RECORD NO. 18-1725

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

J.D., by his father and next friend, BRIAN DOHERTY,

Plaintiff-Appellamt,

v.

COLONIAL WILLIAMSBURG FOUNDATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS

BRIEF OF THE DISABILITY LAW CENTER OF VIRGINIA & NATIONAL DISABILITY RIGHTS NETWORK AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1725 Caption: J.D. V. Colonial Williamsburg Foundation

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(name of party/amicus)

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Signature: /s/ Kerry Chilton Date: 09/26/18

Counsel for: disAbility Law Center of Virginia

CERTIFICATE OF SERVICE

****

I certify that on 09/26/18 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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National Disability Rights Network
(name of party/amicus)

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Zachary S. DeVore Date: September 24, 2018

Counsel for: National Disability Rights Network

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/s/ Kerry Chilton (signature) September 24, 2018 (date)

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I. IDENTIFICATION OF AMICI CURAE

The disAbility Law Center of Virginia ("dLCV") and the National Disability Rights Network ("NDRN") respectfully submit this brief amici curiae[1] as part of our mission to advocate for the legal interests of Virginians with disabilities. All parties have consented to the filing of this amici brief under Federal Rule of Appellate Procedure 29.

dLCV is the designated protection and advocacy (P&A) agency for the Commonwealth of Virginia. Va. Code § 51.5-39.13. As the designated protection and advocacy agency, dLCV has the authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals." 29 U.S.C. § 794e(f)(3). The United States Supreme Court affirmed this authority in *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247 (2011) (involving two other protection and advocacy laws). As the P&A agency for Virginia, dLCV has a strong interest in enforcement of the Americans with Disabilities Act ("ADA") to assure full inclusion of people with disabilities.

NDRN is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies

[1] Counsel for amici curiae authored this brief in whole and no party other than amici curiae contributed financially to this brief. Neither party involved in this litigation authored this brief or contributed to its funding.

for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

II. ARGUMENT

The ADA is dedicated to the full inclusion of persons with disabilities in American society. Title III of the ADA entitles people with disabilities visiting an entertainment or educational facility to an equal opportunity to participate in the program. *Feldman v. Pro Football, Inc.*, 419 Fed.Appx. 381, 391-92 (4th Cir. 2011). Amici believe that the grant of summary judgment in favor of CWF below should be reversed due to the existence of disputed material facts. *Jacobs v. N.C. Admin. Office of Courts*, 780 F.3d. 562 (4th Cir. 2015); *see Dee v. Maryland National Capitol Park and Planning Commission*, 2010 WL 3245332 at 6 (D. Md. Aug. 16, 2010) (reasonableness of an accommodation is a factual question, unless

there is something in the ADA, implementing regulations, or case law that indicates an accommodation is unreasonable as a matter of law). By finding that the requested accommodation was not necessary, the district court reached a conclusion that could have only been reached by weighing evidence and making credibility determinations – neither of which is permitted at the summary judgment stage. *Jacobs*, 780 F.3d. at 568-69.

This amici brief will highlight three particular areas that demonstrate why the requested accommodation was both reasonable and necessary. First, the district court did not adequately determine what service, food, or education/entertainment CWF provides. Instead, the district court treated the CWF tavern primarily as a restaurant. In the context of a school fieldtrip, with no reasonable opportunity for the Plaintiff-Appellant J.D. to eat elsewhere, and where a shared experience was the point of the trip, J.D.'s modest request to eat known safe food should have been allowed without missing that shared experience.

Second, the district court erred by agreeing with CWF that J.D. had to make his request for accommodation in advance. Such a blanket requirement for advance notice is contrary to the purpose of the ADA.

Third, other entities within the entertainment and tourism industry have adopted policies that provide the very accommodation that J.D. and his father requested: the ability to eat food from home due to a severe disability related

dietary restriction. This shows that J.D.'s requested accommodation could have been provided without the negative effects speculated by CWF.

