CASE 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-Appellant

v.

COLONIAL WILLIAMSBURG FOUNDATION,

Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Virginia
At Newport News

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

This case is about a child who reacts severely to gluten. His pediatric gastroenterologist has ordered him to adhere to a strict, gluten-free diet. When his family tried ordering gluten-free meals for him when eating out at restaurants that promised gluten-free meals, he was nonetheless exposed to gluten and suffered debilitating symptoms for months. J.D. and his family have been traumatized by his experiences eating out and have stopped eating out at mainstream restaurants altogether except when J.D. brings a guaranteed-to-be-gluten-free meal necessary not only for his physical safety but also for their peace of mind that he is in fact eating a safe meal.

Consequently, based on doctors' orders and prior traumatic experiences when eating purportedly gluten-free meals that made him seriously ill, J.D. packed a guaranteed-to-be-gluten-free meal to take on his school trip to Colonial Williamsburg. All Colonial Williamsburg had to do was let him eat that meal with his classmates. Colonial Williamsburg refused despite having been paid full price for J.D. to be on the educational field trip and now argues that J.D.'s physical safety and peace of mind when eating was unnecessary and that allowing him to eat his own meal was somehow unreasonable.

J.D. has offered a wealth of evidence demonstrating genuine issues of material fact. He has provided evidence about his disability and reactions when eating purportedly gluten-free meals. In addition, he has presented the expert report of a nationally recognized consultant to the restaurant industry on gluten-free meal preparation who explained the risk created by the Colonial Williamsburg chef's lack of knowledge that even foods that one might not expect to contain gluten can in fact have gluten as a result of cross-contamination or hidden ingredients.

Although the Magistrate Judge correctly recognized that J.D. has a disability because he is substantially limited in major life activities including eating, the Magistrate Judge disregarded the severity of J.D.'s disability in holding that J.D. should have nonetheless risked eating food not guaranteed to be gluten-free. The Magistrate Judge erroneously disregarded factual evidence and expert testimony demonstrating the risks to J.D. when he eats out. The Magistrate Judge instead relied on his own assumptions about the risks faced by a child with J.D.'s disability and the opinions of Colonial Williamsburg's chef about what is and is not medically necessary for the child's safety. In doing so, the Court impermissibly weighed the factual evidence, including the expert report and testimony of the nationally recognized expert who concluded that the chef's lack of knowledge, insufficient training, and overconfidence about his ability to safely prepare a

gluten-free meal rendered it unsafe for J.D. to eat the food at Shields Tavern. Accordingly, the Magistrate Judge erred in drawing factual inferences against J.D.

The Americans with Disabilities Act requires that the Court look at how the venue is used by those without disabilities and then consider whether the defendant afforded the person with a disability a like experience. A like experience cannot include being escorted out of a venue that had been paid for him to be in the room. Equal access cannot be achieved by turning the determination of a child's medical needs over to a chef who does not even know how to identify whether ingredients are free from cross-contamination or hidden sources of gluten. Equal access required that J.D. have the same opportunity as his classmates to eat with peace of mind while soaking up the educational environment of a replica colonial-era tavern.

I. J.D. IS AN INDIVIDUAL WITH A DISABILITY

When J.D. ingests trace amounts of gluten he suffers a host of significant symptoms, including cognitive impairment, fatigue, constipation resulting in impaction, abdominal pain, growth delay, and syncope. JA111 at ¶ 4; JA163-165 ¶¶ 9, 10, 13; JA283-288.

Significant evidence establishes the impact of gluten on J.D. Before J.D. went on a gluten-free diet, his growth was so stunted that he wore the same size clothing for approximately four years. JA164-165 at ¶ 13; JA288; JA497. Gluten

causes him to experience abdominal pain. JA164-165 at ¶ 13; JA111 at ¶ 4; JA130. When he is accidentally exposed to gluten, his neurological system fails, causing him to lose consciousness (syncope) resulting in injury including convulsions. JA164-165 at ¶ 13; JA118-120; JA132-133. He experiences peripheral neuropathy that causes him to wake up screaming in the night – intense foot pain with concomitant numbness. JA164-165 at ¶ 13; JA111 at ¶ 4.

Based on his long and complicated medical history, J.D.'s pediatric gastroenterologist at one of the nation's leading hospitals concluded that J.D. has either Celiac Disease or Non-Celiac Gluten Sensitivity ("NCGS") and requires a strict, certified gluten-free diet that eliminates risk of cross-contamination. JA121; JA163-165 at ¶¶ 10-17; JA554 ("Diagnosis is celiac versus non-celiac gluten sensitivity."); JA547-548.

