IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case No. 17-2678

STEAK 'N SHAKE OPERATIONS, INC.,

Defendant-Appellant.

v.

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

Plaintiff-Appellee,

Appeal from an Order of the United States District Court
for the Western District of Pennsylvania Granting Class Certification
No. 2:15-cv-00180

Hon. Robert C. Mitchell, Magistrate Judge

BRIEF OF NATIONAL RETAIL FEDERATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE RESTAURANT LAW CENTER, RETAIL LITIGATION CENTER, INC., AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT STEAK 'N SHAKE OPERATIONS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit LAR 26.1, *Amici Curiae* the National Retail Federation, International Council of Shopping Centers, National Federation of Independent Business, the Restaurant Law Center, and Retail Litigation Center, Inc., and Chamber of Commerce of the United States of America (hereinafter collectively "*Amici*") each state that they have no parent corporation and there is no publicly held corporation that holds 10 percent or more of their stock.

November 20, 2017

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STATEMENT OF THE ISSUES

1. Whether the District Court applied an incorrect legal standard for certifying a class under Fed. R. Civ. P. 23.

2. Whether the District Court abused its discretion in finding that the asserted class claims, which relate to allegedly noncompliant slopes of accessible parking spaces at facilities located in multiple states, present questions of law and/or fact common to the class, as required under Fed. R. Civ. P. 23(a)(2).

3. Whether the District Court abused its discretion in finding that the claims or defenses of the representative parties are typical of the claims or defenses of the class, as required under Fed. R. Civ. P. 23(a)(3).

4. Whether the District Court abused its discretion in relying on a "maintenance" policy to satisfy Fed. R. Civ. P. 23(b)(2), which requires that the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or declaratory relief is appropriate respecting the class as a whole.

INTEREST OF *AMICI CURIAE*

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's

largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry, representing over 70,000 members in over 100 countries. Its members include shopping center owners, developers, managers, marketing specialists, investors, academics, public officials, and attorneys representing both owners/landlords and retail tenants of shopping centers. The shopping center industry is essential to economic development and opportunity, and ICSC seeks to advocate for the interests of this important industry.

The National Federation of Independent Businesses ("NFIB") is America's leading small business association, seeking to promote and protect the right of its members to own, operate, and grow their businesses. NFIB helps its members to own, operate, and grow their businesses and speaks on issues of importance to support these American small businesses. While its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees, the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. NFIB's Small Business Legal Center

is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts.

The Restaurant Law Center ("RLC") is a public policy organization that is affiliated with the National Restaurant Association, the largest foodservice trade association in the world. It was launched to enhance the restaurant industry's legal advocacy capabilities and provide courts with the industry's perspective on legal issues significantly impacting it. The industry is comprised of over one million restaurants and other foodservice outlets employing about 15 million people. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. RLC highlights the potential industry-wide consequences of pending cases such as this one, through amicus briefs on behalf of the industry.

The Retail Litigation Center, Inc. ("RLCI") represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of industries. The RLCI's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLCI offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct

members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Amici are concerned about the implications of the District Court's decision to grant class certification in this case, which *Amici* believe significantly and improperly lowers the standard that representative parties must meet to satisfy the requirements for class certification. If upheld, the lower court's decision would have broad implications beyond the particular facts of this case. The standard applied by the District Court to certify the class ostensibly would permit any claim under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, for alleged barriers to access in an entity's physical facilities to be brought as a nationwide class action, irrespective of the different facts at issue and legal standards applicable to an entity's various facilities, merely by alleging a deficient compliance or maintenance policy.

