

Testimony from Ruth Colker

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Chairman Butler, Vice Chair Pelanda, Ranking Minority Member Stinziano, and Members of the House Judiciary Committee, I thank you for this opportunity to offer this written testimony in opposition to House Bill 333.

My name is Ruth Colker and I am a Distinguished University Professor and the Heck-Faust Memorial Chair in Constitutional Law at the Moritz College of Law at The Ohio State University.¹ I am one of the country's leading legal experts on the topics of disability and constitutional law. I am the co-author of the two major casebooks on the law of disability discrimination, as well as the author of ten academic press books and more than 50 law review articles on related topics. I have spoken to federal and state judges on disability-related issues. My work has been cited with approval by various courts including the United States Supreme Court.

Today, I would like to testify against House Bill 333. It is unconstitutional as applied to the Americans with Disabilities Act. It is terrible policy as applied to Ohio's accessibility laws.

The fact that House Bill 333 is unconstitutional is rudimentary constitutional law. Under the Supremacy Clause, state legislatures may not seek to limit the enforcement of federal law. This principle was well-established in *McCulloch v. Maryland*, 17 U.S. 316 (1819). Congress has repeatedly considered, and rejected, attempts to create a "notice" requirement under ADA Title III. If members of the Ohio legislature wish to modify the rules under the ADA, they need to seek to amend a federal statute, not enact a state statute. All references to federal law must be deleted from this bill in order for it to comply with the federal Constitution.

Others will speak to why this bill is terrible policy. As someone who has written about ADA Title III, let me share a broader perspective on why this Bill reflects a gross misunderstanding of the way accessibility laws operate in the United States.²

When ADA Title III was first introduced in Congress in 1989, the enforcement scheme provided that individuals could get compensatory and punitive damages. The original bill also had language offering a defense that a modification of an existing entity was not "readily achievable."

¹ I also serve on the state Board of Disability Rights Ohio and the national Board of the American Civil Liberties Union although I am not testifying today on behalf of either organization.

² This part of my testimony is drawn from RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 166-200* (2005)

When hearings were held on the proposed ADA, Attorney General Richard Thornburgh supported the bill but argued that the monetary remedies should be eliminated and ADA Title III should parallel the remedies existing under Title II of the Civil Rights Act of 1964. Under Civil Rights Act, Title II, relief is limited to injunctive relief. Further, Thornburgh argued that “readily achievable” should be defined as meaning “easily accomplishable and able to be carried out without much difficulty or expense.” The size and financial resources of the covered entity were to be considered in determining whether that defense could be met.

Senator Harkin agreed to accept the Thornburgh language, narrowing the remedies available under ADA Title III, in return for other language that broadened the scope of entities covered by ADA Title III. In agreeing to this compromise, Attorney General Thornburgh also said the administration would monitor enforcement of ADA Title III to see if a purely injunctive strategy would work. The limitation on remedies under ADA Title III was characterized as a “fragile compromise” by the bill’s supporters.

At risk of getting too legalistic, let me further explain that Title II of the Civil Rights Act of 1964 (which became the model for ADA Title III) limited itself to injunctive relief out of a realization that white juries in the south were not likely to award monetary relief to African-American plaintiffs who sought to enter restaurants and hotels in the south. By limiting enforcement to injunctive relief, Congress sought to have judges, rather than juries, resolve these race discrimination cases.

In subsequent years, enforcement of Title II of the Civil Rights Act of 1964, however, has gone far beyond injunctive relief. Many state statutes provide for compensatory damages. Further, financial relief is also available under 42 U.S.C. § 1981. But Section 1981 can only be used to obtain monetary damages in cases of race discrimination, not disability discrimination.

Hence, ADA Title III was modeled on Title II of the Civil Rights Act of 1964 but has not kept pace with the law of race discrimination in that monetary damages are rarely available when individuals with disabilities are denied access. By contrast, monetary damages have been a potent weapon to force businesses to integrate under Title II of the Civil Rights Act.

I have done empirical research and found that ADA Title III is a very under-enforced aspect of the ADA. In general, I have found that only about ten percent of ADA cases are brought under ADA Title III. The United States Department of Justice has settlement authority under ADA Title III and it brings numerous cases each year (which would obviously not be affected by House Bill 333). In those settlements, the Department of Justice rarely seeks any form of financial relief. It focuses on making the facilities accessible.

