115TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
115–539

ADA EDUCATION AND REFORM ACT OF 2017

JANUARY 30, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 620]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 620) to amend the Americans with Disabilities Act of 1990 to promote compliance through education, to clarify the requirements for demand letters, to provide for a notice and cure period before the commencement of a private civil action, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

79–006

Purpose and Summary

H.R. 620, the "ADA Education and Reform Act of 2017," amends the private enforcement provisions of the public accommodation requirements of Title III of the Americans with Disabilities Act to: require a notice and cure period before the commencement of a private civil action; require the Department of Justice to develop a program to educate state and local governments and property owners on strategies for promoting access to public accommodations for persons with a disability; and require the Judicial Conference of the United States to develop a model program to promote alternative dispute resolution mechanisms to resolve claims of architectural barriers to access for public accommodations. The purpose of the bill is to ensure greater protection of individuals with disabilities while providing business owners with the opportunity to remedy alleged ADA infractions before incurring unnecessary litigation costs.

Background and Need for the Legislation

The Americans with Disabilities Act (ADA) was signed into law by President George H. W. Bush on July 26, 1990.[1] Its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] Title III of the ADA, in particular, prohibits places of public accommodation from discrimination against individuals with disabilities. Entities subject to the public accommodation requirements are listed in the ADA, and include places like hotels, restaurants, theaters, shopping centers, auditoriums, museums, parks, private schools, day care centers, offices of health care providers, and gymnasiums.[3]

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[4] Among other things, Title III requires that existing facilities be free of "architectural barriers, and communication barriers that are structural in nature . . . where such removal is readily achievable."[5] Under the rulemaking authority provided by Title III, the Attorney General has issued regulations and guidance governing accessibility standards.[6]

The ADA defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense."[7] In addition, the ADA sets out following factors to determine whether removal of architectural barriers is readily achievable: the nature and cost of the action; the overall financial resources of the facility or facilities involved; the number of persons employed at such facility; the effect on expenses and resources; the impact of such action upon the operation of the facility; the overall financial resources of

[1] *See* 42 U.S.C. §§ 12101 *et seq.*
[2] 42 U.S.C. § 12102(b)(1).
[3] 42 U.S.C. § 12181.
[4] 42 U.S.C. § 12182.
[5] *Id.*
[6] *See e.g.,* 28 C.F.R. § 36.104–607.
[7] 42 U.S.C. § 12181(9).

the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; the type of operation or operations of the covered entity; and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity.[8]

In addition to the enforcement authority granted to the Attorney General,[9] Title III provides a private right of action for preventative relief, including an application for a permanent or temporary injunction or restraining order.[10] A successful plaintiff may also be entitled to attorneys' fees and costs. The private enforcement provision of Title III further states that: "Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." [11]

ADA COMPLIANCE

A hearing held on May 19, 2016, by the Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice exposed how businesses struggle to achieve absolute compliance with Title III's public accommodation requirements. In his written testimony submitted to the Committee, David Weiss, Executive Vice President and General Counsel of DDR Corp., stated:

> Properties which constitute places of public accommodation, for various reasons, are always in a state of change. For example, hotels and motels are often on routine rehabilitation schedules and shopping centers are regularly remodeled, modified or redeveloped. Properties often change over time without the intentional act of any person. Foundations settle, or a wet summer season or freeze/thaw cycles during winter can cause a parking lot or sidewalk to shift, move or change. These natural occurrences are constant, even if they are undetectable to the naked eye without resorting to measuring devices. Paint for parking spaces fades from year to year and newly placed concrete is chipped by weather, delivery trucks, snow plows or parking lot sweepers.[12]

The sheer number of technical requirements that businesses must follow is also a major cause of non-compliance.[13] According to one legal scholar, "a single bathroom must meet at least 95 different standards from the height of the toilet paper dispenser to the exact placement of hand rails." Furthermore, "[e]ven through good faith efforts, such as hiring an ADA compliance expert, a business can still find itself subject to a lawsuit for the most minor and

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[8] 42 U.S.C. § 12181(9)(A)–(D).
[9] *See* 42 U.S.C. § 12188(b).
[10] 42 U.S.C. § 12188(a)(1).
[11] *Id.*
[12] *Legislation to Promote the Effective Enforcement of the ADA's Public Accommodation Provisions,* Hearing on *H.R. 3765 Before the Subcomm. on the Const. & Civil Justice of the H. Comm. on the Judiciary,* 114th Cong. 44 (2016) (statement of David Weiss, Executive Vice President and General Counsel, DDR Corp.).
[13] Carri Becker, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abusive or Commendable?*, 17 Hastings Women's L.J. 93, 99 (2006).

unintentional of infractions, such as telephone volume controls needing adjustment."[14]

While the technical requirements under Title III are indeed necessary to make a place of public accommodation accessible, businesses claim they cannot identify every defect on their property despite the highly detailed requirements. According to the written testimony submitted by Brendan Flanagan on behalf of the National Restaurant Association in a 2003 hearing before a subcommittee of the House Small Business Committee:

> Unfortunately, as with other laws, the ADA has created some unintended consequences. One consequence is that it created confusion among businesses that must make sure the business is in compliance. The primary difficulty is that parts of the law are vague and open to interpretation. The concern I hear regularly from members [of the National Restaurant Association] is that 'they just want to know what [sic] is they are supposed to do, so that they can do it.' The problem, they say, is that, depending on who you ask, you can sometimes get different answers . . . In many cases, it can be difficult for even the ADA consultants, local inspectors and private attorneys to agree.[15]

The lack of clarity of Title III's requirements under its public accommodation provisions was also echoed in the written testimony submitted to the same hearing by Kevin Maher on behalf of the American Hotel & Lodging Association. According to Mr. Maher, "[i]t is a significant barrier to compliance with the law that the ADA is a highly detailed, yet highly vague law, unlike other laws and regulations."[16] Lawsuits resulting from non-compliance, according to Mr. Maher, often result in "quick, often costly" settlements.[17]

VEXATIOUS ADA LITIGATION

Vexatious ADA litigation under the public accommodation provisions of Title III has received national attention in recent years. A report aired on *60 Minutes*, on December 4, 2016, for example, featured several small business owners who were subject to what are known as "drive-by" lawsuits.[18] Michael Zayed, a storeowner in Fort Lauderdale, Florida, alleged that the person who sued him was not a real customer because the man claimed he encountered barriers inside the store that didn't exist.[19] According to *60 Minutes*, some states do not require plaintiffs in Title III public accommodation cases to be customers, which allows for a person to "simply drive by a store or restaurant," see a violation, and sue.[20]

In some cases, plaintiffs do not even need to drive by the location. Defining what he called "Google lawsuits," Nolan Klein, a Florida attorney who was also interviewed by *60 Minutes*, stated

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[14] *Id.*

[15] *Litigating the Americans with Disabilities Act, Hearing Before the Subcomm. on Rural Enterprise, Ag., & Tech. of the H. Comm. On Small Bus.,* 108th Cong. 57 (2003) (statement of Branden Flanagan, Dir. of Leg. Aff., National Restaurant Assoc.).

[16] *Id.* at 62.

