding accessible parking, *see* DOJ Standards §§ 4.1.2(5), 4.6 (requiring accessible parking), attending movies or sporting events

and being able to sit with their friends, *see id.* § 4.33.3 (requiring integrated, accessible seating), patronizing stores and restaurants and being able to use the restroom, *see, e.g., id.* §§ 4.17, 4.22 (requiring accessible restrooms), and shopping at a grocery store and using the check-out line, *see, e.g., id.* § 7.3 (requiring accessible check-out aisles). And fast-food customers with disabilities should be able to count on going to their favorite restaurant and being able to approach the counter, see and order the food, and pay for their meal in the same way as everyone else. *See, e.g., id.* §§ 4.3 (requiring accessible routes), 4.33.3 (requiring equivalent lines of sight), 5.5 (requiring accessible food service lines), 7.2 (requiring accessible counters).

A number of courts have stressed the importance of independent, hassle-free access for individuals with disabilities. For example, the court in *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 764 (D. Or. 1997), *overruled on other grounds Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1024 (9th Cir. 2008), noted that:

> [i]t always has been "possible" to improvise access, given advance notice that someone with a wheelchair is coming. You simply had two strong persons standing by to carry the wheelchair user up the stairs that could not be traversed by a wheelchair. However, Congress has served notice through the ADA that such solutions no longer are acceptable. In new construction, the facility must be designed to be accessible from day one.

That court went on to hold that it should not be necessary for wheelchair-users to "make a fuss, or to request special accommodations" where "Congress has mandated that newly constructed facilities must be fully accessible from the start." *Id.*

Similarly, the defendant in *Boemio v. Love's Restaurant*, 954 F. Supp. 204 (S.D. Cal. 1997) argued that "with additional time, patience, and jockeying of the wheelchair, access could have been achieved" to its noncompliant restroom. *Id.* at 208. The court rejected that argument, holding that "[t]he standard cannot be 'is access achievable in some manner.' We must focus on the equality of access. If a finding that ultimate access could have been achieved provided a defense, the spirit of the law would be defeated." *Id.*; *see also Clavo v. Zarrabian*, No. SACV03864CJCRCX, 2004 WL 3709049, at *3 (C.D. Cal. May 17, 2004) (holding that defendant could not require plaintiff to ask employee to unlock gate in front of grocery store or request that accessible check-out lane be opened. "Although Plaintiff was ultimately able to purchase merchandise at the [store], the manner in which he was able to make his purchases was neither 'full' nor 'equal' in comparison to non-disabled patrons.").

The District of Columbia Circuit recently addressed the question whether our paper currency is accessible to blind people. The Treasury argued that blind

people had developed "coping mechanisms" that made accessible currency unnecessary. The court rejected that argument, holding that "the Rehabilitation Act's emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons." *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1269 (D.C. Cir. 2008) (citations omitted).[3] The district court -- in the decision affirmed by the D.C. Circuit -- expressed the point more colorfully, relying on statutory purposes that mirror those of the ADA:

> There was a time when disabled people had no choice but to ask for help -- to rely on the "kindness of strangers." It was thought to be their lot. Blind people had to ask strangers to push elevator buttons for them. People in wheelchairs needed Boy Scouts to help them over curbs and up stairs. We have evolved, however, and Congress has made our evolution official, by enacting the Rehabilitation Act, whose stated purpose is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, *independence*, and inclusion and integration into society."

Am. Council of the Blind v. Paulson, 463 F. Supp. 2d 51, 59 (D.D.C. 2006) (citing 29 U.S.C. § 701(b) (emphasis in original)).

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[3] Title III is not to be construed to apply a lesser standard than the Rehabilitation Act. 28 C.F.R. § 36.103(a).