Many of *Amici's* members own and/or operate facilities that qualify as places of public accommodation under Title III of the ADA. *Amici* strongly support the goals of the ADA to ensure access for all customers, however, they

also are concerned that the standard applied by the District Court with respect to class certification is legally incorrect and will subject their members to increased and more costly litigation. Given the plethora of elements in a physical facility that are subject to the technical accessibility requirements set forth in the ADA Standards for Accessible Design ("ADA Standards")[1] promulgated under Title III of the ADA, *Amici's* members already face a substantial risk of litigation under Title III over even minor alleged barriers. Permitting such cases to be certified as class actions encompassing *all* of an entity's facilities upon a naked assertion of nothing more than *first*, that common ownership or management exists; and second, that the alleged barriers evidence a defective "policy" will significantly exacerbate the litigation that *Amici's* members face. This is particularly true with respect to the nature of the alleged barriers at issue in this case – accessible parking with allegedly noncompliant slopes. Given the individualized inquiry and numerous factors involved in determining whether or not the slope of a particular accessible parking space is compliant, claims regarding alleged barriers of this type

[1] There are two versions of the ADA Standards for Accessible Design, the original standards promulgated in 1991("1991 Standards"), 28 C.F.R. pt. 36, app. A, and the revised standards promulgated in 2010 ("2010 Standards"), 28 C.F.R. pt. 36, subpt. D and 36 C.F.R. pt. 1191 app. B and D. Except where the specific version is pertinent to the discussion, for ease of reference *Amici* utilize "ADA Standards" to refer generally to these standards.

are inherently unsuitable for certification as a class action encompassing all of an entity's facilities nationwide.

STATEMENT OF AUTHORITY TO FILE

Amici file this Brief in Support of the Appellant with the consent of both the Appellant, Steak 'N Shake Operations, Inc., and the Appellees Christopher Mielo and Sarah Heinzl.

This Brief was not authored, in whole or in part, by either Steak 'N Shake's or Mr. Mielo's and Ms. Heinzl's counsel, nor did either party or counsel for either party contribute money intended to fund the preparation or submittal of this Brief. No person other than *Amici* contributed money intended to fund the preparation or submittal of this Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court erred in granting class certification in this case, applying a standard that improperly favors class certification and significantly lowers the burden that a party seeking class certification must satisfy. Based on limited evidence that the parking lots at less than a dozen Steak 'N Shake locations in Pennsylvania may have non-compliant accessible parking slopes, the District Court certified a nationwide class that includes over 400 Steak 'N Shake locations in 33 states. In doing so, the District Court misapplied the applicable legal standard and failed to complete the requisite "rigorous analysis" to determine whether the mandatory factors of Rule 23 were established by a preponderance of the evidence, as set forth in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and followed by this Court in *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015), and *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012). The District Court certified a class using a lenient standard that is inconsistent with the governing legal standard for class certification.

The District Court's decision to grant nationwide class certification is based on two fundamental errors. First, the District Court's finding of commonality was based on its conclusion that Steak 'N Shake "applies the same ADA maintenance policies and practices in a uniform way" to its restaurants (JA 70). The District Court's finding disregards the fact that the very nature of the alleged barriers –

noncompliant slopes of accessible parking spaces – requires a fact-specific inquiry into each individual parking lot or facility. This case is distinct from the very few of those in which the alleged barriers might fairly be said to result from a common and uniformly applied design, decision, policy or practice – for example, relying on a standard design for sales counters which results in an improper height. Each parcel of land is unique and the slope that may be achieved for accessible parking spaces will depend on a variety of factors unique to each parking lot, including, for instance, the geographic area in which the lot is located, the specific topography of the lot itself, the lot's size, the lot's relationship to the facility that it serves, limitations or restrictions resulting from surrounding roadways and adjacent parcels and facilities, state and local building code requirements (such as those affecting water run-off), and the effects of environmental factors, such as freeze/thaw cycles. Additionally, different arrangements may govern responsibility for parking lots at leased facilities, necessitating the involvement of different entities. Some retailers and restauranteurs lease, as opposed to own, some or all of their facilities. Depending upon the terms of a particular lease, the landlord may retain all responsibility regarding parking areas (including maintenance), or alternatively, a tenant may be assigned responsibility for maintenance, but be required to obtain the landlord's approval for any modifications made.