Although J.D.'s symptoms have radically improved as the result of his medically prescribed diet, those symptoms come back when he is exposed to even trace amounts of gluten. JA111 at ¶ 7; JA165 at ¶¶ 14, 16. For instance, the last time J.D. ate food prepared in a mainstream restaurant that promised gluten-free food, he was ill for months and had blood tests six months after gluten exposure

that documented the damage to his liver cells.[1] JA289-293; JA546; JA549-552 (showing elevated levels of the liver enzymes AST and ALT).

Therefore, J.D. is an individual with a physical impairment which substantially limits his major life activities, including but not limited to eating and the operation of his digestive system, nervous system, respiratory system, hepatic system, and integumentary system. He is also at increased risk for cancer. JA163-164 at ¶ 11. For these reasons, the District Court correctly held that J.D. can demonstrate that he is an individual with a disability.

A. Colonial Williamsburg Erroneously Relies on Cases Predating the ADA Amendments Act

Colonial Williamsburg erroneously relies on abrogated cases strictly construing disability. However, in 2008, after a series of Supreme Court decisions narrowly interpreting the definition of disability, Congress amended the Americans with Disabilities Act to overturn those decisions. ADA Amendments Act ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553, 3553-54, § 2 (2008) (codified at 42 U.S.C. § 12101 *et seq.*); *see also Summers v. Altarum Inst. Corp.*, 740 F.3d 325, 329-30 (4th Cir. 2014).

[1] Contrary to Colonial Williamsburg's claims that J.D.'s family demanded reparation for the accidental gluten exposure, testimony establishes that J.D.'s family did not ask for reparation, but Disney insisted it do something to make up for having made J.D. so sick. JA410-411.

The Magistrate Judge correctly interpreted the sea change that the ADAAA worked on the definition of disability. Congress, in enacting the ADAAA, specifically rejected Supreme Court decisions requiring that the ADA be "interpreted strictly to create a demanding standard for qualifying as disabled" and creating an "inappropriately high level of limitation necessary to obtain coverage under the ADA." Pub. L. No. 110-325, § 2(b)(4), (5). Congress further rejected the assertion that an individual with a disability "must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Id.* § 2(b)(4).

Congress explained that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* § 2(b)(5); *see also Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 572 (4th Cir. 2015). Accordingly, the definition of disability "shall be construed in favor of broad coverage" and "to the maximum extent permitted." 42 U.S.C. § 12102(4)(A); 28 C.F.R. § 36.105(a)(2)(i); *see also Summers*, 740 F.3d at 329.

The Fourth Circuit has held that it is an error of law for district courts to rely on inconsistent pre-ADAAA cases. *Jacobs*, 780 F.3d at 572 ("In enacting the ADAAA, Congress abrogated earlier inconsistent case law."); *Summers*, 740 F.3d

at 331 (holding that a district court erred in relying on pre-ADAAA cases). Under the ADAAA, a person is covered if he or she has "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Major life activities include, but are not limited to, sleeping, eating, breathing, concentrating, and thinking. *Id.* § 12102(2)(A); 28 C.F.R. § 36.105(c)(1)(i). Major life activities also include the operation of major bodily functions including but not limited to "functions of the immune system," digestive, bowel, neurological, respiratory and endocrine functions. 42 U.S.C. § 12102(2)(B); 28 C.F.R. § 36.105(c)(1)(ii).

The Department of Justice regulations implementing the ADAAA make clear that the "primary object of attention in cases brought under title III of the ADA should be whether public accommodations have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity." 28 C.F.R. § 36.105(d)(1)(ii). Accordingly, "the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis." *Id.* The term "substantially limits" is "not meant to be a demanding standard," *id.* § 36.105(d)(1)(i), and "usually will not require scientific, medical, or statistical evidence," *id.* § 36.105(d)(1)(vii).

The regulations state that in determining whether an individual has a disability, "the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve." *Id.* § 36.105(d)(3)(iii).

The ADAAA makes clear that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D); 28 C.F.R. § 36.105(d)(1)(iv); *see also Summers*, 740 F.3d at 329 (Congress explicitly overturned Supreme Court precedent that had suggested that a temporary impairment could not be a disability). The determination of whether a disability exists "shall be made without regard to the ameliorative effects of mitigating measures" such as medication, learned behavioral modifications, or the use of reasonable modifications. 42 U.S.C. § 12102(4)(E)(i)(III), (IV); 28 C.F.R. § 36.105(d)(4); *Summers*, 740 F.3d at 331.

Colonial Williamsburg erred in relying on cases that predated the ADAAA and have now been abrogated. Colonial Williamsburg's reliance on these cases flouts Fourth Circuit precedent on this point. *Jacobs*, 780 F.3d at 572; *Summers*, 740 F.3d at 331.