[17] *Id.*

[18] https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/.

[19] *Id.*

[20] *Id.*

that "[a] Google lawsuit is where the suspicion, at least, is that the property was spotted on Google, Google Earth, Google Maps, whatever the case may be, and you could see certain things from Google," including pool lifts at motels and hotels.[21] According to *60 Minutes*, "In the comfort of your own home, with a few clicks of a mouse, you can see if a pool near you has one, and if they don't appear to have a pool lift, like many of these hotel pools we looked up, you can file a lawsuit . . . just like that."[22] Perry Pustam, a hotel owner in Hollywood, Florida, alleged that he was targeted by an attorney who had filed 60 such Google lawsuits in 50 days.[23]

Despite the negative attention in the media, vexatious litigation is on the rise. According to the law firm Seyfarth Shaw, which maintains a website on ADA Title III litigation, "[f]rom January 1 through April 30, 2017, 2,629 lawsuits were filed [in federal court]—412 more than during the same period in 2016."[24] In 2016, Seyfarth Shaw recorded a 37% increase from 2015 with 6,601 ADA Title III lawsuits being filed in federal court.[25]

Attorneys who are serial filers of these lawsuits likely contribute to this increase. As part of its report, *60 Minutes* interviewed attorney Tom Frankovich, who admitted to filing between 2,000 to 2,500 disability access lawsuits in California in his lifetime.[26] In Utah, nine separate plaintiffs and six law firms were responsible for an "unprecedented" spike in ADA Title III cases filed in 2016, including one plaintiff filing 57 cases and one attorney named as counsel in 105 of the 124 total cases.[27] Other states, such as Florida, New York, Texas, and Arizona, have also experienced serial filings by a single plaintiff or an attorney.[28]

Attorneys have been subject to disciplinary measures by courts due to these serial filings. In 2017, Texas attorney Omar Rosales, for example, was suspended from practicing law for acting in bad faith in six of the 385 lawsuits he filed against small businesses for ADA violations.[29] The Texas State Bar subsequently filed a lawsuit against Mr. Rosales, alleging that he violated several rules

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Minh Vu, *2017 Federal ADA Title III Lawsuit Numbers 18% Higher than 2016*, Seyfarth Shaw (May 9, 2017), https://www.adatitleiii.com/2017/05/2017-federal-ada-title-iii-lawsuit-numbers-18-higher-than-2016/.

[25] Minh Vu, *ADA Title III Lawsuits Increase by 37 Percent in 2016*, Seyfarth Shaw (Jan. 23, 2017), https://www.adatitleiii.com/2017/01/ada-title-iii-lawsuits-increase-by-37-percent-in-2016/.

[26] *What's a "drive-by lawsuit"?*, 60 Minutes (Dec. 4, 2016), https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/.

[27] Minh Vu, *Utah Is a New Hotbed of ADA Title III Federal Suits,* Seyfarth Shaw (Jun. 27, 2017), https://www.adatitleiii.com/2017/06/utah-is-a-new-hotbed-of-ada-title-iii-federal-suits/.

[28] *See e.g.*, David Biscobing, *Attorney General's Office moves to label ADA super-suing attorney a 'vexatious litigant'*, ABC 15 (Dec. 15, 2017), https://www.abc15.com/news/local-news/investigations/attorney-general-s-office-moves-to-label-ada-super-suing-attorney-a-vexatious-litigant- (Arizona); Debra Weiss, *Lawyer who filed hundreds of ADA suits barred from practice in Texas federal court for three years*, ABA Journal (Jul. 13, 2017), http://www.abajournal.com/news/article/texas_lawyer_who_filed_hundreds_of_ada_suits_is_temporarily_barred_from_pra (Texas); Lorena Inclán, *Man files ADA lawsuits against 24 Northeast Florida hotels*, Action News Jax (Feb. 4, 2015), http://www.actionnewsjax.com/news/local/man-files-ada-lawsuits-against-24-northeast-florid/43358883 (Florida); and Amy Shipley, *South Florida leads nation in controversial disability lawsuits*, Sun Sentinel (Jan. 11, 2014), http://articles.sun-sentinel.com/2014-01-11/news/fl-disability-lawsuits-strike-sf-20140112_1_plaintiffs-attorneys-lawsuits (Florida).

[29] Debra Weiss, *Lawyer who filed hundreds of ADA suits barred from practice in Texas federal court for three years*, ABA Journal (Jul. 13, 2017), http://www.abajournal.com/news/article/texas_lawyer_who_filed_hundreds_of_ada_suits_is_temporarily_barred_from_pra.

of professional conduct, including the prohibition on frivolous lawsuits.[30]

Minnesota attorney Paul Hansmeier, who has been repeatedly sanctioned by various courts as a "copyright troll," turned to filing dozens of ADA lawsuits against Minnesota businesses. According to Chief Judge Peter Cahill of Hennepin County District Court, who assigned these cases to one judge, "The serial nature of these cases . . . raises the specter of litigation abuse, and Mr. Hansmeier's history reinforces this concern."[31]

The ability to profit from ADA litigation has given birth to what at least one federal court has referred to as a "cottage industry," in which serial plaintiffs serve as "professional pawns in an ongoing scheme to bilk attorneys" fees."[32] The ADA has, at least for these serial plaintiffs, been changed from a remedial statute aimed at increasing accessibility into a way for lawyers to make money. As one legal observer commented,

> Businesses sued under the ADA are very rarely recalcitrant offenders who obstinately refuse to comply with known and understood legal requirements. Their good faith is very rarely at issue. Rather, they are mostly pliant defendants who misconstrued or missed excruciatingly detailed regulatory requirements. These businesses are almost uniformly willing to fix their properties without the expense and hassle of litigating in federal court. Haling them into court regardless of their willingness to comply voluntarily with the ADA solely to vest plaintiffs' attorneys with an entitlement to fees provides very little societal benefit. After all, if ADA litigation achieves no result beyond that which would have been obtained had pre-suit notice been given, what value was added by the decision to sue?[33]

The potential for abuse of the ADA has been noted in numerous cases in federal courts throughout the country.[34] For instance, one federal district court explained that the ADA's statutory scheme, which provides for a private right of action for injunctive relief, has resulted in an explosion of private ADA-related litigation that is primarily driven by the ADA's attorneys' fees provision.[35] "Courts have referred to this proliferation of ADA lawsuits as a 'cottage industry' and have labeled the plaintiffs who file these lawsuits 'professional plaintiffs,' 'serial plaintiffs,' and 'professional pawns.'"[36] As a district court explained, the "ability to profit from ADA litiga-

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[30] David Barer, *State Bar Suits Omar Rosales for Professional Misconduct*, KXAN (Sept. 12, 2017), http://kxan.com/2017/09/12/state-bar-sues-ada-lawyer-omar-rosales-for-professional-misconduct/.

[31] Joe Mullin, *Copyright troll Paul Hansmeier now sues small businesses over ADA violations*, Ars Technica (Dec. 16, 2014), https://arstechnica.com/tech-policy/2014/12/copyright-troll-paul-hansmeier-now-sues-small-businesses-over-ada-violations/.

