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 (NO. 4:17CV101)

RESPONSE BRIEF OF DEFENDANT-APPELLEE COLONIAL WILLIAMSBURG FOUNDATION

Robert W. McFarland (VSB # 24021)
E. Rebecca Gantt (VSB # 83180)
MCGUIREWOODS LLP
World Trade Center
101 West Main Street, Ste 9000
Norfolk, Virginia 23510
(Office) (757) 640-3716
(Fax) (757) 640-3966
rmcfarland@mcguirewoods.com
rgantt@mcguirewoods.com

Dana L. Rust (VSB # 28408)
Micah B. Schwartz (VSB # 77299)
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(Office) (804) 775-1000
(Fax) (804) 698-2158
drust@mcguirewoods.com
mschwartz@mcguirewoods.com

Counsel for Defendant-Appellee Colonial Williamsburg Foundation

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1725 Caption: J.D. v. Colonial Williamsburg Foundation

Pursuant to FRAP 26.1 and Local Rule 26.1,

Colonial Williamsburg Foundation
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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/ Dana L. Rust Date: October 19, 2018

Counsel for: Colonial Williamsburg Foundation

CERTIFICATE OF SERVICE

****

I certify that on October 19, 2018 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:

/s/ Dana L. Rust
(signature)

October 19, 2018
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
STATEMENT OF THE ISSUES 2
STATEMENT OF THE CASE 2
I. Shields Tavern and its No-Outside-Food Policy 2
II. Shields Tavern's Gluten-Free Food Preparation Protocols 6
III. J.D. and His Health 7
IV. J.D.'s Experience at Other Establishments 10
V. Prior Arrangements for NAPS' Visit to Shields Tavern 11
VI. J.D.'s Trip to Colonial Williamsburg 12
VII. Procedural History 16
SUMMARY OF THE ARGUMENT 17
ARGUMENT 20
I. The District Court Correctly Held That It Was Not "Necessary" For J.D. to Eat His Own Meal at Shields Tavern Where It Could Provide a Gluten-Free Meal 21
A. The Record Offers No Basis for a Reasonable Juror to Conclude that Shields Tavern's Gluten-Free Offering Would Have Contained Gluten 24
B. The Offer of Safely Prepared Gluten-Free Meals Allowed Appellant to Experience Shields Tavern Like his Classmates 28
II. J.D.'s Proposed Modification Was Not Reasonable 33
III. J.D.'s Proposed Modification Would Fundamentally Alter Shields Tavern 37
A. Allowing Guests to Eat Their Own Meals Inside Shields Tavern Would Drastically Undermine Its Food Service Business 38
B. J.D.'s Arguments to the Contrary Are Unavailing 40
IV. J.D. Is Not "Disabled" Within the Meaning of the ADA 43

TABLE OF CONTENTS
(continued)

Page

A. J.D. Cannot Identify A "Major Life Activity" "Substantially Limited" By His Gluten Sensitivity 45

B. The Decision Below Erred in Denying Summary Judgment as to J.D.'s Alleged Disability 47

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 53

TABLE OF AUTHORITIES

Page(s)

Cases

A.L., by and through D.L. v. Walt Disney Parks and Resorts US, Inc.,
900 F.3d 1270 (11th Cir. 2018) 21, 27, 30, 33, 34

Argenyi v. Creighton Univ.,
703 F.3d 441 (8th Cir. 2013) 22, 32

Barber v. Sedgwick Claims Management Services, Inc.,
2015 WL 6126841 (S.D. W. Va. Oct. 16, 2015) 24

Baughman v. Walt Disney World Co.,
685 F.3d 1131 (9th Cir. 2012) ....*passim*

Beaton v. Metro. Transportation Auth. New York City Transit,
2016 WL 3387301 (S.D.N.Y. June 15, 2016) 45