For instance, Colonial Williamsburg cited *Land v. Baptist Med. Ctr.*, an Eighth Circuit decision dating back to 1999, for the proposition that a peanut allergy is not a disability. 164 F.3d 423, 425 (8th Cir. 1999). *Land* employed reasoning that is no longer valid under the ADAAA, asserting that food allergy

was not a disability because reactions were infrequent. *Id.* at 425. The amended statute makes clear that an episodic impairment qualifies as a disability if it "substantially limits a major life activity when active." 42 U.S.C. § 12102(4)(D); *see also Summers*, 740 F.3d at 329 (a temporary impairment can be a disability). As the Magistrate Judge correctly observed, *Land*'s reasoning predated the ADAAA and continued reliance on the case has been rejected as abrogated by statute. JA326-328 (collecting cases questioning the continued vitality of *Land*).

Colonial Williamsburg's reliance on *Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003) is also misplaced because that pre-ADAAA Ninth Circuit decision relied heavily on Supreme Court cases that the ADAAA explicitly abrogated. *Compare, e.g.*, *id.* at 1038-40 (citing *Sutton v. United Air Lines*, 527 U.S. 471 (1999) and *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184 (2002)), *with* Pub. L. No. 110-325, § 2 (explicitly abrogating the holding of those two cases).

Colonial Williamsburg did cite a post-ADAAA case, *Kelly v. Kingston City Sch. Dist., Inc.*, Case No. 1:16-CV-00764 (MAD/DJS), 2017 U.S. Dist. LEXIS 35079 (N.D.N.Y. Mar. 13, 2017). However, that case, an unreported decision, relied heavily on pre-ADAAA cases, including *Land* and *Fraser*. In one post-ADAAA case that *Kelly* cited – *Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-cv-344, 2015 U.S. Dist. LEXIS 103481 (N.D. Cal. Aug. 6, 2015) – that plaintiff was subsequently allowed to proceed on his disability claim after

correcting a pleading defect. *Phillips v. P.F. Chang's China Bistro*, No. 5:15-cv-00344-RMW, 2015 U.S. Dist. LEXIS 159474, at *9-10 (N.D. Cal. Nov. 23, 2015).

Post-amendment case law shows that individuals with Celiac Disease, NCGS, or food allergies can be individuals with a disability. *See, e.g.*, *Peterson v. Kelly Servs.*, No. 2:15-CV-0074-SMJ, 2016 U.S. Dist. LEXIS 138529, at *17-18 (E.D. Wash. Oct. 5, 2016) (holding that celiac disease can constitute a disability), *rev'd on other grounds*, 730 F. App'x 471 (9th Cir. 2018); *Phillips v. P.F. Chang's China Bistro*, No. 5:15-cv-00344-RMW, 2015 U.S. Dist. LEXIS 159474, at *9-10 (N.D. Cal. Nov. 23, 2015) (same); *see also, e.g.*, *Farmer v. HCA Health Servs. of Va.*, Civ. A. No. 3:17CV342-HEH, 2017 U.S. Dist. LEXIS 204564, at *13-16 (E.D. Va. Dec. 12, 2017) (holding that an allergy can constitute a disability); *Bonnen v. Coney Island Hosp.*, 16 CV 4268 (AMD) (CLP), 2017 U.S. Dist. LEXIS 145171, at *18-22 (E.D.N.Y. Sept. 6, 2017) (same); *O'Reilly v. Gov't of the V.I.*, Civ. No. 11-0081, 2015 U.S. Dist. LEXIS 84407, at *16-17 (D.V.I. June 30, 2015) (same).

For the foregoing reasons, Colonial Williamsburg erred in relying on case law abrogated by the ADAAA. For the reasons described below, J.D. has a disability under the ADAAA.

B. The Magistrate Judge Correctly Held that J.D. Can Show He Is an Individual with a Disability

The Magistrate Judge correctly held that there is a wealth of evidence showing that J.D. is an individual with a disability. When exposed to gluten, J.D. has struggled with cognitive impairment, loss of consciousness, fatigue, abdominal pain, constipation resulting in impaction, and growth delay. JA163-165 ¶¶ 9, 10, 13; JA111 at ¶ 4. His growth became increasingly delayed and his specialists concluded that he has either Celiac Disease or Non-Celiac Gluten Sensitivity ("NCGS") and requires a strict gluten-free diet. JA281; JA164-165 ¶¶ 13, 15-19; JA554 ("Diagnosis is celiac versus non-celiac gluten sensitivity."); JA547-548.