Second, the District Court's decision also fails to properly recognize the differing legal standards that apply to a variety of physical locations in determining whether a particular alleged barrier actually constitutes a cognizable violation of Title III of the ADA. While the ADA Standards set forth the technical requirements for determining whether a particular condition or element poses a barrier for individuals with disabilities, the issue of whether that barrier actually violates Title III requires additional legal analysis in each instance. Title III establishes different legal standards with respect to the degree to which compliance with the ADA Standards is required, depending on whether the facility qualifies as new construction (which must comply except in cases of "structural impracticability"), an alteration (which must comply "to the maximum extent feasible"), or an existing facility (which must remove barriers only where it is "readily achievable" to do so).[2] *Infra*, pp. 15-16. Consequently, whether or not a particular condition actually violates Title III of the ADA, and the particular defenses available to establish that it does not, will raise differing legal issues and obligations from location to location.

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[2] This determination also will depend on whether the alleged non-compliance is nonetheless within recognized industry construction tolerances. *See* 2010 Standards, § 104.1.1 (all dimensions not stated as a range with specific minimum and maximum values are subject to "conventional industry tolerances"); 1991 Standards, § 3.2 (all dimensions are subject to "conventional building industry tolerances for field conditions").

Simply put, both the factual and legal questions necessary to determine whether the slope of accessible parking provided at an existing, pre-ADA facility located in the Allegheny Mountains surrounding Pittsburgh, Pennsylvania complies with Title III of the ADA, will differ significantly from those necessary to determine whether the slope of accessible parking provided at a newly constructed facility located in the plains of Kansas complies with Title III. These differing factual and legal questions are fatal to any effort to demonstrate the commonality necessary to certify a class encompassing parking at facilities nationwide, and the District Court erred in concluding otherwise.

For these same reasons, the District Court also erred in concluding that Plaintiffs have demonstrated the requisite typicality. While Plaintiffs' claims related to the individual restaurants they actually visited in the Pittsburgh area may be typical of the claims of other individuals with mobility disabilities who may visit these *same restaurants*, their claims are not typical of those who may visit different restaurants in the same geographic area, much less different states.

The District Court further erred in finding that the requirements of Fed. R. Civ. P. 23(b)(2) were met. Based on a limited sampling of restaurants, at which Plaintiffs' investigators found the vast majority of features to be compliant (Appellant's Opening Br. at 9), the District Court concluded based on inference upon inference that Plaintiffs had "proffered evidence" of a policy regarding ADA

compliance that is ineffective. (JA 46.) In so doing, however, the District Court appears to have equated the mere existence of any slopes exceeding the maximum slope permitted under the ADA Standards as sufficient to establish a defective compliance policy, without acknowledging or even contemplating the possibility that under the differing legal standards applicable, the slopes weren't even required to be remedied. Although in its overview of Title III's requirements the District Court notes the differing legal standards applicable to existing facilities as distinct from new construction, the District Court fails even to mention these differing legal standards in its analysis of whether Rule 23's requirements are met.

Important policy considerations also counsel against any class certification encompassing all of an entity's nationwide facilities where, as here, there is no proper showing that the alleged barriers result from a common design or decision. Under the District Court's analysis, there is no limiting principle for certifying ADA claims involving physical barriers as nationwide class actions. Essentially, the District Court has concluded that the existence of alleged barriers, despite an entity's compliance and maintenance efforts, establishes commonality notwithstanding the multitude of factual and legal questions involved in determining whether violations exist. A plaintiff need only allege (1) a potential violation, (2) at more than one facility, in order to satisfy Rule 23's commonality requirement. Such a construction eviscerates the requirements of Rule 23.