Burrell v. Cummins Great Plains, Inc.,
324 F. Supp. 2d 1000 (S.D. Iowa 2004) 45

Callum v. CVS Health Corp.,
137 F. Supp. 3d 817 (D.S.C. 2015) 20

Capobianco v. City of New York,
422 F.3d 47 (2d Cir. 2005) 45, 50

Coleman v. Phoenix Art Museum,
2009 WL 1097540 (D. Ariz. Apr. 22, 2009) 29

Emery v. Caravan of Dreams, Inc.,
879 F. Supp. 640 (N.D. Tex. 1995) 39

Feldman v. Pro Football, Inc.,
419 F. App'x 381 (4th Cir. 2011) 21, 22, 32

Garnett v. Remedi Seniorcare of Virginia, LLC,
892 F.3d 140 (4th Cir. 2018) 34

Gathright-Dietrich v. Atlanta Landmarks, Inc.,
452 F.3d 1269 (11th Cir. 2006) 39

Halpern v. Wake Forest Univ. Health Scis.,
669 F.3d 454 (2012)..34, 37, 38

Haulbrook v. Michelin N. Am.,
252 F.3d 696 (4th Cir. 2001) 43

Herbert v. CEC Entertainment,
2016 WL 5003952 (W.D. La. July 6, 2016)...36

Herschaft v. N.Y. Bd. of Elections,
2001 WL 940923 (E.D.N.Y. Aug. 13, 2001) 35

Hustvet v. Allina Health Sys.,
283 F. Supp. 3d 734 (D. Minn. 2017)..48

Kelly v. Kingston City Sch. Dist., Inc.,
2017 WL 976943 (N.D.N.Y. Mar. 13, 2017) 46

Koller v. Riley Riper Hollin & Colagreco,
850 F. Supp. 2d 502 (E.D. Pa. 2012)...43, 44

Kravtsov v. Town of Greenburgh,
2012 WL 2719663 (S.D.N.Y. July 9, 2012)..................................45, 46, 47, 50

Krist v. Kolombos Rest. Inc.,
688 F.3d 89 (2d Cir. 2012) 20

Land v. Baptist Med. Ctr.,
164 F.3d 423 (8th Cir. 1999) 47, 48

Lentini v. Cal. Ctr. For the Arts,
370 F.3d 837 (2004)..29

Lewis v. Zilog, Inc.,
908 F. Supp. 931 (N.D. Ga. 1995)..33

Logan v. Am. Contract Bridge League,
173 F. App’x 113 (3d Cir. 2006) 32

Montalvo v. Radcliffe,
167 F.3d 873 (4th Cir. 1999) 28, 39, 40

Murphy v. Bridger Bowl,
150 F. App'x 661 (9th Cir. 2005) 33

Nolan v. Vilsack,
2016 WL 3678992 (C.D. Cal. June 30, 2016) 46

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001)..21, 33, 37

Phillips v. P.F. Chang's China Bistro, Inc.,
2015 WL 4694049 (N.D. Cal. Aug. 6, 2015) 48, 49

Phillips v. P.F. Chang's China Bistro, Inc.,
2015 WL 7429497 (N.D. Cal. Nov. 23, 2015) 49

Reinhart v. Shaner,
2004 WL 419911 (M.D. Ala. Feb. 9, 2004) 45

Reynolds v. Am. Nat'l Red Cross,
701 F.3d 143 (4th Cir. 2012) 44

Rohr v. Salt River Project Agric. Imp. & Power Dist.,
555 F.3d 850 (9th Cir. 2009) 50