[32] Rodriguez v. Investco, L.L.C., 305 F.Supp.2d 1278, 1280–81, 1285 (M.D.Fla. 2004).

[33] Alan J. Gordee, *Curbing Extortionate Shysterism in ADA Litigation: Case Law Has Accomplished Some "Fixes" on the Disabilities Act*, 47 Orange County Lawyer 38 (2005).

[34] *See, e.g.*, Access 4 All, Inc. v. Thirty E. 30th St., LLC, 2006 U.S. Dist. LEXIS 96742 (S.D.N.Y. Dec. 11, 2006); Doran v. Del Taco, Inc., 2006 U.S. Dist. LEXIS 53551, at *15–16 (C.D. Cal. July 5, 2006) (citing cases).

[35] Rodriguez v. Investco, LLC, 305 F. Supp. 2d 1278, 1281–82 (M.D. Fla. 2004) (noting that, in the Middle District of Florida alone, hundreds of Title III cases had been filed by a relatively small number of plaintiffs—and their counsel—who had assumed the role of private attorneys general).

[36] *Doran*, 2006 U.S. Dist. LEXIS 53551, at * 16 (citations omitted).

tion has led some law firms to send disabled individuals to as many businesses as possible in order to have them aggressively seek out all violations of the ADA." [37] Rather than informing the businesses of the violations and attempting to remedy them, lawsuits are filed, as "[p]re-suit settlements, after all, do not vest plaintiffs" counsel with an entitlement to attorney's fees under the ADA." [38] The result is that "the means for enforcing the ADA (attorney's fees) have become more important and desirable than the end (accessibility for disabled individuals)." [39]

PRE-SUIT SETTLEMENTS

Despite the fact that attorney's fees are not available to plaintiffs' counsel in pre-suit settlements, these types of settlements are nevertheless prevalent. In 2017, for example, the Arizona attorney general's office filed a motion to dismiss over 1,000 cases brought by a Phoenix lawyer who had filed more than 2,000 disability access cases in less than a year.[40] According to the ABA Journal, "[t]he plaintiff reportedly had a standard settlement offer of $7,500" and settled most of its cases for an average of $3,900 per case, an amount reportedly just below the cost of a legal defense.[41] The incentive for a plaintiff's attorney to settle, according to the California Restaurant Association, is that "the plaintiff's attorney is more often than not willing to negotiate its fees and expenses, albeit minimally, to close out a case." [42]

The reforms contained in this bill will help provide greater access to public accommodations for disabled Americans. Faced with the decision between expensive litigation and remediating their workplaces quickly, most businesses will fix the problem quickly, resulting in more business providing more access more quickly.

Hearings

The Committee on the Judiciary held no hearings on H.R. 620.

Committee Consideration

On September 7, 2017, the Committee met in open session and ordered the bill (H.R. 620) favorably reported, without amendment, by a roll call vote of 15 to 9, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 620.

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[37] *Id.* at * 17 (citing Doran v. Del Taco, Inc., 373 F. Supp. 2d 1028, 1030 (C.D. Cal. 2005)).

[38] Brother v. Tiger Partner, LLC, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004) (internal quotation marks and citation omitted).

[39] *Id.*

[40] Walter Olson, *Arizona AG, citing "systemic abuse", asks for dismissal of batch ADA cases*, Overlawyered (Aug. 29, 2016), http://www.overlawyered.com/2016/08/arizona-ag-citing-systemic-abuse-asks-dismissal-batch-ada-cases/.

[41] Stephanie Ward, *Arizona AG asks for mass dismissal of multiple ADA cases; calls lawyer's tactics 'systemic abuse'*, ABA Journal (Aug. 26, 2016), http://www.abajournal.com/news/article/arizona_ag_asks_for_mass_dismissal_of_multiple_ada_cases_calls_lawyers_tact.

[42] *Defending a Title III ADA accessibility claim*, California Restaurant Assoc. (Mar. 23, 2017), *available at* https://www.calrest.org/ada/defending-title-iii-ada-accessibility-claim.

1. An Amendment was offered by Mr. Conyers to expand the scope of the bill to include compensatory and punitive damages. The amendment was defeated by a roll call vote of 9 to 19.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)			
Mr. Biggs (AZ)		X	
Mr. Rutherford (FL)		X	
Ms. Handel (GA)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)			
Mr. Lieu (CA)			
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	9	19	

2. An Amendment was offered by Mr. Cohen to strike the "substantial progress" provision and expand the scope of the bill to include liquidated damages. The amendment was defeated by a roll call vote of 9 to 17.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)			
Mr. Biggs (AZ)		X	
Mr. Rutherford (FL)		X	
Ms. Handel (GA)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)			
Mr. Lieu (CA)			
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	9	17	

3. An Amendment was offered by Mr. Cicilline to narrow the scope of the bill to apply it solely to certain small entities. The amendment was defeated 8 to 19.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Issa (CA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Ms. Roby (AL)			
Mr. Gaetz (FL)		X	
Mr. Johnson (LA)		X	
Mr. Biggs (AZ)		X	
Mr. Rutherford (FL)		X	
Ms. Handel (GA)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)			
Mr. Johnson (GA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)	X		
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Swalwell (CA)	X		
Mr. Lieu (CA)			
Mr. Raskin (MD)	X		
Ms. Jayapal (WA)	X		
Mr. Schneider (IL)	X		
Total	8	19	

4. Motion to report H.R. 620 favorably to the House. Approved by a rollcall vote of 15 to 9.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)			
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Poe (TX)	X		
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)			
Mr. Collins (GA)			
Mr. DeSantis (FL)			
Mr. Buck (CO)			
Mr. Ratcliffe (TX)			
Ms. Roby (AL)	X		
Mr. Gaetz (FL)	X		
Mr. Johnson (LA)	X		
Mr. Biggs (AZ)			
Mr. Rutherford (FL)	X		
Ms. Handel (GA)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)			
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)		X	
Mr. Swalwell (CA)		X	
Mr. Lieu (CA)		X	
Mr. Raskin (MD)		X	
Ms. Jayapal (WA)		X	
Mr. Schneider (IL)		X	
Total	15	9	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 620, the following estimate and comparison prepared by the

Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 30, 2017.

Hon. BOB GOODLATTE, *Chairman*,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 620, the ADA Education and Reform Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

KEITH HALL.

Enclosure.

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 620—ADA Education and Reform Act of 2017

As ordered reported by the House Committee on the Judiciary on September 7, 2017.

H.R. 620 would require the Department of Justice (DOJ) to establish a program to educate state and local governments and property owners on strategies for promoting access to public accommodations for persons with disabilities. The bill would modify the process by which an individual can pursue civil action against the owner or operator of a public accommodation where an architectural barrier limits access. H.R. 620 also would direct the federal Judiciary to develop a model program encouraging alternative mediation to resolve claims of architectural barriers to public accommodations.

Based on an analysis of information from the DOJ and assuming appropriation of the necessary amounts, CBO estimates that the DOJ program would cost about $2 million in 2018 and $4 million each year thereafter. About half of those costs would be for additional personnel and specialists in accessibility issues and half for other costs to train state and local officials and private property owners. Over the 2018–2022 period CBO estimates that implementing the program would cost $18 million.

