June 7, 2016

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

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

Re: ***Comments for Record of May 19, 2016 Hearing, Examining Legislation to Promote the Effective Enforcement of the ADA's Public Accommodation Provisions***

Dear Chairman Franks and Ranking Member Cohen:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) and Allies of CCD submit these comments for the record of this hearing. CCD is a coalition of national disability organizations working for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society.

We strongly oppose the three bills that were the subject of this hearing: the ADA Education and Reform Act of 2015, H.R. 3765, the ACCESS ADA Compliance for Customer Entry to Stores and Services Act of 2015, H.R. 241, and the COMPLI Act, H.R. 4719. These bills are designed to limit the ability of people with disabilities to enforce their rights under the Americans with Disabilities Act (ADA) to access places of public accommodation in the same manner as all other citizens. Twenty-six years after the ADA was enacted, businesses should be expected to know and comply with their obligations under the law. Permitting the continued exclusion of people with disabilities from the mainstream of society unless and until *they themselves* demonstrate to businesses that those businesses are violating the law is absurd and unacceptable.

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

These bills would remove all incentive for businesses, social service establishments, and other places of public accommodation to comply with the ADA's accessibility requirements unless and until an individual with a disability recognizes that the place of public accommodation is out of compliance with the ADA's requirements and provides the entity with written notice in precisely the right manner. Businesses could employ a "wait and see" approach, continuing to violate the law with impunity and excluding countless people with disabilities from their goods, services, facilities, and accommodations until a person with a disability determined that the business was out of compliance with the ADA and provided the business with the proper notification. Even then, the business would face no penalty or consequence for having violated the law for months, years, or decades, if the business then took advantage of the months-long period to remedy the violation before a lawsuit was permitted.

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

One of the bills – H.R. 3765 – would even subject people with disabilities to *criminal penalties* for failure to provide precisely the information called for by its notification provisions. It is beyond ironic for legislation that presumes it is too burdensome for businesses to know and comply with longstanding access requirements to criminalize people with disabilities for lacking the knowledge or information to be included in the required notification.

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

These Bills Are Not Necessary and Will Not Achieve Their Asserted Purpose

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

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

All of the lawsuits highlighted in the May 19th hearing involved monetary damages authorized under *state* law. Indeed, the small number of "serial" ADA litigants filing numerous Title III cases have been based in states with accessibility laws that authorize damages—such as California, Florida, and others. The proposed modifications to the ADA *would do nothing* to eliminate the prospect of monetary damages for violations of these state law accessibility requirements.

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

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

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

"...

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

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

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

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

The imposition of a months-long "waiting period"[2] during which a business may continue to violate the law and deny access to people with disabilities once it has received a notice that it is violating the ADA is unreasonable. Permitting the continued unlawful denial of access by people with disabilities to stores, health care establishments, social service establishments, theaters, schools, transportation terminals, gas stations, day care centers, senior centers, and other places of public accommodation for months or years until someone with a disability discerns that the business is violating the law and provides the requisite notification—and then disallowing any enforcement for an *additional* period of months once that occurs—conveys that people with disabilities are simply not welcome as full members of society. Moreover, forcing individuals to wait for months to enforce their rights would leave people with disabilities without recourse for particularly grievous harms, such as the inability to receive needed surgery at a specialty hospital that is inaccessible, or the inability to continue attending a private school after a student has developed a disability.

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

The message of these bills that individuals should be stopped from enforcing their rights against multiple businesses is misplaced. Indeed, H.R. 4719 would require an Attorney General report concerning individuals who have filed multiple lawsuits, including recommendations on whether a cap on recoverable attorneys' fees would reduce the number of Title III actions brought by individual plaintiffs. The premise of these provisions is that individuals should not enforce the ADA against multiple businesses, regardless of the merit of their claims or of how widespread accessibility violations are.

Many businesses violate the ADA's accessibility requirements, creating many challenges and unequal opportunities for people with disabilities. It is perplexing that individuals who enforce their rights against multiple businesses would necessarily be viewed as the problem, and businesses sued for violating a law that has been in effect for many years as victims. It would be unthinkable to limit fees in other contexts in order to limit enforcement of civil rights—for example, to limit fees under the Civil Rights Act of 1964 to reduce the number of lawsuits brought by African Americans challenging discrimination. As noted above, to the extent that a small number of individuals have filed lawsuits for abusive purposes or based on fraudulent claims, many mechanisms already exist to address such litigation. Congress's goal should be to

[2] H.R. 241 and H.R. 3765 would require individuals to wait as long as six months after providing the requisite notice before being permitted to enforce their rights, and H.R. 4719 would require individuals to wait as long as four months.

ensure that people with disabilities have access to places of public accommodation, not to ensure that they are stopped from enforcing their rights.