Variety Stores, Inc. v. Wal-Mart Stores, Inc.,
888 F.3d 651 (4th Cir. 2018) 23

Statutes

42 U.S.C.
§ 12102...43
§ 12182...20, 21

Other Authorities

28 C.F.R. § 36.105 ....44, 51

INTRODUCTION

Shields Tavern is a restaurant located in Colonial Williamsburg's historic area. Like all restaurants, sells food to paying guests. As part of this platform, it provides meals to guests with dietary restrictions, including guests that require gluten-free meals. Shields Tavern has a long history of serving gluten-free meals to guests without incident. Indeed, it attempted to do so for Appellant J.D., a boy who is sensitive to gluten, when he visited Shields Tavern with his school group in May 2017. However, after J.D. and his father arrived, J.D.'s father rejected the restaurant's gluten-free offerings and insisted that it allow him and J.D. to dine on the gluten-free meals that J.D.'s father had prepared and brought into the restaurant in a cooler, without any prior notice. Shields Tavern's manager explained that J.D. and his father were welcome to remain in the restaurant, but that guests are not allowed to eat outside food in the restaurant. J.D. and his father chose to leave the restaurant so that they could eat the meals they brought in the covered pavilion behind the restaurant. During that time, they were entertained by the only historical interpreter on duty that night, who discussed history and pirates. They then returned to enjoy the rest of their group's visit to Shields Tavern, and the remainder of their group's itinerary in Colonial Williamsburg.

J.D. filed a lawsuit alleging that Colonial Williamsburg's conduct violated the Americans with Disabilities Act ("ADA"), on the grounds that he is disabled and

needs the accommodation of being allowed to eat his own food inside Shields Tavern on a no-notice basis, notwithstanding Shields Tavern's offering of gluten-free meals prepared by a trained chef. The district court rejected this argument on the basis that J.D.'s proposed accommodation was not necessary in light of the gluten-free meals and options provided by the restaurant. This Court should affirm the decision below, on this ground or on a number of available alternative bases for affirmance.

STATEMENT OF THE ISSUES

I. Whether the district court correctly found that there was no genuine dispute of material fact as to whether it was necessary for J.D. to be able to bring and eat his own gluten-free meal at a restaurant that provided him with a gluten-free meal and other options.

II. Whether the proposed modification of J.D. bringing his own meal to a restaurant without any prior notice is reasonable where it would require the restaurant to incur substantial safety, liability, and business risks.

III. Whether the proposed modification of J.D. bringing his own meal to a restaurant without any prior notice would fundamentally alter the business of that restaurant which, like other restaurants, is primarily in the business of selling food to paying customers.

IV. Whether the district court erred in finding that there was a genuine dispute of material fact as to whether J.D. is disabled within the meaning of the ADA where the only life activities impacted that his father identified were being able to join the military and to eat certain foods.

STATEMENT OF THE CASE

I. Shields Tavern and its No-Outside-Food Policy

Shields Tavern is a restaurant located in Colonial Williamsburg's historic area. JA200. It is housed in an historic building, but operates like a modern

restaurant. JA201. It serves modern American dishes prepared in a modern kitchen. JA69, 71, 77-82, 89. The restaurant's wait staff are dressed in 18th century outfits, but they have no special training regarding 18th century history. JA100-01. Other than providing a brief description of the restaurant at the beginning of a group dinner, the wait staff simply takes orders and delivers food. JA100-01. Shields Tavern is not a permanent home to any of Colonial Williamsburg Foundation's ("CWF")[1] historical interpreters. JA100-01.

Shields Tavern sells the food it prepares to paying customers. This business model requires the restaurant to sell food to remain financially viable. JA146. Shields Tavern also enforces a no-outside-food policy, meaning that guests are not permitted to eat food that they made or purchased elsewhere while seated in the Tavern. JA62-63. This policy is commonplace in the restaurant industry. Shields Tavern maintains this policy for multiple reasons. First, the rule promotes food safety and protects Shields Tavern from liability. JA62-63. The restaurant has no control over how outside food is prepared, and therefore cannot be sure if it is safe for someone to bring into the Tavern and eat themselves or share with others. JA62-63. Thus, the policy is designed to prevent lawsuits from patrons who visit the

[1] CWF, the Appellee, owns and operates the living-history museum known as Colonial Williamsburg. Colonial Williamsburg includes a 301-acre historic area, which consists of original and reconstructed buildings from the 18th century and before. This historic area includes several restaurants, including Shields Tavern.

restaurant, become sick from food brought into the restaurant by other guests, and then blame Shields Tavern for food poisoning. JA62-65.