According to the Administrative Office of the U.S. Courts, implementing the bill could lead to a decrease in the number of cases that are filed and fully litigated. CBO estimates that any savings associated with those changes would offset costs associated with the model program for alternative mediation.

Enacting H.R. 620 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 620 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 620 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 620 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee finds that H.R. 620 contains no directed rule making within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 620 ensures greater access to public accommodations for individuals with disabilities while providing business owners with an opportunity to remedy alleged ADA infractions before incurring unnecessary litigation costs.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 620 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title. Section 1 sets forth the short title of the bill as the "ADA Education and Reform Act of 2017."

Sec. 2. Compliance Through Education. Section 2 directs the Disability Rights Section of the Justice Department to use existing funds to provide educational and training grants for professionals, such as Certified Access Specialists, to provide guidance for compliance with the public accommodations portion of the ADA. The intent of this section is to assist states in providing guidance to property owners to facilitate ADA compliance, but could also include the development of a form demand letter for individuals with disabilities that complies with the requirements of this bill. The section does not appropriate funds or require the appropriation of new funds.

Sec. 3. Notice and Cure Period. Section 3 provides before a lawsuit can be commenced up to 180 days after receiving notice of a violation for property owners to remediate ADA public access violations. Under this section, litigation is delayed if, within 60 days of notice of an alleged violation, the property owner provides a written description of how the owner will remove any barrier to access that violates the ADA. This will allow property owners, after being

put on specific notice as to possible ADA violations, to remove, at their own expense, barriers to accessing public accommodations. The property owner then has an additional 120 days to remove barriers or make substantial progress in doing so.

Sec. 4. Effective Date. Section 4 provides that the changes made by the Act will be effective 30 days after the date of enactment.

Sec. 5. Mediation for Section 302(b)(2) ADA Actions Related to Structural Barriers. Section 4 directs the federal courts, in consultation with property owners and representatives of the disability rights community, to develop a model program to promote alternative dispute resolution mechanisms to resolve ADA violations for public accommodations. The goal of the model program is to promote access quickly and efficiently without the need for costly litigation.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

AMERICANS WITH DISABILITIES ACT OF 1990

* * * * * * *

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

* * * * * * *

SEC. 308. ENFORCEMENT.

(a) IN GENERAL.—

[(1) AVAILABILITY OF REMEDIES AND PROCEDURES.—The remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a 3(a)) are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303. Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.]

(1) AVAILABILITY OF REMEDIES AND PROCEDURES.—

(A) IN GENERAL.—Subject to subparagraph (B), the remedies and procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a 3(a)) are the remedies and procedures this title provides to any person who is being subjected to discrimination on the basis of disability in violation of this title or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303. Nothing in this sec-

tion shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this title does not intend to comply with its provisions.

(B) BARRIERS TO ACCESS TO EXISTING PUBLIC ACCOMMODATIONS.—A civil action under section 302 or 303 based on the failure to remove an architectural barrier to access into an existing public accommodation may not be commenced by a person aggrieved by such failure unless—

(i) that person has provided to the owner or operator of the accommodation a written notice specific enough to allow such owner or operator to identify the barrier; and

(ii)(I) during the period beginning on the date the notice is received and ending 60 days after that date, the owner or operator fails to provide to that person a written description outlining improvements that will be made to remove the barrier; or

(II) if the owner or operator provides the written description under subclause (I), the owner or operator fails to remove the barrier or to make substantial progress in removing the barrier during the period beginning on the date the description is provided and ending 120 days after that date.

(C) SPECIFICATION OF DETAILS OF ALLEGED VIOLATION.—The written notice required under subparagraph (B) must also specify in detail the circumstances under which an individual was actually denied access to a public accommodation, including the address of property, the specific sections of the Americans with Disabilities Act alleged to have been violated, whether a request for assistance in removing an architectural barrier to access was made, and whether the barrier to access was a permanent or temporary barrier.

(2) INJUNCTIVE RELIEF.—In the case of violations of sections 302(b)(2)(A)(iv) and section 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

(b) ENFORCEMENT BY THE ATTORNEY GENERAL.—

(1) DENIAL OF RIGHTS.—

(A) DUTY TO INVESTIGATE.—

(i) IN GENERAL.—The Attorney General shall investigate alleged violations of this title, and shall undertake periodic reviews of compliance of covered entities under this title.

(ii) ATTORNEY GENERAL CERTIFICATION.—On the application of a State or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which persons, including individuals with disabilities, are provided an opportunity to testify against such certifi-

cation, certify that a State law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of this Act for the accessibility and usability of covered facilities under this title. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements of this Act.

(B) POTENTIAL VIOLATION.—If the Attorney General has reasonable cause to believe that—

(i) any person or group of persons is engaged in a pattern or practice of discrimination under this title; or

(ii) any person or group of persons has been discriminated against under this title and such discrimination raises an issue of general public importance,

the Attorney General may commence a civil action in any appropriate United States district court.

(2) AUTHORITY OF COURT.—In a civil action under paragraph (1)(B), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including, to the extent required by this title—

(i) granting temporary, preliminary, or permanent relief;

(ii) providing an auxiliary aid or service, modification of policy, practice, or procedure, or alternative method; and

(iii) making facilities readily accessible to and usable by individuals with disabilities;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) SINGLE VIOLATION.—For purposes of paragraph (2)(C), in determining whether a first or subsequent violation has occurred, a determination in a single action, by judgment or settlement, that the covered entity has engaged in more than one discriminatory act shall be counted as a single violation.

(4) PUNITIVE DAMAGES.—For purposes of subsection (b)(2)(B), the term "monetary damages'" and "such other relief" does not include punitive damages.

(5) JUDICIAL CONSIDERATION.—In a civil action under paragraph (1)(B), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this Act by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of aux-

iliary aid needed to accommodate the unique needs of a particular individual with a disability.

* * * * * * *

Dissenting Views

H.R. 620, the so-called "ADA Education and Reform Act of 2017," undermines the civil rights of Americans with disabilities and would set a dangerous precedent for civil rights enforcement more generally. By weakening enforcement, it would undermine the Americans with Disabilities Act's (ADA's)[1] goal of full inclusion and integration of persons with disabilities into the mainstream of American life. Specifically, H.R. 620 would amend title III of the ADA to bar victims of disability discrimination by places of public accommodations—such as hotels, restaurants, theaters, private schools, private day care centers, and health care providers—from filing suit to enforce their rights under the ADA unless the victim: (1) notifies a business of a violation of the ADA's prohibition on access barriers to public accommodations; and (2) waits up to 180 days to allow the business to either remedy the violation or to simply make "substantial progress" towards complying with the law. Additionally, the bill mandates that the required notice of a violation must provide detailed information about the alleged violation, including the specific provision of the ADA that has been violated, whether the victim made a request to the business about removing an access barrier, and whether an access barrier was temporary or permanent. By going far beyond requiring notice of a violation, the bill would effectively impose a standard more akin to the heightened pleading standard applicable to a legal complaint, thus potentially dissuading meritorious complaints from being pursued. No other federal civil rights statute imposes such onerous requirements on discrimination victims *before* they can have the opportunity to vindicate their rights in court.[2] Also, by delaying the filing of a lawsuit for up to six months and introducing uncertainty as to whether a lawsuit could be filed, H.R. 620 will have the additional effect of disincentivizing lawyers from accepting ADA title III cases, further undermining a victim's ability to obtain adequate legal representation and enforce his or her rights in court.