Failure to apply a proper standard for class certification is particularly problematic with respect to claims brought under Title III of the ADA. A growing body of case law reflects that litigation brought pursuant to Title III, in many instances, has taken on the indicia of being brought more for pecuniary gain than for securing compliance. As one district court explained:

> The ability to profit from ADA litigation has given birth to what one Court described as "a cottage industry." The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance," a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter. The result of this scheme is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals). Serial plaintiffs . . . serve as professional pawns in an ongoing scheme to bilk attorney's fees. It is a type of shotgun litigation that undermines both the spirit and purpose of the ADA.

Molski v. Mandarin Touch Rest., 347 F.Supp.2d 860, 863 (C.D. Cal. 2004) (internal citations and quotations omitted).

If the District Court's decision is allowed to stand, the unintended but unavoidable consequence will be to contribute to the proliferation of this "cottage industry."

ARGUMENT

I. The District Court's Class Certification was Based on a Misapplication of the Law.

A. Rule 23 Requirements.

Class certification is warranted only if the trial court determines after a "rigorous analysis," that the requirements of Rule 23 are met. *Wal-Mart Stores, Inc., v. Dukes,* 564 U.S. 338, 351 (2011); *In re Blood Reagents Antitrust Litig.,* 783 F.3d 183 (3d Cir. 2015); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012). To obtain class certification, a plaintiff must meet all of the Rule 23(a) prerequisites (numerosity, commonality, typicality and adequacy) and fall within one of the three types of class actions listed in Rule 23(b). *Marcus,* 687 F.3d at 590-91.

Rule 23 is not a pleading standard. *Id*. The party seeking certification must establish each element of Rule 23 by a preponderance of the evidence. *Id*. "Echoing the Supreme Court, [this Court] has repeatedly "emphasized that actual, not presumed, conformance with Rule 23 requirements is essential." *Id*.

The District Court's nationwide class certification order is inconsistent with these legal standards. Rather than adhering to the mandate that the plaintiffs seeking class certification must provide sufficient evidence to establish, by a preponderance of the evidence, actual conformance with the Rule 23 requirements, the District Court instead applied a presumption that "when doubt exists

concerning certification of the class, the court should err in favor of allowing the case to proceed." (JA. 39.) The District Court's presumption is based on *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985), a case that pre-dates important amendments to Rule 23, and misstates the prevailing Third Circuit class certification standard. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-17 & n. 18, 321-22 (3d Cir. 2008).

This Court has described the District Court's presumption of resolving doubt in favor of class certification as "inviting error." *Id.* at 321. In *Hydrogen Peroxide*, this Court explained:

> *Eisenberg* should not be understood to encourage certification in the face of doubt as to whether a Rule 23 requirement has been met. *Eisenberg* predates the recent amendments to Rule 23 which, as noted, reject tentative decisions on certification and encourage development of a record sufficient for informed analysis. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.

Id. (citing Fed. R. Civ. P. advisory committee's note, 2003 Amendments.) Accordingly, the Third Circuit has instructed that courts "should not suppress 'doubt' as to whether a Rule 23 requirement is met – no matter the area of substantive law. *Id*.; *see also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 600 n.14 (3d Cir. 2009).

The District Court's analysis reflects a misapplication of the governing legal standards and should be reversed. *See In re Hydrogen Peroxide*, 552 F.3d at 322.

B. Because Unique Questions of Fact and Law Predominate, Commonality Does Not Exist.

Commonality requires plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This language is "easy to misread, since any competently crafted complaint literally raises common 'questions. . . . Reciting these questions is not sufficient to obtain class certification." *Wal-Mart Stores, Inc. v. Duke*, 564 U.S. 338, 349 (2011). The appropriate inquiry under this prong is whether there are issues of fact and law that are common to all members of the class. The issue is not, as the District Court apparently misunderstood, whether Steak 'N Shake's policy is sufficiently robust, but whether parking lot slopes at Steak 'N Shake locations in fact violate the ADA and the *causes* of the alleged barriers. *See infra* pp. 19-21. This is a site-specific inquiry that involves unique questions of fact and law and is not capable of efficient resolution through class action litigation.