As this record shows, J.D. is substantially limited in the major life activities of eating, breathing, concentrating, sleeping, and thinking along with serious impacts on the operation of the major bodily functions of his immune, digestive, neurological, bowel, cognitive, and respiratory systems. The ADAAA defines "major life activities" to include all these major life activities and the operation of these bodily functions. 42 U.S.C. § 12102(2); 28 C.F.R. § 36.105(c)(1). The Magistrate Judge correctly recognized that J.D. presented considerable evidence, including medical records and an affidavit from his treating physician, that eating food with even trace amounts of gluten significantly affects these bodily functions. JA580-581. The Magistrate Judge further stated that as a result of these bodily systems that are affected, J.D. has demonstrated that he is substantially limited in

at least the major life activity of eating. JA581. Since eating gluten affects his entire body, he is also substantially limited in the major bodily functions of his immune, digestive, neurological, bowel, cognitive, and respiratory systems and the attending major life activities of breathing, concentrating, sleeping, and thinking. JA111 at ¶ 4; JA116-121; JA126-133; JA163-165 at ¶¶ 11-19; JA505-508; JA549-552 (showing elevated liver enzymes AST and ALT after JD was exposed to gluten).

On appeal, Colonial Williamsburg errs in focusing solely on whether joining the military or riding a bike to the corner store are major life activities. In the course of this argument, Colonial Williamsburg selectively quoted from J.D.'s father's deposition in which he was asked to identify some activities that J.D. "can't do because of" his gluten sensitivity. J.D.'s father had given the examples of military service and riding a bike to the corner store to eat foods that might contain gluten. JA444-445. J.D.'s father was not asked to provide an exhaustive list of all things J.D. "can't do." He was also not asked what "major life activities" J.D. is substantially limited in, a very different question than what J.D. "can't do." *See, e.g.*, 28 C.F.R. § 36.105(d)(1)(v) ("An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."); *Jacobs*, 780 F.3d at 573

(a "person need not live as a hermit in order to be 'substantially limited' in interacting with others").

Furthermore, the response of J.D.'s father to Colonial Williamsburg's question about what J.D. "can't do" followed his extensive testimony about the pervasive impact of gluten exposure on virtually every aspect of J.D.'s life. His father testified that when J.D. ingests gluten, he experiences a host of significant and lasting symptoms including syncope, severe constipation, asthma flares, foot pain and numbness, cognitive impairment, difficulty concentrating, and difficulty sleeping. JA117-121; JA126-133; JA446. His father also discussed in detail J.D.'s months of illness after being served a gluten pizza that a restaurant assured him was gluten-free. JA289-293. Colonial Williamsburg would have this Court disregard all this evidence about J.D.'s disability, including even the affidavit of his gastroenterologist.

Colonial Williamsburg's focus on military service and riding a bike to the corner store is puzzling because J.D. identified with precision in briefing below the major life activities in which he is substantially limited as documented by his medical records and an affidavit from his treating physician. The Magistrate Judge correctly focused on those major life activities in holding that J.D. can be an individual with a disability.

Colonial Williamsburg further errs in downplaying gluten sensitivity as an impairment. Colonial Williamsburg erroneously claims that just because there are gluten-free foods, gluten is "not a struggle to avoid" and J.D. has tens of thousands of certified gluten-free options to choose from. As explained in detail in his opening brief, a gluten-free label does not mean a food is actually gluten-free because it may still contain trace amounts of gluten either because of its manufacture and packaging or because of its preparation using shared equipment. Since J.D. cannot eat even trace amounts of gluten, he cannot simply eat a food just because it is labeled gluten-free. Avoiding gluten is not, as Colonial Williamsburg implies, a simple matter like passing on chocolate cake.

As J.D.'s expert stated in her report and as *amici* explained in their briefs, gluten is ubiquitous and the risks of both short- and long-term impairment from trace gluten exposure in sensitive individuals is severe. JA174-177; Brief of *Amici* Hayes and VFAA, Docket Entry 24-1, at 11-18. As they noted, gluten is present in many foods that people including the chef might not think contain gluten such as soups, dressings, marinades, and seasonings. JA174-175; Brief of *Amici* Hayes and VFAA, Docket Entry 24-1, at 13-18. Cross-contamination also regularly occurs in the manufacturing or packaging process, for instance, when a production line is used to manufacture gluten-containing ingredients and then is switched over to make food that would not otherwise have gluten. JA174-179; Brief of *Amici*

Hayes and VFAA, Docket Entry 24-1, at 15-18. J.D.'s expert stated there was risk of cross-contamination in this instance given the chef's ignorance about how to prevent cross-contact and the fact that he had prepared fried chicken containing flour in the kitchen earlier that day. JA179-181. Consequently, even the chicken and potatoes that the chef would have prepared for J.D. could have contained gluten through cross-contamination on shared food production lines, the presence of hidden ingredients, or improper handling during food preparation.