Both individually and cumulatively, H.R. 620's notice and cure provisions will have the effect of inappropriately shifting the burden of enforcing compliance with a federal civil rights statute from the alleged wrongdoer onto the discrimination victim. Moreover, it would undermine the carefully calibrated voluntary compliance regime that is one of the hallmarks of the ADA, a regime formed through negotiations between the disability rights community and the business community when the ADA was drafted 28 years ago.

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[1] 42 U.S.C. §§ 12101 *et seq.* (2018).

[2] H.R. 620's proponents claim that the requirement to obtain a "right to sue" letter from the Equal Employment Opportunity Commission (EEOC) prior to filing an employment discrimination lawsuit pursuant to title VII of the Civil Rights Act of 1964 is a precedent for H.R. 620's notice and cure requirements. Such a comparison, however, is inapposite, as the requirement to first exhaust administrative remedies with the EEOC is intended to allow a government enforcement agency to have the first opportunity to decide whether to file an enforcement action on its own against an offending party, not to simply give a defendant the chance to correct discriminatory behavior that it should not have engaged in in the first place, as H.R. 620 proposes to do. Moreover, the charge of discrimination that must be filed with the EEOC is nowhere nearly as detailed or onerous as what is required by the notice requirement under H.R. 620.

H.R. 620 would, instead, perversely incentivize a public accommodation to *not* comply with the ADA unless and until it receives a notice of a violation pursuant to H.R. 620's notice provision. Finally, the bill does nothing to address the problem that its proponents seek to address, which is the purported concern with the filing of meritless lawsuits by certain plaintiff's attorneys, a problem that would be one of state law, not the federal ADA. H.R. 620's proponents have never adequately articulated why federal law must be amended to address a problem driven by state law. Also, the bill makes no attempt to distinguish between meritorious and non-meritorious lawsuits and would, instead, impose its harmful and unnecessary requirements on *all* ADA claims, regardless of potential merit.

We remain adamantly opposed to any effort to weaken the ability of individuals to enforce their rights under federal civil rights laws and are concerned that H.R. 620 would undermine *the* key enforcement mechanism of the ADA and other civil rights laws, namely, the ability to file private lawsuits to enforce rights. Joining us in opposition is a broad coalition of 236 disability rights groups, including American Foundation for the Blind, the Bazelon Center for Mental Health, the Christopher and Dana Reeve Foundation, the National Council on Independent Living, the National Disability Rights Network, the Paralyzed Veterans of America, and Vietnam Veterans of America. This coalition opposes H.R. 620 because it "would create significant obstacles for people with disabilities to enforce their rights under Title III of the [ADA] to access public accommodations, and would impede their ability to engage in daily activities and participate in the mainstream of society."[3] Other members of the coalition opposing H.R. 620 include the AFL–CIO, the Anti-Defamation League, Human Rights Campaign, the NAACP and the NAACP Legal Defense and Educational Fund.[4]

Additionally, the Leadership Conference on Civil and Human Rights opposes the bill because it would "remove incentives for businesses to comply with the law unless and until people with disabilities are denied access" which "would lead to the continued exclusion of people with disabilities from the mainstream of society and would turn back the clock on disability rights in America."[5] Likewise, the American Civil Liberties Union opposes H.R. 620 because it would "fundamentally alter [the] way in which a person with a disability enforces their civil rights and would severely limit access to places of public accommodations. This misnamed and misrepresented bill would have a devastating impact on people with disabilities."[6]

For the foregoing reasons and those discussed below, we strongly oppose H.R. 620 and respectfully dissent from the Committee report.

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[3] Letter from the Consortium for Citizens with Disabilities to Bob Goodlatte, Chairman, & John Conyers, Ranking Member, Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, in opposition to H.R. 620 (Sept. 7, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

[4] *Id.*

[5] Letter from the Leadership Conference for Civil and Human Rights to Bob Goodlatte, Chairman, & John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary, in opposition to H.R. 620 (Apr. 27, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

[6] Letter from Faiz Shakir et al. to Members of Congress in opposition to H.R. 620 (Sept. 6, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

DESCRIPTION

H.R. 620 would lay numerous litigation traps for the unwary plaintiff by imposing various pre-suit notice and cure provisions. Specifically, section 3 amends the ADA's general remedies provision to require that before a lawsuit can be filed to enforce the ADA's public accommodations provisions, several conditions must either be met by the aggrieved person or not met by the owner or operator of the public accommodation at issue. First, the aggrieved person must provide written notice to the owner or operator of the accommodation "specific enough to allow" the owner or operator to identify the barrier to access at issue. Second, the owner or operator of the accommodation must fail to respond within 60 days of receiving such notice with a description outlining improvements to remove the barrier to access. Third, the owner or operator must fail to remove the barrier "or to make substantial progress in removing the barrier" within 120 days after the 60-day response period. The phrase "substantial progress" is undefined. In short, under this provision, an aggrieved disabled person could potentially have to wait up to 180 days before filing suit, assuming a business owner has failed ultimately to comply with or "make substantial progress" toward complying with the law. Notably, there is no provision in H.R. 620 that would dissuade a business owner from deliberately using the proposed notice-and-cure provisions as a dilatory litigation tactic to delay or discourage even legitimate lawsuits from being filed.

With respect to the "specific notice" required under section 3, that provision further mandates that such written notice must specify in detail the circumstances under which an individual was actually denied access to a public accommodation, including the address of the property at issue, the specific ADA provisions being violated, whether a request for assistance in removing a barrier to access was made, and whether the barrier to access was permanent or temporary. These requirements appear to be an attempt to impose into a pre-suit notification regime some of the specificity required of a legal complaint under the heightened pleading standard of Rule 8 of the Federal Rules of Civil Procedure.

CONCERNS WITH H.R. 620

I. H.R. 620 would undermine the civil rights of persons with disabilities.

As with other federal civil rights laws banning discrimination in public accommodations, title III of the ADA was enacted with the purpose of ensuring that persons with disabilities were guaranteed the fundamental right to access public accommodations and to eliminate "the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[7] In passing the ADA, Congress sought to

> Send a clear message . . . to places of public accommodations . . . that the full force of the Federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them, by exclud-

[7] Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1165 (July 20, 1990).

> ing them, or by denying them equally effective and meaningful opportunity to benefit from all aspects of life in America.[8]

By passing the ADA, Congress "affirm[ed] its commitment to remove the physical barriers and the antiquated social attitudes that have condemned people with disabilities to second-class citizenship for too long."[9]

While title III issues a mandate to public accommodations to remove barriers to access, it depends largely on voluntary compliance by such public accommodations, enforced by the credible threat of a private lawsuit brought by an aggrieved individual should such businesses fail to comply. By disincentivizing voluntary compliance and weakening the credible threat of a lawsuit, H.R. 620 threatens to undermine the ADA's goal of fully integrating persons with disabilities into mainstream society.