Despite empirical evidence that few ADA Title III lawsuits are brought each year, the media is often full of stories of what is described as “vexatious litigation.” That characterization is generally unwarranted. Attorneys are only able to bring multiple lawsuits against inaccessible entities because

those entities are still out of ADA compliance, even though the statute was passed in 1990 - - nearly 25 years ago.

But let me briefly debunk this notion of vexatious litigation. San Diego attorneys Mark D. Potter and Russell C. Handy filed 250 Title III lawsuits in the Central District of the United States Court for the Southern District of California between March 1998 and March 2000. Despite complaints from the media and various defendants, these lawsuits resulted in more than 1,000 additional parking spaces for people with disabilities and hundreds of additional ramps and arm rails. Because their clients could not receive any monetary relief from these lawsuits, the only way these attorneys could afford to bring these cases was to seek attorney fees from the defendants. Settlements occurred, but only because the defendants were in blatant noncompliance with the ADA. Similarly, many facilities in Florida are accessible because of settlements reached in lawsuits brought by a few Florida lawyers. This so-called “vexatious litigation” is still possible only because accessibility violations are such low-hanging fruit.

Many of the ADA Title III lawsuits involve matters that are obvious and easily corrected. Parking spaces often do not have correct vertical signage so that their designation is obvious in the snow. They are also often not wide enough for wheelchair-accessible vehicles. Curb cuts are often in such a state of disrepair that they are dangerous rather than useful, forcing individuals who use wheelchairs to enter the street rather than stay on the sidewalk. Doors are often so heavy that the building is essentially closed to anyone without significant upper body strength.

Under current law, such egregious accessibility barriers continue. When I drive around the state of Ohio, I routinely point out accessibility barriers to friends and family. When I briefly was disabled and had to travel in a wheelchair, I had the opportunity to experience these violations first-hand.

It is tragic that businesses in the state of Ohio are still routinely out of compliance with ADA Title III (and state accessibility law). Passage of House Bill 333 will just give businesses one more excuse not to comply with the law, and create yet one more barrier for people with disabilities.

If House Bill 333 becomes law, pro se actions to enforce the accessibility laws will end. People with disabilities, who are among the poorest people in our society, will have to find a lawyer who is willing to send the demand letter required by House Bill 333. Then, they will have to wait five months to see if the business actually improves its accessibility. If “voluntary” compliance occurs, the lawyer will not be able to collect any attorney fees. Under the Supreme Court’s decision in *Buckhannon Board v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), a plaintiff cannot collect attorney fees merely for being a catalyst to a legal change. Unless a plaintiff attains a judgment on the merits or a court-ordered consent decree, the plaintiff is entitled to no reimbursement as a prevailing party. Thus, the combination of House Bill 333 and *Buckhannon* will be the death knell of any private attorney handling accessibility cases. The twenty-four years of inaccessibility that have endured in Ohio since the enactment of ADA Title III will become nearly permanent due to a total lack of private enforcement.

Before voting on this bill, I encourage the members of this committee to spend a week in a wheelchair traveling around the state of Ohio, especially during one of our snow storms. Try to find a visible, accessible parking spot when the ground is covered in snow. Try to open a heavy outer door when there is no automatic opener. Try to use a restroom when it is not accessible. After a week of frustration, maybe you'll come back and seek to amend Ohio law to provide significant financial penalties for each violation.

The question you should really be asking yourself is why is there a lack of compliance with ADA Title III after the law has been on the books for nearly 25 years? The answer is a dire problem of under-enforcement not a problem of vexatious litigation.

I can understand you calling this legislation "emergency" legislation to deal with "the immediate preservation of the public peace, health, and safety." Unfortunately, though, you misunderstand the emergency. The genuine emergency is that people with disabilities still face significant accessibility barriers in Ohio with a dire shortage of lawyers willing to assist them respond to those problems. Your bill will simply make the emergency even worse.

Thank you for the opportunity to provide testimony against House Bill 333. I apologize that I could not offer this testimony in person but I was already scheduled to give a speech on the ADA to a group of individuals with disabilities. I would be happy to answer any questions in writing if any member of the committee or staff wishes to contact me. I would also be happy to meet with any member of the committee or staff at your convenience. I can be reached at 614-292-0900 or by email at colker.2@osu.edu.