Misperceptions Voiced at the Hearing

While there was a suggestion in the hearing that Title II of the Civil Rights Act contains a notification requirement similar to those proposed in these bills, that suggestion is unfounded. There is no analogous notice requirement in Title II of the Civil Rights Act. The only "notice" requirement in Title II is 42 U.S.C. § 2000a-3, which requires plaintiffs to notify state enforcement authorities of an intent to sue in federal court to allow the state 30 days to take action itself under similar state law requirements. This notice is not to permit a business to take corrective action before being sued or to limit enforcement by victims of discrimination; it is simply to notify state governments of potential violations and permit them to take enforcement action.

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

We appreciate the opportunity to provide this feedback and look forward to working with you to ensure that people with disabilities can enforce their right to access places of public accommodation and be treated as full and equal members of society. Please contact Jennifer Mathis, Bazelon Center for Mental Health Law at jenniferm@bazelon.org or at 202-467-5730 or Dara Baldwin, National Disability Rights Network at dara.baldwin@ndrn.org or 202-408-9514 ext. 102.

Sincerely,

ACCSES
American Association of People with Disabilities (AAPD)
American Foundation for the Blind (AFB)
American Music Therapy Association
Association of University Centers on Disabilities (AUCD)
Autistic Self Advocacy Network (ASAN)
Bazelon Center for Mental Health Law
Disability Rights and Education Defense Fund (DREDF)
Easterseals
Epilepsy Foundation
Justice in Aging
Learning Disabilities Association of America
Lutheran Services in America Disability Network
Mental Health America
The Advocacy Institute
The Arc of the United States
National Association of Councils on Developmental Disabilities

National Council on Independent Living (NCIL)
National Disability Rights Network (NDRN)
National LGBTQ Task Force Action Fund
National Multiple Sclerosis Society
Paralyzed Veterans of America (PVA)
United Spinal Association

Allies of CCD:
Ability Center of Greater Toledo
Advocacy Center of Louisiana
Arizona Center for Disability Law
Association of Late Deafened Adults
Association on Higher Education and Disability (AHEAD)
Civil Rights Education and Enforcement Center
Colorado Cross Disability Coalition
Disability and Civil Rights Clinic: Advocating for Adults with Intellectual and Developmental Disabilities, Brooklyn Law School
Disability Power & Pride
Disability Rights California
Disability Rights Iowa
Disability Rights New Jersey
Disability Rights Oregon
Disability Rights Pennsylvania
Disability Rights Tennessee
Disability Rights Texas
Everyone Reading, Inc.
Goldstein, Borgen, Dardarian & Ho
Helping Educate to Advance the Rights of the Deaf (HEARD)
Jo Anne Simon, P.C.
Law Office of Lainey Feingold
Law Office of Ellen Saideman
Law Office of Michelle Uzeta
Maryland Disability Law Center
National Association of the Deaf
National Federation of the Blind
Oregon Communications Project
Protection and Advocacy for People with Disabilities, Inc. (P&A)
The Advocrat Group.
Washington Civil and Disability Advocate
Washington State Communication Access Project

Written Submission to the House Judiciary Committee on ADA Notification

Submitted to the House Judiciary Subcommittee on the Constitution for a hearing "Examining Legislation to Promote the Effective Enforcement of the ADA's Public Accommodation Provisions"

May 19th, 2016

FOR THE RECORD

Policy Statement of the National Council on Disability
Regarding Amending the ADA to Require Notice

The National Council on Disability (NCD) offers this testimony for the written record in accordance with our mission as an independent federal agency tasked with making recommendations to the President and Congress on policy matters affecting the lives of Americans with disabilities. Given this mission, NCD is responsible for providing advice regarding the implementation and enforcement of the Americans with Disabilities Act (ADA) – a law with which NCD has an inextricably connected history.

NCD first proposed the concept of the ADA in 1986. Congress relied on and acknowledged the influence of NCD, its reports, and its testimony throughout the legislative process leading up to its passage and in 1990, the ADA was signed into law by President George H.W. Bush. Since passage of the ADA, NCD has remained actively involved in disability policy, including working with Congress to amend the ADA in 2008, recalibrating it to address discrimination in a broad array of circumstances after interpretation of the law was narrowed by the federal courts.

The proposed policies before the Committee at today's hearing, "Examining Legislation to Promote the Effective Enforcement of the ADA's Public Accommodation" all fall under the general rubric of ADA notification bills, which have come before this committee year after year. In 2012, NCD submitted a Statement for the Record to this Committee expressing concern regarding legislation that proposed "...to amend the ADA to require that an individual alleging a business is inaccessible provide written notice to the business about the specific ADA violation before bringing suit."[1] Additionally, NCD reminded the Committee that:

Title III of the ADA was intended to balance the interests of small businesses along with the accessibility concerns of people with disabilities. It is a myth that the ADA's requirements are too hard on small businesses .The legislative history of the ADA is rife with concern about the burden on small businesses and as a result, Title III does not require any action with respect to existing buildings that would cause an undue burden or that is not readily achievable. The approach of the ADA was not to exempt small businesses from the requirements of the bill, but rather to tailor the requirements of the Act to take into account the needs and resources of small businesses– to require what is reasonable and not to impose obligations that are unrealistic or debilitating to businesses.[2]