Given that gluten is everywhere, avoiding gluten is not a straightforward matter, and eating strictly gluten-free meals requires major lifestyle adaptations including eating out less or not at all, bringing everywhere one's own guaranteed-to-be-gluten-free meals, and being proactive in packing gluten-free meals when participating in public events such as a school field trip to Colonial Williamsburg where the food is not guaranteed to be gluten-free.

Colonial Williamsburg also makes a hitherto unknown distinction between mitigating measures that require "avoidance" and those that require "proactive" steps. Such a distinction is not only wholly unsupported by the law but also unworkable in practice. J.D., for instance, has to be "proactive" in "avoiding" gluten. He cannot eat whatever he wants. He cannot rely on certified gluten-free food being free of gluten. He cannot trust unknown individuals –whether chefs or his friends' parents—to prepare food for him. He cannot eat mainstream restaurant

food. He is at risk of significant illness from trace exposure to something that is everywhere. He and his family must take proactive steps, including preparing his food themselves even when they travel to visit family, to avoid gluten. Similarly, a person with Type II diabetes can be "proactive" in "avoiding" foods high in sugar.

Congress did not contemplate such fine hairsplitting when it declared that the focus of the ADA should not be on whether the person has a disability, but whether covered entities such as Colonial Williamsburg engaged in discrimination. Pub. L. No. 110-325, § 2(b)(5); *see also* 28 C.F.R. § 36.105(d)(3)(iii); *Jacobs*, 780 F.3d at 572. Colonial Williamsburg's invented distinction between proactive and avoidance measures would shoehorn back into the ADA a requirement to consider mitigating measures when determining whether a person has a disability, in violation of the ADAAA's commandment *not* to consider mitigating measures in such circumstances. 42 U.S.C. § 12102(4)(E)(i)(III), (IV); 28 C.F.R. § 36.105(d)(4); *Summers*, 740 F.3d at 331.

J.D.'s physician has diagnosed him with severe gluten sensitivity and stated that it is medically necessary for him to eat strictly gluten-free meals. Given that J.D. is substantially limited in major life activities including eating and major bodily functions of his immune, digestive, neurological, bowel, cognitive, and respiratory systems, the Magistrate Judge correctly held that he can establish that he is an individual with a disability.

II. COLONIAL WILLIAMSBURG'S FACTUAL ARGUMENTS ON NECESSITY DEMONSTRATE GENUINE ISSUES OF MATERIAL FACT

Colonial Williamsburg strenuously argues its own, post-litigation version of the facts in claiming that its chef could have prepared a gluten-free meal. At the very most, Colonial Williamsburg demonstrates genuine issues of material fact regarding the chef's qualifications and the measures that he might have taken to prepare a meal he never actually prepared.[2] Further demonstrating genuine issues of material fact, J.D. has presented evidence showing that the chef did not even know what gluten is or how to identify gluten-free ingredients.[3] The chef did not

[2] Colonial Williamsburg places great weight on the chef having prepared purportedly gluten-free meals for others. However, there is no evidence those meals were actually gluten-free. In addition, there is no evidence that those other individuals suffer from the same severe gluten sensitivity as J.D. and must eat strictly gluten-free meals as a matter of medical necessity or merely ordered gluten-free as a matter of lifestyle choice. Further, individuals with severe gluten sensitivity may not have traced any exposure back to the chef's cooking or not taken the time to file a complaint. J.D. himself became ill in the past when eating purportedly gluten-free meals prepared by a highly-skilled chef who had assured his family that he had considerable experience preparing gluten-free meals. JA289-293; JA546; JA549-552 (showing elevated AST and ALT liver enzyme levels after being exposed to gluten when eating out). It is for the jury to decide what weight, if any, to give Colonial Williamsburg's chef having cooked purportedly gluten-free meals for others.

[3] Colonial Williamsburg erroneously dismisses the credentials of J.D.'s expert on the ground that she has a law degree. The fact that she has a law degree is irrelevant. She is qualified because, *inter alia*, she trains chefs on gluten-free meal preparation, the restaurant industry consults with her on how to safely prepare such meals, and she trains medical students at a leading celiac research center on gluten-free dining.

know how to ensure that the ingredients he used were truly gluten-free and did not have gluten as a hidden ingredient or had not been contaminated as a result of production on manufacturing lines also used to prepare foods containing gluten. Significantly, the chef admitted that Shields Tavern did not even possess dedicated utensils necessary for preparation of strictly gluten-free food. J.D. also presented evidence that he became seriously ill after eating purportedly gluten-free meals prepared for him in commercial kitchens similar to that at Shields Tavern. These genuine issues of material fact about whether the chef could have in fact prepared a gluten-free meal which was safe for J.D. are for the jury to resolve, and the Magistrate Judge erred in reaching out to decide this jury issue.