II. Title III is Structured to Ensure That Physical Access Increases Over Time.

A. New Construction is Required to be Fully and Conveniently Accessible.

The mechanism for ensuring that, in new construction, "the service offered to persons with disabilities is equal to the service offered to others," House Report, pt. 3 at 60, is the stringent accessibility standards imposed on those facilities. While buildings built before January 26, 1993 are subject to a more modest requirement of accessibility to the extent it is "readily achievable," 42 U.S.C. § 12182(b)(2)(A)(iv), Title III of the ADA requires that buildings built for first occupancy after January 26, 1993 -- such as the Chipotle restaurants at issue in this case -- be "readily accessible to and usable by individuals with disabilities," *id* § 12183(a)(1).[4] Alterations in existing facilities are required to meet the new construction standard to the maximum extent feasible. *Id.* § 12183(a)(2). To satisfy the "readily accessible to and usable by" standard, both new construction and alterations are required to comply with the DOJ Standards. 28 C.F.R. § 36.406(a).

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[4] *See also Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001) ("In enacting the ADA, Congress adopted two distinct systems for regulating building accessibility: one to apply to existing facilities (those designed and constructed for occupancy before January 26, 1993) and another to apply to later-constructed facilities.")

Through this three-tiered system, "[t]he ADA is geared to the future -- the goal being that, over time, access will be the rule rather than the exception." House Report, pt. 3 at 63. As old buildings are altered to be accessible or torn down and replaced with new accessible buildings, access will -- over time -- become far more prevalent.

Congress also made clear that "readily accessible to and usable by individuals with disabilities" was a high standard:

> the term contemplates a high degree of convenient accessibility, entailing . . . access to the goods, services, programs, facilities, accommodations and work areas available at the facility. . . . Accessibility elements for each particular type of facility should assure both ready access to the facility and usability of its features and equipment and of the goods, services, and programs available therein.

House Report, pt. 2 at 117-18. This requirement of a "high degree of convenient accessibility" must be read in harmony with the other non-discrimination requirements of Title III: that individuals with disabilities have "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation," 42 U.S.C. § 12182(a); that such individual may not be denied the opportunity to "participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations" of a covered entity, be afforded an opportunity that is not equal to that of others, or

be afforded goods, services or privileges that are different or separate from those provided others, *id.* § 12182(b)(1)(A)(i) - (iii); and that the entity's goods and services must be provided "in the most integrated setting appropriate to the needs of the individual," *id.* § 12182(b)(1)(B).

B. Alternative Customer Service Methods Are Only Permitted in Older Facilities.

Title III permits places of public accommodation to use "alternative methods" to provide access, but only under two narrow conditions: if the building is a pre-1993 "existing facility;" and even then, only where physical access is not readily achievable. 42 U.S.C. § 12182(b)(2)(A)(v). The regulations make clear that "alternative methods" means primarily customer service policies. 28 C.F.R. § 36.305(b) ("alternative methods" include "curb service," "retrieving merchandise," and "relocating activities to accessible locations."). This provision recognizes that not every older facility will meet the standards for readily achievable barrier removal, so that alternative -- often service-based -- measures will be necessary to provide as much access as possible.

The use of alternative methods in place of required physical access is never acceptable in new construction, and would only be permitted in older facilities once all possible readily achievable barrier removal had been exhausted. In this

case, all parties agree that the restaurants at issue are new construction, and are thus not eligible to substitute "alternative methods" under § 12182(b)(2)(A)(v).

C. Equivalent Facilitation Requires an Alternative Design or Technology that Provides Substantially Equivalent Access and Usability.

In contrast to the "alternative methods" permitted in older facilities, new construction may only deviate from the DOJ Standards where "equivalent facilitation" is provided,[5] that is, "alternative designs and technologies [that] will provide substantially equivalent or greater access to and usability of the facility." DOJ Standards § 2.2. The purpose of this exception is very much in keeping with the goal of increasing the accessibility of the built environment: Covered entities may apply creative designs or technological advances to provide equivalent or greater physical access and usability than the DOJ Standards required. This goal is clear from the legislative and regulatory history of section 2.2.

Congress, in passing the ADA, stated that allowing departures from the standards for equivalent facilitation "will provide public accommodations and commercial facilities with necessary flexibility to design for special circumstances

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[5] New facilities are also not required to comply where the defendant can show that access is "structurally impracticable." 42 U.S.C. § 12183(a)(1). Chipotle has not asserted this defense and because it applies "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features," 28 C.F.R. § 36.401(c)(1), it is unlikely to apply here.

and will facilitate the application of new technologies." House Report, pt. 2 at 119. As one court explained, "[t]he equivalent facilitation exception is an acknowledgment that the federal government does not enjoy a monopoly on good ideas, and that there may be more than one means to accomplish a particular objective." *Indep. Living*, 982 F.Supp. at 727. The provision permits architects and designers to find creative ways to provide required physical access.