In fact, Virginia's health code prohibits Shields Tavern from serving food that was prepared in a private home, and also prohibits guests from consuming such food in the restaurant. *See* 12 Va. Admin. Code 5-421-270(B) ("Food prepared in a private home shall not be used or offered for human consumption in a food establishment unless the home kitchen is inspected and regulated by the Virginia Department of Agriculture and Consumer Services."). Additionally, the state's health code makes CWF responsible for the contamination of food in the restaurant, even if the contamination came from food carried into the restaurant by a guest. *See* 12 Va. Admin. Code 5-421-690.

The policy protects Shields Tavern's business model by preventing guests from occupying tables in the restaurant without purchasing any food. Abandoning this policy and allowing guests to eat their own meals in Shields Tavern would transform it into another kind of establishment altogether – as Mr. Doherty put it, a "covered picnic area." JA487;[2] DE 20 at 7. Finally, Shields Tavern enforces this

---

[2] This quote is from a 54-page excerpt of Mr. Doherty's deposition that was sealed in the district court on the basis that it contained confidential medical and educational information of a minor. DE 24-26. However, both parties referenced portions of this and other sealed exhibits that did not contain such confidential information. *E.g.*, DE 20 at 7. Appellant has continued this practice in his brief in this Court, *e.g.* Br. 16 at 9 (citing JA451-52), and CWF will do the same, including parallel citations where available to public reference to that material below.

policy so that it can maintain control over its brand, preventing patrons – who would see other patrons dining on food they purchased elsewhere or cooked at home – from getting a false impression about the types of food that the restaurant serves. JA213-15.

Shields Tavern has two exceptions to its no-outside-food policy. First, it allows parents of babies and toddlers who are too young to order from the children's menu to eat baby food, Cheerios and other snack items. JA64-65. Second, the restaurant allows patrons to bring their own wine and anniversary and birthday cakes, foods that carry a low risk of foodborne illness. *Id.* It recoups revenue otherwise lost from this second exception through a "corkage" fee for wine and a "plating" charge for cakes. *Id.*

CWF's restaurant managers also have discretion to make other limited exceptions if necessary. JA217. For example, after the events involved in this case, a mother called two weeks before her family's visit to Colonial Williamsburg and informed CWF that her son had nearly 30 food allergies. JA217-18. She asked if she could bring a cooked chicken breast into another CWF restaurant in a Tupperware container for her son. *Id*. CWF concluded that it would not be able to accommodate this guest's unusual collection of allergies, so it allowed this guest to bring the cooked chicken breast. *Id*.

II. Shields Tavern's Gluten-Free Food Preparation Protocols

Anthony Zurowski was Shields Tavern's head chef, and also managed the kitchen during the night of J.D.'s visit. JA86, 96, 240, 317. He received two years of culinary-school training, during which he learned how to prepare meals for those with special needs. JA86-88. This included training on how to prepare gluten-free meals. *Id*. Upon arriving at Colonial Williamsburg, he received additional one-on-one training from CWF's head chef on preparing gluten-free meals. JA238-39. Chef Zurowski has also completed the Commonwealth of Virginia's "ServSafe" training, a program focusing on cross-contamination and safe food-handling practices. JA87-88.

Shields Tavern has established cooking protocols to ensure that its gluten-free meals are in fact free of gluten. JA66-74, 89. Chef Zurowski personally oversees the entire process, from the ordering of gluten-free ingredients from vendors to the delivery of gluten-free meals to guests. JA90-91. Shields Tavern obtains gluten-free ingredients from Sysco, a multinational distributor of food to restaurants, healthcare and educational facilities, and hospitality businesses. *Id*. Chef Zurowski prepares the gluten-free meals himself, in a separate section of the kitchen, 13 feet away from the regular food prep area. Before doing so, he dons new aprons and gloves. JA92. He thoroughly cleans his prep area, and his cooking utensils, pots,

and pans, before preparing the gluten-free meals.[3] JA240. Once he has finished preparing the gluten-free meals, he covers them, and labels them "gluten-free" so the wait staff will know which meals are gluten-free when they deliver them to the tables. JA258.