Colonial Williamsburg's argument that J.D. should have eaten the chef's food also ignores the anxiety that J.D. would have been forced to suffer as a result of eating food that he could not know for a fact was truly gluten-free. This anxiety when eating food is a result of his disability and trauma that he has endured as a result of becoming seriously ill when eating purportedly gluten-free meals. Just as a person with severe anxiety may need mitigating measures such as a service animal, J.D. needs that certainty of knowing that his food is truly gluten-free. He had that certainty with the food that he brought with him which was guaranteed to be gluten-free, and he did not have that certainty with respect to food prepared by

Shields Tavern, a commercial kitchen with no special expertise in preparing gluten-free meals for people with severe gluten sensitivity disorders.

Colonial Williamsburg also argues that J.D.'s experiences at other restaurants have no bearing on his decision to bring safe food to the tavern. This is absurd. J.D.'s experiences at other restaurants have painfully taught him how pervasive gluten is and how risky for his health it is to trust unknown individuals to prepare his food. It would be unsafe for J.D. to continue trying restaurants given these experiences. Thus, he always brings safe food, though usually it is his mother and not his father who goes with him on excursions. The only reason they went to the tavern in May 2017 was because it was part of J.D.'s class trip to enjoy the Colonial Williamsburg experience.

For the reasons described here and in J.D.'s opening brief, there are genuine issues of material fact regarding whether it was necessary for him to have that certainty of knowing that his food is truly gluten-free.

III. THERE ARE GENUINE ISSUES OF MATERIAL FACT WHETHER COLONIAL WILLIAMSBURG DISCRIMINATED AGAINST J.D. BY PROVIDING HIM WITH A SEPARATE AND UNEQUAL BENEFIT

Colonial Williamsburg erroneously argues that even as it forced J.D. to eat outside in the cold away from his classmates, it did not discriminate against him because it provided him with service allegedly "superior" to that it provided his

classmates by sending a performer outside to talk to him while he cried. Colonial Williamsburg's claim to have provided superior service flies in the face of the facts when construed in the light most favorable to J.D. Colonial Williamsburg's own employee testified that the tavern manager was "cruel" to J.D. and that she would not want her own child treated in that way. JA380-381; JA385. J.D. was crying because he was singled out on the basis of disability and forced to eat apart from his classmates and friends. He was also deprived of the opportunity to eat in the historic environment of Shields Tavern, an experience that his school had paid for him and his classmates to have.

Colonial Williamsburg's claim that it provided J.D. with a separate service is an admission that it discriminated on the basis of disability. The Americans with Disabilities Act was implemented to end exclusion and segregation by integrating individuals with a disability into all facets of society. *See generally* 42 U.S.C. § 12101. To carry out this goal, Title III specifically prohibits unequal or separate treatment of individuals with disabilities. 42 U.S.C. § 12182(b)(1)(A)(ii), (iii) (defining as discrimination offering services that is "not equal to" or "that is different or separate from that provided to other individuals"); 28 C.F.R. § 36.202(b), (c) (same); 28 C.F.R. § 36.203(b) (same). The last thing J.D. wanted was to be singled out for "special" treatment and forced to sit apart from his classmates. Colonial Williamsburg did just that to him in violation of the ADA.

IV. ALLOWING J.D. TO BRING HIS MEDICALLY SAFE MEAL WAS A REASONABLE MODIFICATION

Colonial Williamsburg engages in rampant speculation entirely without factual support and contrary to the evidence of record in trying to justify forcing J.D. to eat his medically safe meal outside.

The reasonableness of a modification is an inquiry that must be moored to the specific facts of a case. *E.g.*, *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2nd Cir. 1995) (explaining that "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry) Hypotheticals and speculation about the reasonableness of a modification based on alternative fact patterns have no place in the fact-intensive nature of the reasonableness inquiry. *See id.*

The record is clear on the facts of *this* case; all J.D. wanted was to be able to eat his medically safe meal with his classmates. Colonial Williamsburg makes no factual argument how J.D.'s meal would have somehow undermined its business model when the school had already paid for J.D. to eat in Shields Tavern. Nor does Colonial Williamsburg make any factual argument how allowing J.D. to eat his medically safe meal in the tavern would have somehow harmed his classmates.