It is also clear from the history of the regulatory language that the "alternative designs and technologies" that may constitute equivalent facilitation in new construction are very different from the "alternative methods" that are permitted where barrier removal in older facilities is not readily achievable. In the first draft of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") -- which were eventually adopted by the Department of Justice as the DOJ Standards, 28 C.F.R. § 36.406(a) -- the equivalent facilitation provision in fact used the phrase "alternative methods." Following notice and comment, the Architectural and Transportation Barriers Compliance Board ("Access Board") substituted the current phrase "alternative designs and technologies" for the phrase "alternative methods." The Access Board explained that,

> [t]he equivalent facilitation provision has been clarified by substituting the words "designs and technologies" for "methods." The purpose of the provision is to allow for flexibility *to design for unique and special circumstances and to facilitate the application of new technologies*.

"Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities," 56 Fed. Reg. 35,408, 35,413 (July 26, 1991) (emphasis added). This change in wording took place against the backdrop of a statute that already used the phrase "alternative methods" for alternatives to barrier removal in pre-1993 facilities, 42 U.S.C. § 12182(b)(2)(A)(v), lending further support to the proposition that the Access Board was drawing a sharp distinction between alternative customer service policies permissible in older facilities and alternative physical designs or technologies permissible in new construction. *See also* U.S. Architectural and Transportation Barriers Compliance Board, *ADAAG Manual: a Guide to the Americans with Disabilities Act Accessibility Guidelines* 7 (1998) (The provision "provides flexibility for new technologies and innovative designs [sic] solutions that may not have been taken into account when ADAAG was developed.").

In sum, it is clear that the drafters -- Congress, the Department of Justice, and the Access Board -- intended the equivalent facilitation provision to apply

only to alternative physical designs and technologies, and not to customer service work-arounds.

D. Title III Requires Access in All New Commercial Facilities Regardless of the Policies of Their Eventual Occupants.

The built environment will only evolve toward the day when "access will be the rule rather than the exception" if all buildings are designed and constructed to provide the full physical access required by the DOJ Standards or alternative designs or technologies that provide equivalent or greater physical access. Access will not increase over time if new buildings can be built in violation of DOJ Standards in the hope that future occupants will draft and implement the right combination of customer service policies.

In this respect, it is important to note that while the general language of Title III prohibits disability discrimination by any one who "who owns, leases (or leases to), or operates a place of public accommodation," 42 U.S.C. § 12182(a), the new construction and alterations provisions apply to both public accommodations and "commercial facilities," *id.* §§ 12183(a)(1), (2). The term "commercial facilities" is defined as nonresidential facilities whose operations will affect commerce. *Id.* § 12181(2).

Congress explained that while most new construction will be covered as public accommodations, the ADA "also includes . . . the phrase 'commercial facilities,' to ensure that all newly constructed commercial facilities will be constructed in an accessible manner." House Report, pt. 2, at 117. Furthermore, Congress declined to limit such facilities to those with 15 or more employees "because of the desire to establish a uniform requirement of accessibility in new construction, because of the ease with which such a requirement can be accomplished in the design and construction stages, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is open to the public is always a possibility." *Id.* at 119. That is, because the use of commercial facilities can change over time, the ADA requires them all to be accessible, regardless of the identity -- or policies -- of the public accommodations that may eventually occupy them.

In a similar vein, the DOJ Standards -- the source of the equivalent facilitation provision -- make clear that they are "to be applied during the design, construction, and alteration of [covered] buildings . . .." *Id.* § 1. Again, during this design and construction phase, it is often not known what use the building will be put to when it becomes a public accommodation serving customers. Only by requiring that all public accommodations and commercial facilities be designed

and constructed to be accessible -- regardless of use or policies -- will the built environment become, over time, increasingly accessible.