Guests regularly order gluten-free meals from Shields Tavern. JA96. This includes guests who order gluten-free meals from the menu on the day of their visit, and also large groups that order gluten-free meals in advance. JA95-96. Thus, the restaurant is well-practiced in following the gluten-free protocols described above. Chef Zurowski estimates that he prepares 4-5 gluten-free meals per day, or well over 1,000 per year. JA96. In his five years following this protocol at Shields Tavern, he has never received a complaint that his gluten-free offerings actually contained gluten. JA96. In fact, J.D. presented no evidence that Chef Zurowski's 5,000-some gluten-free preparations had ever contained gluten, or that the gluten-free meal he would have prepared for J.D. the night of the visit was likely to have in fact contained gluten.

III. <u>J.D. and His Health</u>

J.D. was 11 years old when the events in this case transpired. JA312. His

[3] Shields Tavern does not have special utensils and containers designated for gluten-free cooking. JA68-69. J.D.'s expert testified that specially-designated cooking ware was not required to avoid cross-contamination, provided proper cleaning of the mixed-use cooking ware. JA338 n.29.

parents had him tested for Celiac Disease as a toddler. JA497-504; DE 20 at 2. The test indicated that he did not have Celiac Disease. *Id*. Nonetheless, his parents chose to place him on a gluten-free diet when he was five years old. JA441-43; DE 20 at 2. More recently, Dr. Anthony Guerrerio, a pediatric gastroenterologist, concluded that while J.D. exhibits some symptoms consistent with both Celiac Disease and gluten sensitivity, it was not necessary to test him again for Celiac Disease because the treatment for Celiac Disease and other kinds of sensitivity to gluten is the same: avoiding the ingestion of gluten. JA165. Consequently, J.D. has never tested positive for either Celiac Disease or gluten sensitivity. *Id.* Additionally, J.D. does not suffer all of the symptoms commonly associated with Celiac Disease. *Id*. For instance, according to J.D.'s father, when J.D. is "glutened" (a phrase J.D.'s parents have coined for when he accidentally eats food containing gluten), he does not experience the severe stomach pain that most individuals with Celiac Disease experience when they ingest gluten. JA446; DE 20 at 16. After one inadvertent ingestion at a restaurant, J.D. did not suffer severe symptoms but seemed "a little under the weather." JA452; DE 75 at 2.

According to J.D.'s expert,[4] the U.S. Food and Drug Administration allows

[4] J.D.'s expert is a lawyer, not a food scientist, nutritionist, medical professional, dietician, food inspector, restaurant manager or chef. JA262-65. She has never been qualified as an expert in state or federal court before. Her expertise is based upon approximately 10 hours of training. JA266-70. CWF moved to exclude her

food to be labeled "gluten-free" if it contains less than 20 parts-per-million of gluten. JA174. J.D.'s Opening Brief suggests for the first time that J.D. experiences his symptomology if he ingests food with even trace amounts of gluten below the 20 parts-per-million threshold, Br. 8, but there is no evidence in the record that he is this sensitive to gluten. Instead, Dr. Guerrerio says simply that he should maintain a "gluten free" diet to avoid his general symptomology. JA165.

J.D. attended the Naval Academy Primary School ("NAPS") at the time of the events involved in this case. JA312. The school's Director, Ms. Devon Clouse, described the Dohertys' vigilance in eliminating J.D.'s exposure to gluten as "overwhelming," "excessive," and "interfering …with his growth in the classroom." JA492-93; DE 31 at 3 n.3. Mr. Doherty believes, however, that J.D.'s health is now very good because of the Dohertys' diligence. JA441-44; DE 31 at 10. Mr. Doherty has "no concerns" about his son's health now that he maintains a gluten-free diet. JA444; DE 31 at 10. As J.D.'s own expert testified, "there are tens of thousands of products that are certified gluten-free." JA407-08. Mr. Doherty fears that J.D. will not be able to join the military when he is older, and laments that J.D. cannot go to McDonald's or to the corner store to eat a Snickers bar or ice cream. JA444-45; DE 31 at 8. But, otherwise, Mr. Doherty admits that J.D.'s life is not limited in any

---

testimony, JA4, but the district court never ruled on this motion because it granted CWF's motion for summary judgment.

significant respect. *Id*.