A. H.R. 620 wrongly shifts the burden of compliance with a civil rights law onto victims of discrimination rather than the businesses that are supposed to be complying with the law.

Title III of the ADA places the burden of ensuring access to places of public accommodation—places such as hotels, restaurants, theaters, private schools, private day care centers, and health care providers[10]—on the owners and operators of such businesses. To help achieve this end, title III is designed to make it easy for businesses to comply with its requirements. For example, it requires public accommodations to take reasonable steps to increase access into their facilities, services, and programs for people with disabilities. These steps need only be taken if they are "readily achieveable,"[11] which the ADA defines as "easily accomplishable and able to be carried out without much difficulty or expense."[12] This "readily achievable" standard has been the governing legal principle for increasing access to existing facilities since the ADA's passage almost 28 years ago. It ensures that, rather than having a one-size-fits-all requirement, businesses have flexibility to determine what steps are possible based on their size and resources and the prospective cost of an improvement. A small, family-owned business does not have to take the same steps as a large commercial chain. Businesses fought for this standard during drafting of the ADA because of its flexibility; with flexibility also comes responsibility for determining, with guidance and rules from Department of Justice (DOJ), what steps are possible.

To provide an incentive to take these steps and help minimize the cost burden for business, Congress has provided a tax deduction and tax credit. Section 44 of the Internal Revenue Code allows a tax credit for small businesses to cover ADA-related costs. The amount of the tax credit is equal to 50% of eligible expenditures to increase accessibility in a year, up to a maximum each year of $10,250.[13] Section 190 of the Internal Revenue Code provides a tax

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[8] 135 Cong. Rec. 8506 (1989) (statement of Sen. Tom Harkin).
[9] 136 Cong. Rec. 17360 (1990) (statement of Sen. Edward Kennedy).
[10] 42 U.S.C. § 12181 (2018).
[11] 42 U.S.C. § 12182(b)(2)(A)(iv) (2018).
[12] 42 U.S.C. § 12181 (2018).
[13] 26 U.S.C. § 44 (2018).

deduction of up to $15,000 per year for removal of architectural barriers.[14] Small businesses can use these incentives in combination if they qualify under both sections.

Additionally, there also is free technical assistance available to businesses on how to comply with title III's requirements. The DOJ has developed compliance manuals and maintains a telephone information line to respond to questions as well as a web site with a full complement of technical assistance materials.[15] We have long taken the position that if there is a lack of understanding regarding the ADA's requirements, the answer is to strengthen assistance, not to weaken the ADA through a pre-suit notice requirement.

This intricate framework to encourage voluntary compliance was achieved through negotiation and compromise between the disability rights community and the business community in the process of crafting the ADA. Another important aspect of this framework, however, is the credible threat of private lawsuits against businesses that ultimately fail to comply with the ADA despite the incentives to do so.

Title III authorizes the Attorney General and private parties to bring lawsuits to enforce its provisions. Private lawsuits, in the civil rights tradition of "private attorneys general," have long been understood and acknowledged as a necessary mechanism to ensure adequate enforcement of civil rights. Yet as with its voluntary compliance regime, title III's lawsuit provision represents further compromise between the business and disability rights communities. Under title III, while the Attorney General is authorized to sue for money damages,[16] private parties may only obtain injunctive relief and reasonable attorneys' fees and costs.[17] Moreover, the award of such attorneys' fees is at a court's discretion, and the Supreme Court has further potentially limited such awards in most cases where a defendant voluntarily fixes the problem.[18] Thus, any defendant who acts quickly to remedy an alleged violation is likely to have to pay minimal, if any, court costs or attorneys' fees.

As it is, too few businesses are complying with title III's directive to remove access barriers to places of public accommodations. The National Council on Disability (NCD)[19] reported that "many public accommodations are not in compliance with Title III and are not, in fact, accessible."[20] In part, this is because title III does not pro-

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[14] 26 U.S.C. § 190 (2018).

[15] U.S. Dep't of Justice, ADA Title III Technical Assistance Manuel, available at *https://www.ada.gov/taman3.html; see generally* U.S. Dep't of Justice, ADA Technical Assistance Materials, available at *https://www.ada.gov/ta-pubs-pg2.html.*

[16] 42 U.S.C. § 12188(b)(4) (2018) (authorizing the Attorney General to sue and seek damages in instances where there is "reasonable cause to believe that" there is a pattern or practice of discrimination or a case raises an issue of "general public importance").

[17] 42 U.S.C. § 12188(a) (2018) provides that the remedies and procedures in section 204(a) of the Civil Rights Act of 1964 are available to private parties enforcing title III; those referenced remedies include only prospective injunctive relief. *See* 42 U.S.C. 2000a–3(a) (2018).

[18] *See* Buckhannon Board and Care Home Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001) (rejecting the "catalyst" theory under which plaintiff could recover reasonable attorneys' fees if a lawsuit resulted in voluntary remedial action).

[19] The National Council on Disability (NCD) is an independent federal agency charged with gathering information about the effectiveness and impact of the ADA and making recommendations to the President and Congress. NCD is composed of 15 members appointed by the President and confirmed by the U.S. Senate.

[20] National Council on Disability, Implementation of the Americans with Disabilities Act: Challenges, Best Practices, and New Opportunities for Success (July 26, 2007), available at *http://www.ncd.gov/publications/2007/July262007* [hereinafter NCD Report].

vide for aggrieved persons to recover damages, making it more difficult for a person who has been discriminated against to obtain legal representation to enforce his or her rights.

Rather than trying to improve compliance with title III, H.R. 620's notice and cure provisions cut in the opposite direction and, instead, flip the voluntary compliance regime on its head. By weakening the incentives for businesses to comply and by making it harder for aggrieved persons to vindicate their rights in court, H.R. 620 shifts the overall burden of compliance onto victims rather than wrongdoers. Under H.R. 620, when there is an access barrier—that is, when there is an act of unlawful discrimination against a person with a disability—the onus is placed on the victim to initiate H.R. 620's cumbersome process for enforcing title III rather than on the business that is supposed to be in compliance with the nearly 28-year-old law in the first place. Under such a scheme, businesses have no inventive to comply except in the unlikely event that they fail to take advantage of H.R. 620's notice and cure provisions, all of which are designed to stack the deck against an aggrieved person with a disability. The bill incentivizes businesses to simply take the not-unreasonable chance that they will never receive a notice of an ADA violation pursuant to H.R. 620 despite the existence of one. Pre-suit notification creates a disincentive to comply voluntarily with the ADA. Requiring pre-suit notification—a "get out of jail free" card—excuses businesses from taking affirmative steps to remove barriers and allows them to wait and see if they ever get a notification letter.

In light of the foregoing, Rep. John Conyers, Jr. (D–MI) offered an amendment during the Committee's markup of H.R. 620 that would have added a provision allowing plaintiffs to recover compensatory and punitive damages for title III violations. If H.R. 620's proponents insist on upending the bargain that the disability rights community reached with the business community in 1990 to forego damages and agree to incentives for voluntary compliance, then it is only fair to allow for the recovery of damages in title III cases brought by private plaintiffs in order to restore a level playing field in title III litigation between public accommodations and persons with disabilities. Unfortunately, the Committee rejected this amendment by a party-line vote of 9 to 19.