III. Courts Interpret the Equivalent Facilitation Provision to Require Alternative Physical Access.

Courts that have applied the "equivalent facilitation" provision have done so only to permit physical designs or technologies that provide equivalent or greater access, and not customer service as a substitute for noncompliant facilities.[6]

The Third Circuit has made clear that "equivalent facilitation" cannot be used to excuse what is ultimately an unequal experience for patrons with disabilities. The defendant outdoor concert venue in *Caruso v. Blockbuster-Sony Music Entertainment Centre*, 193 F.3d 730 (3d Cir. 1999), attempted to excuse the

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[6] The DOJ Standards themselves provide a number of examples of equivalent facilitation. In alterations, "an elevator car of different dimensions" may be used "when usability can be demonstrated." *Id.* § 4.1.6(3)(c)(iii). A hotel may provide a portable text telephone in lieu of a public text telephone if it meets certain usability standards. *Id.* § 4.31.9(3). A folding shelf or nearby counter maybe used in lieu of a transaction counter where necessary to hand materials back and forth. *Id.* § 7.2(2)(iii). A hotel may construct the required number of accessible rooms, but elect to make them all multiple-occupancy provided it makes them available to people with disabilities at the single-occupancy price. *Id.* § 9.1.4(2). Where a threshold must be higher than required to prevent water damage, equivalent facilitation in the form of a raised deck or ramp must be provided. *Id.* § 9.2.2(6)(d). A hotel can provide portable visual alarms and communication devices in lieu of permanent ones. *Id.* § 9.3.2. Crucially, in none of these examples is physical access permitted to fall below the level required in the DOJ Standards themselves; rather, each of these examples constitutes an alternative way to achieve the same or higher level of physical access.

lack of accessible lawn seating by the fact that it had provided additional accessible interior seating. The Third Circuit rejected this, noting that "equal access is an explicit requirement of both the statute itself and the general provisions of the DOJ's regulations," and holding that "[p]roperly read, the 'Equivalent Facilitation' provision does not allow facilities to deny access under certain circumstances, but instead allows facilities to bypass the technical requirements laid out in the Standards when alternative designs will provide 'equivalent or greater access to and usability of the facility.'" *Id.* at 739.

In *Independent Living*, discussed above, the court addressed equivalent facilitation in two contexts. It permitted the owner of an arena to use high-quality folding chairs in place of fixed seating, noting that both types of seating permitted a wheelchair-user to sit with his companion, and that "[a] quality folding chair has some advantages over a companion seat bolted to the floor because it provides greater flexibility." *Id.*, 982 F. Supp. at 725-26. The court also addressed the defendant's argument that it did not need to provide compliant suites because its policy of making suites accessible with advance notice was "an equivalent facilitation" under section 2.2 of the DOJ Standards.

> *Defendant could not be more mistaken*. An "equivalent facilitation" is an alternative design or technology that will provide substantially equivalent or greater access to and usability of the facility. Standard 2.2. What defendant proposes is not an "alternative design or technology" that provides equivalent or greater access. Rather, defendant proposes a design that creates *less* access than is required, but -- if given advance notice that a wheelchair user is in route -- defendant will remove some of the barriers and temporarily comply with the ADA. *That is unacceptable.*

Id. at 764 (emphasis added).

The defendant in *Moeller v. Taco Bell Corp.*, No. C 02-5849 MJJ, 2005 WL 1910925 (N.D. Cal. Aug. 10, 2005), argued that elements that were out of compliance with the DOJ Standards could be excused as "equivalent facilitation" if it could introduce anthropometric evidence that a significant number of individuals with disabilities could still use the element. *Id.* at *2. The court rejected that argument. Noting that "the purpose of the exception is to give architects the flexibility to design facilities that may not strictly comply with the Accessibility Standards but nonetheless provide equivalent facilitation," the court held that there were two requirements for compliance with section 2.2: an alternative design or technology; and equal or greater access to subject facilities. *Id.* at *2-3. *See also United States v. AMC Entm't, Inc.*, 245 F. Supp. 2d 1094, 1101 (C.D. Cal. 2003) (holding that the defendant could not avail itself of section 2.2 because "[t]here [was] no evidence that the documented violations were the

result of designs and technologies that were implemented in order to provide substantially equivalent or greater access to and usability of the facility.")