A. The CWF Tavern Is More Than Just a Restaurant, and the Shared Historical Experience There Was Central to the Service Provided

Appellant J.D., a then 11-year-old child, along with his father, visited Colonial Williamsburg as part of a school fieldtrip. They were part of a group of approximately 30 students and 30 adult chaperones. JA 12. The bookings with CWF – which included tours of Colonial Williamsburg, several events, dinner at a CWF tavern, and spending the night in a CWF hotel – were made by the school. But CWF made the schedule of events including dinner at Shields Tavern, along with events at Colonial Williamsburg before and after dinner. JA 22.

CWF operates a living history museum with many attractions. The overriding purpose of these attractions is for education and historic preservation. However, CWF also charges admission to these attractions and operates numerous businesses. *See Colonial Williamsburg Foundation v. Kittinger Co.,* 38 F.3d. 133 (4th Cir. 1994) (involving a furniture business), *Davidson v. Colonial Williamsburg Foundation*, 817 F. Supp. 611 (E.D. VA 1993) (noting numerous commercial operations). CWF's operation of a living history museum qualifies as a place of public accommodation under the ADA, which specifically lists museums as a covered entity. 42 U.S.C. § 12181(7)(H); *see also* 42 U.S.C. § 12181(7)(I) (places of recreation are places of public accommodations); 42 U.S.C. § 12181(7)(C)

(places of entertainment are places of public accommodations); 42 U.S.C. § 12181(7)(B) (establishments serving food or drink are places of public accommodation).

As part of a school group, J.D. and his father did not have access to transportation during the tour; going someplace else to eat was not an option. As such, when a court examines the need for J.D. to receive accommodation, the court should not view the tavern overwhelmingly as a restaurant, with comparatively brief attention paid to its historical and entertainment characteristics. JA 342; R&R at 32. In the school trip context, it is proper to see CWF as being similar to an amusement park, stadium, or theater, where having a shared experience is important. While the educational purpose of CWF makes it somewhat different than the above, legally there is no difference. The ADA applies equally to entertainment and educational venues. See, 42 U.S.C. § 12181(7)(J) (defining educational venues as places of public accommodation); *supra* p. 4-5 (other examples of places of public accommodation).

Like CWF, amusement parks operate multiple attractions including restaurants on premises. Like the restaurants within an amusement park, the CWF taverns allow people to eat without leaving the Colonial Williamsburg historical area. Like theme park restaurants, the taverns provide entertainment as well as food: they offer an educational or entertainment experience through costumed

interpreters and costumed servers in an historical environment. Both CWF and amusement parks often attract visitors in large groups, including school groups or family groups. Like amusement parks, CWF covers a large land area.[2] Finally, amusement parks and CWF are ultimately in the same business – attracting visitors.[3]

This court has recognized that a place of public accommodation may serve additional purposes beyond the stated purpose. *See Feldman*, 419 Fed. Appx. at 391 ("We also agree with the district court that the defendants 'provide more than a football game.'") In *Feldman,* this court held that a professional football team had to provide certain services for deaf patrons for them "to have full and equal access to the goods and services that defendants provide." *Id.*

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[2] According to CWF, Colonial Williamsburg covers 301 acres. *First Timer's Ticket and Itinerary*, Colonial Williamsburg, https://www.colonialwilliamsburg.com/~/link.aspx?_id=83B5C66D34CA4BC18B8A7C74B86D818D&_z=z?from=homecarousel (last visited Sept. 10, 2018). By comparison, Epcot Center at Walt Disney World is 300 acres. *See, A.L. by D.L. v. Walt Disney Parks and Resorts U.S., Inc.*, 900 F.3d. 1270 (11th Cir. 2018), n 2 (listing the size of the parks).