Title III of the ADA establishes different legal standards for compliance depending on whether the facility constitutes new construction, is being altered, or is an existing facility. Existing facilities that predate January 26, 1992, are only required to remove barriers to access where such removal is "readily achievable, *i.e.*, easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. §§ 12182(b)(2)(A)(iv), 12181(9); 28 C.F.R. §§ 36.304(a), 36.104. For facilities altered after January 26, 1992, the alterations must be readily

accessible to and usable by individuals with disabilities "to the maximum extent feasible." 42 U.S.C. § 12183(a)(2); 28 C.F.R. § 36.402(a). Facilities newly constructed for first occupancy after January 26, 1993, must be readily accessible to and usable by individuals with disabilities," except where compliance is "structurally impracticable." 42 U.S.C. § 12183(a)(1); 28 C.F.R. § 36.401(a), -(c).

Commonality simply cannot exist where, as here, there is neither a uniform legal standard nor a common design scheme that applies to all locations. This is not a case in which there is a central policy specifying the height of a counter or the width of a door. Each location has a different parking lot design based on the available lot and the topography of the land in question, and each parking lot would need to be considered individually by the court. Each parking lot must be investigated to determine whether the slope satisfies the requirements of Title III of the ADA, taking into account the differing legal standards that will apply to each facility given its date of construction or alteration. Each store would need to be individually analyzed to determine when it was constructed and whether and when it was altered to determine the appropriate legal standard. The court would have to conduct a mini-trial for each location to determine if injunctive relief is appropriate. Accordingly, class certification is not appropriate under Rule 23.

The District Court's decision to certify a nationwide class based on the evidence "at this juncture," but implicitly acknowledging evidentiary gaps in the

record, is a misapplication of the law. "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." *See In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 319 (3d Cir. 2008) (quoting Fed. R. Civ. P. 23 advisory committee's note, 2003 Amendments).

The District Court's certification is a departure from the decisions rendered by other district courts that have addressed this precise issue. The majority of courts that have considered class certification in this context have rejected attempts to expand allegations nearly identical to Plaintiffs' into nationwide class actions, and for good reason. *See Timoneri v. Speedway*, 186 F. Supp. 3d 756 (N.D. Ohio 2016); *Wagner v. White Castle Sys., Inc.*, 309 F.R.D. 425 (S.D. Ohio 2015); *Castaneda v. Burger King Corp.*, 264 F.R.D. 557, 564 (N.D. Cal. 2009); *King v. O'Reilly Auto, Inc.*, No. 2:15-CV-230 RMP, 2016 U.S. Dist. LEXIS 28094 (E.D. Wa. Mar. 4, 2016),*Mielo v. Bob Evans Farms, Inc.*, No. 14-1036, 2015 U.S. Dist. LEXIS 36905 (W.D. Pa. Mar. 23, 2015); *but see Heinzl v. Cracker Barrel Old Country Stores, Inc.*, No. 14-1455, 2016 U.S. Dist. LEXIS 58153 (W.D. Pa. Jan. 27, 2016). Title III cases involving alleged parking lot slope violations are unsuitable for class treatment for at least two reasons. ***First***, the applicable legal standard for ADA compliance differs depending on the date of construction. ***Second***, the lack of a design or scheme common to all locations requires a court to

conduct a detailed store-by-store assessment before it can even apply the relevant legal standard to determine whether an ADA violation even exists. To the extent any violations exist, the court will need to identify the specific violations on a location by location basis before it can issue any relief.