B. H.R. 620's notice and cure requirements constitute a minefield of litigation traps for unwary plaintiffs that will have the effect of dissuading discrimination victims with meritorious claims from vindicating their rights in court.

H.R. 620 provides numerous means by which businesses can avoid being held accountable in court for their failure to comply with title III of the ADA. All of the bill's notice and cure provisions must be met *before* an aggrieved party can file a lawsuit, and a business can raise an aggrieved party's alleged failure to meet any of these requirements as arguments for defeating any lawsuit that may be commenced. For instance, the bill allows business owners to defeat lawsuits by asserting that they had made "substantial progress" toward eliminating barriers to access, with the the term "substantial progress" undefined and potentially leading to protracted and expensive litigation over its meaning. Similarly, a business owner could extensively litigate the question of whether notice

was "specific" enough under H.R. 620's notice requirements. The bill also requires a disability discrimination victim to wait up to 180 days before filing suit regardless of the merits of his or her claims. And, justice delayed is justice denied, for such a delay makes it more difficult for the victim to retain counsel or otherwise be able to pursue potential litigation. At a minimum, courts will have to struggle to determine what the inherently vague terms of H.R. 620's notice and cure provisions mean, thereby creating an open invitation for well-financed business interests to engage in endless litigation that would drain the typically limited resources of a plaintiff. The prospect of protracted litigation would be enough to dissuade discrimination victims from pursuing litigation despite having meritorious claims.

1. H.R. 620 does not require actual compliance with the ADA.

Perhaps tellingly, H.R. 620 fails to require actual compliance with title III by businesses. While delaying the ability of discrimination victims to file a lawsuit to enforce their rights and giving business owners numerous ways to dissuade lawsuits from being filed or to stop them once they are filed, the bill's notice and cure provisions do nothing to enforce compliance. In fact, its cure provision states that, once given notice of an ADA violation, a business has 120 days to either cure the violation or "to make substantial progress" in doing so. In other words, a business need not actually fix its violation of the law in order to prevent a lawsuit to enforce the law from being filed. Moreover, H.R. 620 does not define the term "substantial progress," leaving it entirely to a business owner's discretion as to whether he or she has made such progress and, at a minimum, raising the prospect of expensive and protracted litigation should a lawsuit be filed over the question of whether the business made such "substantial progress."

In light of the foregoing, and because no provision in the bill attempts to dissuade business owners who act purely in bad faith by using the bill's notice and cure provisions primarily to delay or avoid compliance, Rep. Steve Cohen (D–TN) offered an amendment that would have removed the "substantial progress" language from the bill and permitted the recovery of liquated damages when a business owner failed to remove an access barrier within the 120-day cure period. The Committee rejected the amendment by a party-line vote of 9 to 17.

2. The bill's notice requirement is overly burdensome and excessive.

Rather than simply requiring a person with a disability to notify a business of the existence of an access barrier, H.R. 620 essentially requires the person to plead a legal case with the specificity of a legal complaint in his or her initial notice to a business. Such specific information may be very difficult or impossible for a discrimination victim to provide, particularly without legal counsel. The bill requires, among other things, that the written notice to a business must: (1) cite the specific sections of the ADA alleged to have been violated; (2) describe whether a request for assistance in removing the barrier was made; and (3) whether the access barrier was permanent or temporary. A person with a disability confronting an access barrier may not know what specific sections of

the ADA were violated, may not be in a position to request removal of a barrier if the barrier prevents the person from entering the public accommodation in the first place, and may not be able to determine whether a barrier was temporary or permanent depending on the disability that the person suffers from. Finally, as with the bill's notice and cure provisions, this provision appears designed to allow a defendant to have a subsequent lawsuit dismissed or to protract litigation by raising an argument over whether a notice was sufficiently specific.

In light of these concerns about the bill's burdensome notice requirements, Rep. Jamie Raskin (D–MD) offered an amendment that would have limited the required information to be contained in a written notice to the address of the property on which the access barrier existed and a description of the barrier or circumstances under which a person was denied access to the public accommodation. Though Rep. Raskin chose to withdraw this amendment, it was an attempt to ease the bill's excessive notice requirement.

3. H.R. 620 requires discrimination victims to wait 180 days to enforce their rights.

Justice delayed is justice denied. Under H.R. 620, a discrimination victim, after giving notice of the ADA violation to a business owner, must wait up to 60 days for the business owner to respond to the notice and then must wait for up to an additional 120 days thereafter to give the business owner—who should have already been in compliance with the law—time to comply or "to make substantial progress" in complying with the law. Put plainly, this means that any business owner who has been alerted to the existence of an ADA violation can force a victim of disability discrimination to wait up to 180 days before that person can file suit to enforce his rights under the ADA, vastly diminishing the chances that such a suit will be filed, no matter how meritorious. As the American Association for Justice noted, H.R. 620 "awards wrongdoers with a strategic advantage by forcing the disabled community to wait over half a year before filing a complaint. This is too long, and the time frame provided for compliance too uncertain." [21]

4. The bill erodes the ability of victims of discrimination to obtain adequate legal representation.

H.R. 620's notice and cure requirements would discourage attorneys from representing individuals with potential claims under title III because attorneys' fees may only be recovered if litigation ensues. By delaying and creating uncertainty over the prospects of litigation for even meritorious claims, H.R. 620 makes it far less likely that a disabled person with a title III claim would be able to obtain adequate legal representation, further eroding his or her ability to enforce his or her civil rights under the ADA.

In light of the onerous burden that H.R. 620's notice and cure provisions would impose on disability discrimination victims, Rep. David Cicilline (D–RI) offered an amendment that would have limited the availability of the bill's notice and cure provisions to busi-

[21] Letter from Linda Lipsen, C.E.O., American Association for Justice, to Bob Goodlatte, Chairman, and John Conyers, Jr., Ranking Member, H. Comm. on the Judiciary (Sept. 7, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

nesses with five or fewer full-time employees. To the extent that the bill's proponents claim that vexatious litigation hurts small businesses, the bill's notice and cure provisions should be targeted towards such businesses. In contrast, there is no reason why a major corporation such as Wal-Mart, which has more than adequate resources to comply with the law and to defend itself in court, should be given the tools to threaten a litigation war of attrition against aggrieved persons. Unfortunately, the Committee rejected this reasonable amendment by a party-line vote of 8 to 19.

II. H.R. 620 does not address the purported problem of vexatious litigation, a phenomenon that is driven by state law, not the federal ADA.

Despite widespread lack of voluntary compliance almost 28 years after the ADA's enactment, some have raised concern regarding lawsuits being filed by a handful of attorneys and individual or organizational plaintiffs, allegedly for personal profit rather than a desire to bring about compliance with the law.[22] Proponents of presuit notification bills like H.R. 620 cite these examples to justify the need for their legislation.