Since NCD issued this statement, businesses small and large--and the state and federal agencies that regulate them--have had four more years (nearly 26 total years now) to ensure compliance with the reasonable and balanced requirements of the ADA, and yet legislation that seeks to place the onus on

the person with a disability who is prevented from spending their money to purchase goods and services from an inaccessible business is again under consideration by this Committee. Furthermore, among the current slate of bills, H.R. 3765 not only requires that the aggrieved person with a disability notify the owner-operator of the allegedly inaccessible business about their violation of the ADA, but also subjects the complainant to criminal liability if the notice does not meet strict statutory requirements. This proposed provision would be unique in civil rights law, and would have a chilling effect on anyone aware of this provision. Ironically, an innocent person with a disability who simply wanted to make a business owner aware of a violation of a well-settled 26-year old law might unwittingly violate this new notice requirement and face a stiff penalty while a business owner is free to flout the access requirements of the ADA. This sort of imbalance is certainly not in keeping with original Congressional intent which already took all parties' interests into consideration against the backdrop of an individual's inalienable civil rights.

While we all support small businesses and appreciate the valuable role they play in our economy, opening a business necessarily entails adherence to certain rules. For over 50 years, federal law prohibits businesses from engaging in discrimination based on race, religion, or sex, and for 26 years, they have been required to make their businesses accessible to people with disabilities. These requirements are widely known and ascertainable by any responsible business owner. Shifting the responsibility to aggrieved individuals with disabilities who may already have suffered the indignity of discrimination is bad national policy, and it is an unacceptable and unprecedented rollback of the "...guarantee [of] fair and just access to the fruits of American life which we all must be able to enjoy..." that George H.W. Bush recognized the ADA to be when he signed this landmark legislation. At the signing, President Bush declared eloquently, "[W]e rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America."[3]

26 years later, surely we cannot be ready to declare that equality is a failed experiment and that discrimination against people with disabilities is tolerable and acceptable in America, and that those that have been treated unfairly must stay silent or risk criminal penalties for a less than artful protest of their mistreatment.

As we did four years ago when this Committee considered similar legislation, NCD recommends that Congress follow its own careful considerations when enacting the ADA and reject these unnecessary amendments.

[1] National Council on Disability, NCD Statement for the Record – House Judiciary Subcommittee on the Constitution Hearing on "Access (ADA Compliance for Customer Entry to Stores and Services) Act" June 27, 2012. Available from:www.ncd.gov/newsroom/Testimony.06272012

[2] Id.

[3] George H.W. Bush, "Statement on Signing the Americans with Disabilities Act of 1990," July 26, 1990.

NATIONAL LGBTQ TASK FORCE

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Washington, DC 20005

P: 202.393.5177
F: 202.393.2241

May 18, 2016

Re: Letter of Opposition to H.R. 241, H.R. 3765, and H.R. 4719

Whom it may concern:

The National LGBTQ Task Force (Task Force) is the nation's oldest national organization advocating for the rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and their families. We write in opposition to H.R. 241, the ADA Compliance for Customer Entry to Stores and Services Act (ACCESS), H.R. 3765, the ADA Education and Reform Act of 2015, and H.R. 4719, the COMPLI Act.

As victims of constant systemic discrimination, LGBTQ people are more likely to have disabilities, particularly psychiatric disabilities, such as major depression and post-traumatic stress disorder, including a heightened risk of suicide, demonstrated by the fact that 41% of transgender people have attempted suicide. This makes disability discrimination an integral LGBTQ issue.

Almost 26 years ago, the Americans with Disabilities Act (ADA) was enacted as a compromise between the disability and business community. The disability community gave up the ability to receive damages from failure to comply with the federal ADA by only allowing injunctive relief and attorney's fees for violations of the law. Unfortunately, almost 26 years after enactment, there are still organizations, businesses, and companies who have yet to comply with this important civil rights law for persons with disabilities.

A number of bills, such as these, have been introduced in Congress that would create barriers to the civil rights for persons with disabilities that do not exist in other civil rights laws. These bills seek to limit the power of the ADA and reduce compliance with the law.

As was mentioned earlier, the ADA has been law for almost 26 years, if a business has decided to not comply with the requirements of this legislation by this point, why should a person have to wait more time for enforcement of their civil rights? Should an individual who is not allowed to enter a restaurant because of their race, gender or religion, have to wait before seeking to enforce their civil rights? The disability community already compromised with the passage of the ADA by not allowing individuals to seek damages from violations of their civil rights, but now legislations such as the aforementioned bills seek to erode the civil rights of people with disabilities.

Congress should be ensuring that people with disabilities have full access to the community through the strong enforcement of the ADA, not making it more difficult for people with disabilities to be fully participating members of society. As these bills would erode the civil rights of people with disabilities, we must oppose these legislations.

At the Task Force, we look forward to working together on creating policies that help LGBTQ people with disabilities. Please contact Victoria M. Rodríguez-Roldán, Director, Trans and Gender Non-Conforming Justice Project at vrodriguezroldan@thetaskforce.org, or 202-639-6328, should you have any questions.