It is for these very reasons that courts have denied class certification in these circumstances. For example, in *Mielo v. Bob Evans Farms, Inc.*, No. 14-1036, 2015 U.S. Dist. LEXIS 36905 (W.D. Pa. Mar. 23, 2015), the district court encountered similar, and in some ways identical, facts and properly concluded commonality did not exist. The *Bob Evans* case is strikingly similar to the instant case, involving the *very same* plaintiff, plaintiffs' counsel and "investigative" team. *Id*. at *1, *3, *6. In that case, Mr. Mielo moved to certify a nationwide class of plaintiffs who were allegedly denied full and equal enjoyment of any Bob Evans restaurant in the United States. *Id*. at *7. Mr. Mielo's motion to certify was based on his three visits to Bob Evans restaurants in Pittsburgh and the investigators' visits to 16 restaurants in Ohio, Pennsylvania, West Virginia and Maryland, where they allegedly encountered excessive parking slopes. *Id*. at *5-6. The court held that certification was not warranted.

The court concluded that Mr. Mielo could not establish commonality because there was no common parking lot design to the Bob Evans restaurants,

each of the parking lots was different and the applicable legal standard varied based on the date of construction. *Id.* at *17. The Court reasoned:

> Proving the existence and cause of accessibility barriers at each of the Bob Evans restaurants would be too fact-intensive and individualized to be effectively addressed in a single class action. The threshold question – whether any store in particular is out of compliance and if so, in what matter (running slope, cross slope, degree of deviation) – would have to be answered on a store-by-store basis, and the class members at the various 563 nationwide stores would not share common legal issues or salient core facts. Rather, the Court would have to conduct a mini trial for each restaurant in order to determine if injunctive relieve was appropriate. For these reasons, the Court cannot find based on a preponderance of the evidence that Plaintiff has met the commonality requirement.

Id. at 20 (citing *Hydrogen Peroxide*, 552 F.3d at 307.) The same result is compelled here and in similar cases.

The *Bob Evans* case is by no means an outlier. In *Timoneri v. Speedway*, 186 F. Supp. 3d 756 (N.D. Ohio 2016), the plaintiff – also represented by the same counsel as Plaintiffs – claimed the parking lot slopes at Speedway gas stations were excessive. *Id*. at 758. The court dismissed the class allegations entirely and rejected plaintiff's arguments that a common centralized policy was sufficient:

> The Court agrees that this is not a situation where "a common question . . . will yield a common answer for the class." Rather, determining liability as to each Speedway location would require the court to hold a series of "mini-trials," where it would have to conduct an individualized analysis of each location's compliance or non-compliance with the ADA based on the age of the facility and the type of violation claimed.

Id. at 763.

Similarly, in *King v. O'Reilly Auto, Inc.*, No. 2:15-CV-230 RMP, 2016 U.S. Dist. LEXIS 28094 (E.D. Wa. Mar. 4, 2016), the plaintiff – again represented by the same counsel as Plaintiffs in this case – claimed that O'Reilly auto parts stores had excessive parking lot slopes. *Id*. at *2-3. Although the plaintiff visited only three stores in Spokane, Washington and his investigators visited only eight other locations, the plaintiff attempted to bring a nationwide class action. *Id*. at *3-4. The court dismissed the plaintiff's class allegations, finding that the plaintiff could not state "how the alleged examples of noncompliance adhere to any common policy or design." *Id*. at *8.

In *Wagner v. White Castle Sys., Inc.*, 309 F.R.D. 425 (S.D. Ohio 2015), the two named plaintiffs attempted to certify a statewide class claiming that 54 White Castle locations had architectural barriers, even though they had only visited and found violations at five stores. *Id*.at 427. The court denied class certification because there was no commonality. "Plaintiffs have not provided any evidence of a common design or blueprint for the 54 White Castle locations in Ohio that would support a claim that they all have the same ADA violations." *Id*. at 429. "There is also a significant amount of variety based on differing points in time in which the restaurants were initially constructed and/or modified and differing physical constraints caused by specific locations of the restaurants." *Id*. at 429-30. "The central question posed by Plaintiffs would have to be answered on a restaurant-by-

restaurant basis, and Plaintiffs have not demonstrated that the class members at the various 54 Ohio restaurants would have common legal issues or salient core facts." *Id*. at 432. "As currently presented, it appears that the Court would be required to conduct a mini-trial for each restaurant to determine whether injunctive relief was appropriate." *Id*.