[3] *Summer Getaway Package*, Colonial Williamsburg Resorts, https://www.colonialwilliamsburghotels.com/packages/summer-getaway-package/ (last visited Sept. 10, 2018). One of the hotels owned by CWF is a preferred lodging partner of Busch Gardens. *Hotel Partners*, Busch Gardens Williamsburg, VA, https://buschgardens.com/williamsburg/vacation-packages/hotel-partners/ (last visited Sept. 10, 2018).

Given that CWF's promotional materials portray the taverns as serving an educational and entertainment purpose,[4] the district court erred by focusing overwhelmingly on CWF's provision of meals while allowing inflexible policies to force J.D. and his father, in effect, to choose between known safe food and having a shared historical experience with friends. JA 342; R&R at 32. Forcing them to make that choice undermined their enjoyment of a shared experience central to the service provided, especially on a school fieldtrip where having a shared experience is the whole point.[5]

The modest policy exception sought by J.D. was necessary for him and would not have fundamentally altered the service offered by the tavern. In this context, the district court erred in finding that CWF "did not deny J.D. a like experience as that of nondisabled guests" and should be reversed. JA 342; R&R at 32.

Moreover, the district court appears to have ruled that a "gluten-free" meal, prepared in a non-gluten-free kitchen, was *per se* a reasonable accommodation for someone with severe dietary restrictions. Case law shows that accommodations

[4] According to CWF, "Shield's Tavern offers an authentic taste of the cosmopolitan nature of the Colonies in the 18th century." *Shields Tavern*, Colonial Williamsburg Resorts, https://www.colonialwilliamsburghotels.com/dining/shields-tavern/ (last visited Sept. 10, 2018)

[5] The Appellee claims J.D. still shared that experience by eating outside in cold, damp weather because a colonial singer followed them. Def's SJ Reply at 14, (ECF Doc. 31). The Amici strongly disagree and hope the court will also.

must be tailored whenever possible to a disabled person's specific needs. *See, PGA Tour, Inc. v. Martin,* 532 U.S. 661, 690 (2001)("the ADA's basic requirement that the need of a disabled person be evaluated on an individual basis."); *A.L., by D.L. v. Walt Disney Parks and Resorts U.S., Inc*., 900 F.3d. 1270, 1293-96 (11th Cir. 2018) (holding that it is error for a district court to grant summary judgment when plaintiffs present evidence that a general accommodation does not provide for their unique needs). The ADA requires that places of public accommodation make reasonable modifications of policy to avoid excluding people with disabilities. *National Federation of the Blind v. Lamone*, 813 F.3d. 494, 504 (4th Cir. 2016). Courts are not required to consider more convenient alternatives when determining whether a requested accommodation is reasonable and necessary. *See, e.g., Id.* at 508 (holding that the requested accommodation was reasonable without considering alternative accommodations). Additionally, the district court made the conclusion that CWF's proposed alternative was reasonable and the district court rendered J.D.'s requested accommodation unnecessary by weighing evidence, which is not permissible at the summary judgement stage. *Jacobs*, 780 F.3d. at 568-69. The district court erred by not allowing a very simple accommodation (eating food from home) for a child with a severe condition. (Particularly when the venue was paid for the meal, resulting in no economic impact).

B. The ADA Does Not Support Advanced Notice In This Case

The director of food and beverages for CWF, Mark Florimonte, testified that advance notice is required when making an ADA accommodation request to bring outside food into a CWF restaurant. JA 221; Florimonte Dep. 136:4-136:17. The manager then determines if the restaurant can accommodate the individual's needs by providing an alternative meal, and if not, they have the discretion to allow for an exception to the policy. *Id.* & JA 217-18; Florimonte Dep. 107:13-108:7.

Congress in the ADA stated that "society has tended to isolate and segregate individuals with disabilities" and that "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially […] and educationally." 42 U.S.C. § 12101(a)(2) & (a)(6). The ADA was thus enacted to "address the major areas of discrimination faced day-to-day by people with disabilities." 43 U.S.C. § 12101(b)(4). Requiring an individual with a disability to provide advance notice of a passive ADA accommodation request is precisely the type of social disadvantage the ADA tries to eliminate.