To begin with, we note that the fact that an attorney files numerous similar lawsuits does not, by itself, indicate that the lawsuits are abusive or that the claims alleged are illegitimate. The filing of numerous similar lawsuits may, in fact, indicate the presence of numerous similar violations of the law. Moreover, H.R. 620 makes no attempt to distinguish between meritorious and non-meritorious claims with respect to the application of its onerous notice and cure provisions.

To the extent that there is a problem with vexatious litigation, however, this problem has mostly been limited to several states—California, Florida, Hawaii, New York and Texas—where state laws, unlike the ADA, provide for money damages.[23] In these states, some lawyers have filed similar suits against a large number of small businesses, alleging violation of both federal (ADA) and state law, and have then used the threat of state damages to force quick settlements from defendants.[24] When faced with this problem, however, courts have sanctioned parties found to be "vexatious litigants," have refused to award attorneys' fees where a lawyer failed to serve a defendant with a demand letter prior to filing suit, and have dismissed cases for a lack of standing where the plaintiff cannot allege harm.

In *Molski* v. *Mandarin Touch Restaurant,*[25] for example, a California district court found that the plaintiff was a "vexatious litigant" and ordered him to obtain leave of court before filing any future claims. Mr. Molski, who has a physical disability that requires him to use a wheelchair, had filed 300–400 lawsuits that were "nearly identical in terms of the facts alleged, the claims presented,

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[22] *See, e.g.,* Mosi Secret, *Disabilities Act Prompts Flood of Suits Some Cite as Unfair,* N.Y. TIMES, Apr. 16, 2012, available at *http://www.nytimes.com/2012/04/17/nyregion/lawyers-find-obstacles-to-the-disabled-then-find-plaintiffs.html?pagewanted=all* (April 16, 2012).

[23] *See* Cal. Civ. Code (Unrush Act) 54.3(a); Fla. Civil Rights Law, 760.11(5); N.Y. Human Rights Law § 297(9); Haw. Rev. Stat. § 347–13.5; Tex. Human Resources Code 121.004(b).

[24] *See* NCD Report.

[25] 347 F.Supp.2d 860 (C.D.Cal. 2004).

and the damages requested [by virtue of California law]."[26] While acknowledging that it was "possible, even likely, that many of the businesses sued were not in full compliance with the ADA," the court nonetheless sanctioned Mr. Molski and his attorney for filing suits intended to intimidate business owners into agreeing to cash settlements. The Ninth Circuit upheld these orders on appeal, though also noting that "for the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA."[27] Because the allegations in Mr. Molski's suits were "contrived, exaggerated, and def[ied] common sense," however, the court concluded that sanctions were appropriate.

Other courts have exercised their discretion under title III's attorneys' fees provision to refuse to award fees when no pre-suit demand (notification) letter was given to the defendant.[28] Some have even assessed costs against plaintiffs when allegations were not credible, the suit did not result in a finding of liability, and no pre-suit notification was provided.[29] Courts also have dismissed cases for lack of standing where the plaintiff is unable to show a real and immediate threat of future injury in cases, for example, where a litigant appears to have visited a public accommodation "solely for the purpose of bringing a Title III claim and supplemental state claims[.]"[30]

As these examples illustrate, courts have tools to address those instances—that have taken place in only a handful of states—where litigants have inappropriately used the ADA and corresponding state disability laws for pecuniary gain. Amending the ADA to require pre-suit notification is not necessary. Additionally, there has been state-level legislative action to address abusive lawsuits in those states that do provide for money damages.[31] Moreover, while a handful of states whose laws allow for money damages may be the source for vexatious litigation, we note that other states whose laws allow for money damages have not raised similar concerns. For example, Vermont, Oregon, Kentucky, and the District of Columbia have not had a similar problem even though their laws provide money damages against public accommodations that violate accessibility requirements.

Rep. Eric Swalwell (D–CA) offered an amendment that sought to address concerns about vexatious litigation while not closing the courthouse door to discrimination victims. His amendment would have allowed a defendant to move to dismiss a case where the same plaintiff or plaintiff's attorney has filed five or more title III

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[26] *Id.* at 861.

[27] Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007), cert. denied, 129 S. Ct. 594 (2008).

[28] *See* Macort v. Checker Drive-In Restaurants, Inc., 2005 WL 332422 *1 (M.D. Fla. Jan. 28, 2005) ("Court is not inclined to award attorney's fees for prosecuting a lawsuit when a pre-suit letter to the Defendant would have achieved the same result"); Doran v. Del Taco, Inc., 373 F.Supp.2d 1028, 1032 (C.D.Cal. 2005) ("fair and reasonable to require a pre-litigation un-ambiguous notice and a reasonable opportunity to cure before allowing attorneys' fees in an ADA case.")

[29] *See, e.g.,* Rodriguez v. Investco, L.L.C., 305 F.Supp. 2d 1278 (M.D. Fla. 2004).

[30] Harris v. Stonecrest Care Auto Ctr., 472 F.Supp.2d 1208, 1220 (S.D. Cal. 2007).

[31] In 2016, California enacted a law allowing, among other intended reforms, a 120 day "grace period" for "minimum statutory damages" if the defendant meets certain specified conditions, including a documented prior state inspection for compliance. See S.B. 269, 2016 Leg., 2015–2016 Sess. (Cal. 2016).

lawsuits within 30 days prior to the present lawsuit where a defendant could show by clear and convincing evidence that such lawsuits demonstrated a pattern of duplicative lawsuits intended solely to cause nuisance, there was no objective evidence of good faith belief that the plaintiff expected to prevail, and the defendant had no reason to believe the existence of and received no notice of a failure to comply with title III of the ADA. The Committee rejected this amendment by voice vote.

CONCLUSION

H.R. 620 will have the effect of undermining the civil rights of people with disabilities because justice delayed is justice denied. The ADA was intended to integrate people with disabilities into the mainstream of American society, and to ensure that the law lives up to its purpose, people with disabilities must be able to obtain timely legal redress to erase barriers to access where voluntary compliance incentives have failed. Yet H.R. 620 erects unnecessary and arbitrary legal hurdles that will only benefit ADA violators and further isolate people with disabilities from the rest of society. Under the bill, places of public accommodation can willfully forego compliance with the ADA's accessibility requirements. They will be forced to comply only if a person with a disability notifies the business of the specific ADA sections being violated, whether a request was made to remove the barrier, and whether such barrier was permanent or temporary. Then, the victim must wait up to 180 days before being able to file suit. Moreover, a business need not actually rectify a violation and need only make some undefined level of "substantial progress" toward removing an access barrier. These provisions, individually and taken together, will prevent meritorious claims from moving forward because they would be prerequisites to filing suit and would also serve as potential defenses to be litigated should a suit ultimately be filed. Such a prospect would deter persons with disabilities who have legitimate claims from enforcing their rights in court and undermine the ADA's ultimate goal of integration for persons with disabilities into mainstream society.

For these reasons, we dissent and urge our colleagues to join us in opposing H.R. 620.

MR. NADLER.
MS. JACKSON LEE.
MR. JOHNSON, Jr.
MR. CICILLINE.
MS. JAYAPAL.
MR. RASKIN.

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