Even the two cases on which the district court relied for the proposition that policies and practices could constitute equivalent facilitation in fact involved equivalent or greater *physical* access. *See Antoninetti v. Chipotle Mexican Grill, Inc.*, 05CV1660-J (WMc), 2008 WL 111052, at *21 (S.D. Cal. Jan. 10, 2008). One of the two was the *Independent Living* case, which was discussed above in detail and which held that the argument that policies can be equivalent facilitation "could not be more mistaken." *Id.*, 982 F. Supp. at 764. The other case on which the district court relied was *Access 4 All, Inc. v. The Atlantic Hotel Condominium Association, LLC*, Case No. 04-61740 CIV, 2005 WL 5643878 (S.D. Fla. Nov. 23, 2005). In that case, the court held that providing two accessible rooms at a resort was equivalent to providing a two-bedroom suite. *Id.* at *14 n.21. Although the court did not explain its decision, it is clear that the solution provides equivalent physical access.

IV. The District Court's Decision Could Have Very Pernicious Consequences.

The district court has endorsed a novel theory that customer service policies and practices may excuse a failure to comply with the DOJ Standards in new

construction. This holding has the potential to significantly undermine the accessibility and independence goals of Title III of the ADA.

The policy at issue in this case is a good illustration: instead of complying with the DOJ Standards for new construction, Chipotle elected to ignore sections 4.33.3, 5.5 and 7.2 and construct a counter that renders its food preparation process -- a central part of the Chipotle Experience -- invisible to customers who use wheelchairs. Then instead of offering an alternative design or technology that permitted such customers to observe and adjust their order and proceed through the line like nondisabled customers, Chipotle offered only the assistance of its employees in showing bits and pieces of ingredients, or taking the time -- and incurring the disruption -- to gather up the various ingredients and move them to the cash register area or a table in the dining area.

Above all, this transforms the experience from an equal and integrated experience to one in which customers with disabilities receive inferior and separate services, requiring just the sort of after-the-fact hassle that the new construction provision was designed to prevent. And that's on a good day. It also makes customers with disabilities depend on the level of training and attitude of the employees behind the counter when they roll in the door hoping to order a burrito. Full compliance with the DOJ Standards -- as required by the new

construction provision -- eliminates this element of dependence and chance. When physical compliance is required, customers who use wheelchairs can roll in the door hoping to order the personally-designed burrito that Chipotle promises to all of its customers, confident that they will be served in an equal and integrated way.

Furthermore, were this Court to adopt the district court's approach to equivalent facilitation, it would permit businesses to ignore any of the physical requirements of the DOJ Standards and substitute the contingencies and dependence of customer service policies. Stores could refuse to provide access to fixed displays, in violation of section 4.1.3(12)(b), and force customers with disabilities to locate staff to retrieve merchandise. They could install inaccessible coin-operated locks on restroom doors, in violation of section 4.13.9, and force customers with disabilities track down employees to help them get to the bathroom. They could construct a narrow route to a counter, in violation of section 4.3.3, and force customers with disabilities to wait off to the side and hope for service.

These examples demonstrate that the district court's holding would frustrate the ADA's purposes of "equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities, 42 U.S.C.

§ 12101(a)(8), as well as its "goal . . . that, over time, access will be the rule rather than the exception." House Report, pt. 3, at 63. Buildings constructed without required accessible features -- in the hope that individuals with disabilities can prevail on employees for help -- will delay rather than advance the day when access will be the rule.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court hold that customer service policies cannot constitute "equivalent facilitation" in the absence of alternative physical designs or technologies that provide substantially equivalent or greater access to and usability of the facility in question.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, undersigned counsel certifies that this brief complies with the type-volume limitations of Rules 29(d) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure, and that this brief contains 6,148 words. Counsel relied on the word count of WordPerfect X3, which was used to prepare this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ashley Boothby, certify that on October 10, 2008, two true and correct copies of the foregoing Brief of *Amici Curiae* were served on the following counsel by FedEx "2Day" delivery:

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I declare under penalty of perjury under the laws of the State of Colorado and of the United States of America that the foregoing is true and correct.

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