Social engagement is often not a pre-planned affair. The choice to go bowling, see a movie, or eat out, etc., often occurs on short notice. While advance notice may be necessary for some accommodations (such as an in-person interpreter for a person who is deaf), when it is not necessary, it only serves as a roadblock to inclusion, further isolating those with disabilities. Here, though there

was advanced planning for the trip, it was unclear before arriving at the tavern that J.D. needed prior approval to eat a simple meal from home.

CWF acknowledges that it has polices allowing for accommodations of guests without advance notice. When a building is not accessible, photographic interpretations of buildings are available upon request.[6] Additionally, when a guest cannot access a historic trade interpretation within a building, CWF directs guests to request assistance from an interpreter, as these interpretations can "often be done outside the shops."[7] In regards to accommodations for non-disabled guests, Mr. Florimonte stated during his deposition that CWF has a policy which allows infants and toddlers under the age of three to consume outside food within a tavern without inspection of the food or advance notice.[8]

The ADA acknowledges an individual's need to adapt to spontaneous events in day-to-day life. Several disability discrimination regulations specifically state that advance notice is not required for accommodation requests, including over-the-road bus services (advance notice only required for providing boarding

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[6] Colonial Williamsburg Foundation, *Accessibility: A Guide for Guests with Disabilities* (2011) *available at* https://www.colonialwilliamsburg.com/plan/-/media/bc483c8aae4f4943ac9b49bd82270949.ashx.

[7] *Id.*, at 1.

[8] CWF has two exceptions to its no-outside-food policy, one of which is that "parents of babies and toddlers too young to order from the main menu may bring in baby food and other snacks for the infants." JA 316; R&R at 6. In depositions, Mr. Florimonte further discussed how this policy operates. JA 216, 212-13; Florimonte Dep. 105:9-105:14; Florimonte Dep. 19:8-20:12.

assistance) and air travel (advance notice only required for enumerated accommodations). 49 C.F.R. § 37.169(f); 14 C.F.R. § 382.27.

In both of the above listed regulations, the accommodations requiring advance notice are those that would likely involve planning or action by the entity providing the accommodation. The regulations state that even these accommodation must be provided when there is no advance notice, so long as the entity can reasonably do so (and do so without delaying departure, in the case of air travel). 49 C.F.R. § 37.189(d); 14 C.F.R. § 382.27. "Advance notice requirements are generally undesirable" and should only be required when necessary to ensure that the accommodation can be made. 49 C.F.R. Pt. 37, App. D. Many ADA regulations, such as those relating to employment and service animals, do not require advance notice. 29 C.F.R. § 1630.9; 28 CFR § 36.302(C).

It is possible that advance notice would be required if lack thereof would make the requested accommodation unreasonable. In *Dee v. Maryland National Capitol Park and Planning Commission,* the plaintiff and defendants disagreed as to whether 30 minutes notice was reasonable for requesting assistance with navigating through a fitness facility. *Dee*, 2010 WL 3245332 at 6. The court held that "reasonableness" was a factual question, and the amount of notice had to be considered in conjunction with the nature and clarity of the request for

accommodation. *Id.* As noted above, for accommodations that require additional resources or staff, an "on the spot" accommodation may be unreasonable.

But that was not the case here. J.D.'s requested accommodation did not require CWF to take any action or utilize additional resources. J.D., through his father, simply asked the tavern for permission to consume the food they brought from home. CWF is able to accommodate outside food for toddlers and infants without advance notice. *See supra* note 8. J.D.'s request should have been afforded similar treatment.