Additionally, in *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009), the plaintiffs attempted to certify a class of 92 different Burger King stores across California, arguing that access barriers stemmed from an alleged failure to enforce compliance. *Id*. at 559-60, 568. However, the court found that there was no common design across the 92 stores, and that the stores had been constructed and remodeled at different times, and thus were subject to different standards under the ADA. *Id*. at 562, 568. The court held there was a lack of commonality among the 92 restaurants, and that "[b]efore any common legal issues can be reached, each feature at issue in every store must be individually measured," and that these "bone-crushing feature-by-feature and store-by-store analyses" would be too fact intensive and individualized to be effectively addressed in a single class action." *Id*. at 564, 567-68. The court further held that there was no typicality because "named plaintiffs here have suffered different injuries than those suffered by purported class members who encountered different access barriers at other [locations] that the named plaintiffs did not visit." *Id*. at 571-72.

This well established body of case law shows that the District Court's decision to certify the class is an anomaly and should be reversed.

C. Typicality Does Not Exist Because Any Alleged Barriers are Site-Specific; There is No Typical Plaintiff.

As noted by this Court, "typicality" overlaps with other requirements of Fed. R. Civ. P. 23, including that the named representatives adequately represent the class, that there be common questions of law and fact, that such questions predominate, and that the class action be a superior means of resolution. *Eisenberg*, 766 F.2d at 786-787. While Plaintiffs' claims that are related to the individual restaurants that they actually visited in the Pittsburgh area may be typical of the claims of other individuals with mobility disabilities who may visit these *same restaurants,* their claims are *not* typical of those individuals who may visit other stores, in other geographic areas or states, encountering different alleged barriers, different degrees of barriers, or no barriers at all. *See, e.g., Bob Evans,* 2015 U.S. Dist. LEXIS 36905 at *23 ("[T]here is no common design or architectural feature with respect to Bob Evans parking lots; therefore, there is no typical plaintiff.") As discussed above, the factual basis and legal standards applicable to these claims will differ.

D. Plaintiffs Did Not Establish the Cohesiveness Required for Certification under Rule 23(b)(2).

The District Court further erred in finding that the requirements of Fed. R. Civ. P. 23(b)(2) were met. As this Court recently summarized:

> For certification of a Rule 23(b)(2) class seeking only declaratory or injunctive relief, a properly defined "class" is one that: (1) meets the requirements of Rule 23(a); (2) is sufficiently cohesive under *Rule 23(b)(2)* and our guidance in *Barnes [v. American Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)]*;* and (3) is capable of the type of description by "readily discernable, clear, and precise statement of the parameters defining the class," as required by Rule 23(c)(1)(B) . . .

Shelton v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015). Any "disparate factual circumstances of class members may prevent a class from being cohesive." *Gates v. Rohm & Hass Co.*, 655 F.3d 255, 264 (3d Cir. 2011).

Based on a limited sampling of restaurants, some of which Plaintiffs' investigators found to be compliant, the District Court concluded that Plaintiffs "proffered evidence" that Appellant's policy regarding ADA compliance is ineffective. (JA 46.) Again, in so doing the District Court failed to appropriately consider whether the noncompliant slopes alleged at a limited number of Appellant's restaurants actually established that Appellant's compliance policy is deficient, or alternatively whether, under the differing legal standards applicable, the slopes did not actually constitute violations of the ADA. Although in its overview of Title III's requirements the District Court notes the differing legal standards applicable to existing facilities as distinct from new construction, the

District Court fails even to mention these differing legal standards in its analysis of whether the Rule 23 requirements are met. Rather, the Court simply concludes that if Plaintiffs are successful on the merits, "a single injunction would provide relief to each member of the class by ensuring … that Defendant's parking facilities are barrier free and properly maintained going forward." (JA 46.) Given the differing legal standards applicable to new construction, alterations and existing facilities, a parking facility may in fact comply with Title III even if it is not "barrier free," complicating any ability to provide any relief in a single injunction.