Rather than engage in the fact-specific inquiry that the reasonable modification inquiry requires, Colonial Williamsburg engages in rampant speculation that goes far beyond the facts of this case. For instance, Colonial

Williamsburg imagines scenarios where the outside food that a person brings would somehow "conflict" with the food served on the premises, such as a person bringing pizza into a French restaurant. Those are not the facts of this case. Colonial Williamsburg has not and cannot argue that J.D.'s medically safe meal (which was a sandwich consisting of a chicken breast on a gluten-free bun) somehow clashed with the fried chicken Colonial Williamsburg served to his classmates.

Colonial Williamsburg also erroneously claims in the abstract that allowing people to eat medically safe meals different from that of others in the tavern would somehow confuse people. Colonial Williamsburg has not and does not explain how J.D.'s eating his medically safe meal inside Shields Tavern would have confused his classmates. If anything, his classmates were likely more confused by the fact that J.D. was crying and eating outside in the rain while they were sitting comfortably inside.

Colonial Williamsburg also erroneously argues that prior notice is required for a modification to be reasonable and that J.D. did not provide such notice. J.D. and his father did provide Colonial Williamsburg with notice upon entering Shields Tavern. The requested modification did not require Colonial Williamsburg to *do* anything other than let him eat his medically safe meal with his classmates. There is no rule that requires an individual with a disability to provide a covered entity

with prior notice; such a rule would freeze out individuals with a disability who, like anyone without a disability, may decide on the spur of the moment to visit a place of public accommodation. Moreover, the example of service animals accompanying their owners with disabilities into all public accommodations shows that prior notice is not required for public accommodations to make reasonable modifications. *See generally* 28 C.F.R. § 36.302(c).

Colonial Williamsburg has not explained how prior notice would have changed the outcome. Given that J.D. is seeking injunctive relief and Colonial Williamsburg has strenuously opposed his right to bring a medically safe meal to Shields Tavern, requiring J.D. to provide advance notice for a future visit would be a futile gesture that the law does not require. 42 U.S.C. § 12188(a)(1) (stating that an individual with a disability is not required to engage in futile gestures); *Pickern v. Holiday Quality Foods*, 293 F.3d 1133, 1136-37 (9th Cir. 2002) (quoting the statutory language).

Colonial Williamsburg also speculates without any evidentiary support that allowing outside food would threaten the safety of others. Colonial Williamsburg's wholly unsupported argument that allowing outside food would somehow poison or otherwise injure people defies logic. Colonial Williamsburg's own witness admitted at deposition that cross-contamination is not a risk unless a guest shared their outside food with others. JA64. Colonial Williamsburg's

conjecture also goes to direct threat, an affirmative defense for which it bears the burden and which it has waived by failing to list in its Answer. *E.g.*, *Tyner v. Brunswick Cty. Dep't of Soc. Servs.*, 776 F. Supp. 2d 133, 152 (E.D.N.C. 2011) (direct threat is an affirmative defense); Fed. R. Civ. 8(c) (defendants must list affirmative defenses in their responsive pleadings); Def.'s Answer [Doc. No. 5] (failing to list direct threat as an affirmative defense).

Even if Colonial Williamsburg did not waive the issue of direct threat, it cannot come forward with any evidence demonstrating actual safety issues. The Supreme Court has made clear that safety concerns may not be based on speculation; there must be objective evidence supporting such allegations to guard against such pretext being used to perpetuate discrimination against individuals with a disability. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998); *Montalvo v. Radcliffe*, 167 F.3d 873, 876-77 (4th Cir. 1999) (direct threat determinations must be based on "current medical knowledge or the best available objective evidence") (quoting 28 C.F.R. § 36.208). The relevant factors include "the nature, duration, and severity of the risk and the probability that the potential injury will actually occur." *Id.* at 877 (quoting 28 C.F.R. § 36.208). Colonial Williamsburg cannot and does not offer any objective evidence, much less use such evidence in determining whether J.D.'s outside meal posed a direct threat to the safety of

others. Absent such evidence, Colonial Williamsburg's stated safety concerns are pure speculation.