C. Other Venues Provide the Accommodation Requested by J.D. and CWF Should Also

Theme parks inside and outside Virginia recognize that some individuals will need to bring in outside food for medical reasons and do not require advance notice for this accommodation. For example, Walt Disney World Resort's personal food item policy states: "Guests with food allergies or intolerances are allowed to bring food into Walt Disney World theme parks and dining locations. When entering a park, simply inform the Security Cast Member at bag check that someone in the party has a food allergy or intolerance." [9]

[9] *Special Dietary Requests*, Walt Disney World, https://disneyworld.disney.go.com/guest-services/special-dietary-requests/ (last visited Sept. 10, 2018).

King's Dominion, in Virginia,[10] allows for outside food and beverages for those with special diets or medical conditions. Guests are directed to Guest Services at the Front Gate of the park for accommodations.[11] Busch Gardens, also in Williamsburg, Virginia, allows guests with dietary restrictions to bring their own food in collapsible carry coolers. The park lists no advance notice requirement.[12]

Six Flags locations, including one in Maryland, also make an exception for "guests who suffer from sensitivities or life-threatening allergies […] if they do not feel comfortable with the menu options available." Depending upon park location, guests are asked to check in with security or first aid to receive a medical sticker.[13]

That several entertainment and recreation venues allow people with severe dietary restrictions to bring their own food shows that the commercial considerations CWF relies upon are insufficient to override J.D.'s modest request

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[10] King's Dominion's parent company Cedar Fair Entertainment Company owns 12 amusement parks in the United States including Carrowinds in Charlotte, North Carolina within the Fourth Circuit. *Our Parks*, Cedar Fair, https://www.cedarfair.com/our-parks (last visited Sept. 10, 2018).

[11] *Kings Dominion & Soak City 2018 Guest Assistance Guide*, https://cdn-cloudfront.cfauthx.com/binaries/content/assets/kd-en-us/general-information/help/2018-guest-assistance-guide.pdf (last visited Aug. 23, 2018).

[12] *Food Allergen Information*, Busch Gardens Williamsburg, VA, https://buschgardens.com/williamsburg/help/allergen-information/ (last visited Aug. 23, 2018).

[13] *Park Policies*, Six Flags America, https://www.sixflags.com/america/plan-your-visit/park-policies (last visited Aug. 23, 2018); *Frequently Asked Questions*, Six Flags Great Adventure and Safari, https://www.sixflags.com/greatadventure/plan-your-visit/frequently-asked-questions (last visited Aug. 23, 2018); *Park Policies*, Six Flags New England, https://www.sixflags.com/newengland/plan-your-visit/park-policies (last visited Aug. 23, 2018).

for accommodation. JA 316; R&R. at 6. The district court appeared to accept the claimed commercial losses by CWF at face value. *Id.* To the extent it did, that was error. At the summary judgment stage, the district court is not permitted to weigh evidence. *Jacobs*, 780 F.3d, at 568.

CWF concedes that it only receives a few requests per day for gluten-free meals and allows children to eat food from home. JA 316, 339; R&R at 6, 29. CWF should permit outside food consumption in cases involving severe gluten intolerance, especially given its historical and educational character, which will be partly or largely missed by forcing people to eat outside. Given CWF's mission to provide education and historic preservation, a reasonable finder of fact could conclude that this mission would have been better served by accommodating J.D.'s request. A reasonable finder of fact could also find that the requested accommodation was both reasonable and necessary in light of J.D.'s disability specific risk. Furthermore, the requested accommodation would have caused no harm to Appellee. This accommodation would have allowed J.D. to be fully included in that shared experience, without being forced to decide between uncertain food options and having to eat outside in uncomfortable weather.

IV. CONCLUSION

For the reasons stated above, the district court erred in granting summary judgment for Appellee CWF and should be reversed. It is error for a district court to reach a conclusion that could have only been reached through weighing disputed evidence when resolving a motion for summary judgment. *Jacobs*, 780 F.3d, at 569. A reasonable finder of fact could conclude that J.D.'s requested accommodation was both reasonable and necessary, and the district court committed error when it resolved numerous factual disputes and concluded otherwise.

Dated: September 26, 2018

Respectfully Submitted,

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By: /s/ Kerry Chilton
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