The District Court's overly simplistic analysis did not properly weigh the lack of cohesiveness, given the claims at issue are dependent upon numerous individualized facts unique to each respective parking facility. Although the class is homogenous in the abstract – all class members are mobility disabled – the different vintage, different designs and different circumstances presented at hundreds of Steak 'N Shake locations demonstrates the lack of cohesiveness of the class and precludes certification under Rule 23(b)(2). *See, e.g.*, *Gates*, 655 F.3d at 268-69; *Bob Evans*, 2015 U.S. Dist. LEXIS 36905, at *34 (Plaintiff could not meet the requirements of Rule 23(b)(2) because injunction to remediate parking lots that may have fallen out of compliance was an "obey the law" injunction and "the differences and unique designs of each lot" made it impossible to craft one injunction to remedy all injuries to the class "in one stroke.")

II. The District Court Failed to Consider The Policy Implications of its Decision.

From a policy perspective, the financial and practical implications of the District Court's order are staggering. This Court has held that such considerations are relevant to the class certification analysis. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

> Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because denying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . In some cases, class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Accordingly, the potential for unwarranted settlement pressure "is a factor we weigh in our certification calculus."

Id. at 310. If allegations of excessive parking slopes at less than a dozen facilities in Pennsylvania and Ohio are sufficient to certify a nationwide class consisting of over 400 facilities, businesses with national operations should reasonably expect to be subject to nationwide class action litigation indefinitely.

The District Court's order will further encourage abusive litigation in an area where there is already far too much. Given the absence of a limiting principle in its decision to certify a class of plaintiffs who present factually and legally distinct issues with regard to each store location, retailers, restauranteurs, and other public accommodations across the country could be subject to class actions that are

certified before any court can determine whether a fast food restaurant in Tennessee has anything in common, in terms of its physical plant, with a fast food restaurant in Texas. The District Court has improperly looked to whether an allegedly uniform policy or practice regarding maintenance of accessibility exists, as opposed to whether the alleged barriers (be they parking slopes, counter heights, restroom layouts etc.) share a common design or scheme.

The potential scope and liability arising from nationwide class actions will place an "inordinate [and] hydraulic pressure on defendant" to abandon any meritorious defenses and settle plaintiff's claims. *Newton v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001). As a result, ADA litigation will be increasingly driven by the economics of attorney's fees rather than the goal of eliminating disability discrimination, a result that is inconsistent with the letter and spirit of the ADA. The District Court's order should be reversed.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court reverse the district court's order certifying a nationwide class and find in favor of Steak 'N Shake on this appeal.

Respectfully submitted this 20th day of November 2017.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that the undersigned counsel is a member of the Bar of the United States Court of Appeals for the Third Circuit.

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I certify that the text of the electronic brief is identical to the text in the paper copies. I also certify that a virus check was performed using Microsoft's System Center Endpoint Protection version 4.10.209.0 and Cisco AMP for Endpoints Connector version 5.1.11.10455, and that no virus was detected.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This certification is based on the word count feature of Microsoft Word, the work processing system used to prepare this brief. Excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,160 words.

This Brief also complies with the typeface and type style requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure because it was prepared using Microsoft Office Word 2010 with proportionally-spaced typeface in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit via the CM/ECF system, which will cause service on counsel for all parties of record, who are registered CM/ECF Users. In addition, 10 paper copies of this brief will be delivered to the Clerk within 5 days of the electronic filing, and a paper copy will be served upon counsel listed below:

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