Colonial Williamsburg has referenced the health code. However, the code itself only restricts restaurants from serving or using food from a home kitchen but does not prevent customers themselves from bringing in outside food. *See* 12 Va. Admin. Code 5-421-270; JA182. If Colonial Williamsburg's claims were accurate, it would be violating the health code every time it allows a customer to bring in outside food which the record establishes Colonial Williamsburg does routinely.[4] This Court may take judicial notice that state health code officials charged with enforcing the health code have publicly stated that it would not have been a health code violation for J.D. to eat at the tavern the food that he had brought. Fed. R. Evid. 201(b) (courts may take judicial notice); JA182; Joan Quigley, *Did a gluten-allergic boy break the law taking food into Colonial Williamsburg tavern?*, WILLIAMSBURG YORKTOWN DAILY, Aug. 3, 2017, *at* https://wydaily.com/health/2017/08/03/did-a-gluten-allergy-boy-break-the-law-taking-food-into-colonial-williamsburg-tavern-officials-say-no-hlth (last visited on

[4] Colonial Williamsburg boasts in its briefing that it allows people to bring in wine and cake from outside for a fee. Colonial Williamsburg also allows outside baby food and outside finger foods for young children. It does not limit the kinds of finger foods which may be brought in or check to see what has been brought. JA223-224; JA256.

Nov. 12, 2018) (also filed with the District Court as Docket Entry 27-20, Exhibit T).

Colonial Williamsburg has not listed any trial exhibits or expert witnesses going to food safety. Colonial Williamsburg can thus offer nothing beyond speculation that allowing J.D. to eat his own food would somehow threaten the safety of others in a way that allowing scores of other guests to do the exact same thing would not. Colonial Williamsburg admits that it allowed another guest to bring in an outside meal to Shields Tavern for her son with severe food allergies. Colonial Williamsburg thus falls far short of offering the objective evidence that the United States Supreme Court has required of covered entities claiming safety concerns in disability discrimination cases. *See Bragdon*, 524 U.S. at 649.

For these reasons, Colonial Williamsburg's arguments based on health and safety are wholly without merit. J.D.'s requested modification was reasonable because it would have cost Colonial Williamsburg nothing to let him eat his medically safe meal in the tavern with his classmates.

V. COLONIAL WILLIAMSBURG CANNOT MEET ITS BURDEN OF ESTABLISHING FUNDAMENTAL ALTERATION

Colonial Williamsburg erroneously argues that it would have been a fundamental alteration to allow J.D. to eat his medically safe meal in Shields Tavern.

Colonial Williamsburg erroneously asserts that it is J.D.'s burden to prove that bringing safe food from home to the tavern would not have resulted in a fundamental alteration. To the contrary, fundamental alteration is an affirmative and fact specific defense and Colonial Williamsburg bears the burden of establishing that affirmative defense. 42 U.S.C. § 12182(b)(2)(A)(ii); *see, e.g.*, *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 404 (E.D.N.Y. 2017).

Colonial Williamsburg argues that allowing J.D. to bring in a medically safe meal would somehow result in financial ruin. This extraordinary claim is wholly unsupported by the record. For starters, Colonial Williamsburg's "rule" against outside food is not in writing nor is it consistently enforced. JA189-91, JA197; JA210-213, JA216-219; JA373-376; JA402, JA403, JA405. Whether outside food is allowed is left in the manager's discretion. JA188-189; JA228. It has allowed people with food allergies to bring in outside food, including the exact food that J.D. sought to consume. JA217-219. Since Colonial Williamsburg routinely and arbitrarily allows in outside food, it cannot establish as a matter of law that allowing a child to bring in outside food based on medical necessity would be a fundamental alteration.

Further, on the facts of *this* case, J.D.'s school paid full price for him, including a steep $30 per-person price for the meal that he did not eat — this is not a case where a single person asked to come into the restaurant, pay nothing, and

take up the space of a paying customer. J.D.'s school had already paid for him to experience Shields Tavern not from the outside but from the inside with his classmates. It made no difference to Colonial Williamsburg financially whether J.D. ate that meal or brought in outside food. On these facts, charging full price for a meal not eaten cannot be a fundamental alteration. Colonial Williamsburg cannot and has not proffered any evidence showing any financial harm that it would have suffered as a result of allowing J.D. to eat his medically safe meal in Shields Tavern.

As a last resort, Colonial Williamsburg argues that other theme parks that allow individuals with a disability to bring in outside food do so according to policies that require notification at specific places in the park. The fact that other theme parks have policies allowing individuals to bring medically safe meals shows that doing so is not a fundamental alteration and would not result in financial harm to Colonial Williamsburg.

For these reasons, this Court should reject Colonial Williamsburg's far-fetched assertions of fundamental alteration.

CONCLUSION

There are genuine issues of material fact regarding each element of J.D.'s claim that Colonial Williamsburg discriminated against him due to his disability. Therefore, the District Court erred in granting summary judgment to Colonial

Williamsburg which offered only the self-serving, post-litigation affidavit of its own employee to justify its discriminatory treatment of a child.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, font size 14.

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CERTIFICATE OF SERVICE

This is to certify that on November 16, 2018, I electronically filed the foregoing Brief with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served, listed below. Any counsel not ECF registered will be served via Federal Express (FedEx):

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