IV. J.D.'s Experience at Other Establishments

Initially, J.D.'s parents would take him to dine at restaurants like Chipotle, Red Robin, Maggiano's, Chick-fil-A, and a local frozen yogurt store. JA49-50, 451-53; DE 20 at 5. However, they no longer do so because they do not trust these establishments to be careful enough to prepare truly gluten-free meals. JA453; DE 20 at 5. Nonetheless, the visit to Shields Tavern was *the first time* that J.D.'s father attempted to bring and eat his own food at a restaurant. JA316, 474-75.

Appellant's Brief asserts that J.D.'s parents made this decision because these establishments "repeatedly" served J.D. food containing gluten even after promising to provide him a with a gluten-free meal. Br. 39. However, the record below points to only *two* such incidents, and none at Shields Tavern. First, the family once spotted a single regular noodle in a gluten-free pasta dish at a Maggiano's restaurant. JA451-52; DE 20 at 5. J.D. did not suffer severe symptoms after that meal. Rather, he seemed "a little under the weather." JA452; DE 75 at 2. Additionally, J.D. once ordered a gluten-free pizza from a restaurant in Disney World, but after J.D. started exhibiting symptoms, the family learned that the pizza had in fact contained gluten. JA451-52; Br. 9. J.D.'s father responded to this incident by demanding reparations from Disney World, resulting in a free fishing trip at Disney World for the entire family. JA410-11.

V. Prior Arrangements for NAPS' Visit to Shields Tavern

NAPS' fifth grade class takes a field trip to Colonial Williamsburg at the end of every school year. JA112. NAPS' Director, Ms. Clouse, made arrangements in January 2017 for J.D. and his class' trip, scheduled for May 2017. JA59-60. The itinerary she created for this trip started with a box lunch in the patio behind Shields Tavern, followed by a tour of the historic area, then dinner at Shields Tavern, a post-dinner "Defense of Liberty" program, and a Colonial Dance. JA22. This trip included approximately 30 students, as well as approximately 30 teachers and other chaperones, including Mr. Doherty. JA22.

Mr. Doherty informed Ms. Clouse when she created the itinerary in January 2017 that he and his son did not intend to eat at CWF's restaurants during the trip. JA416-17. He therefore asked Ms. Clouse to refund this portion of the cost of their trip accordingly. JA416-17. Ms. Clouse said she would. JA416-17. Nevertheless, the meal orders that Ms. Clouse placed and approved in January 2017 requested two gluten-free box lunches and two gluten-free dinners for NAPS' trip in May. JA59-60. J.D.'s father denies that these gluten-free options were intended for him and his son. JA315, 460-61. However, he acknowledges that he never informed anyone at CWF of his intention to eat his own food at Shields Tavern. JA148-49. He also never inquired into Shields Tavern's cooking protocols prior to his arrival in May 2017. JA315-16. NAPS ultimately raised enough money for the trip so that those

attending were not charged by the school for meals, lodging and transportation. JA461. J.D.'s father did not learn that the school ordered the gluten-free meals before this litigation, and he certainly did not know they had already been paid for by the school. JA461-62.

VI. J.D.'s Trip to Colonial Williamsburg

On May 11, 2017, J.D.'s school group arrived in Colonial Williamsburg. JA22. The group started their visit with lunch eaten on the patio behind Shields Tavern. JA314, 466-67; DE 20 at 7-8. J.D.'s father photographed J.D. and the area where they ate, which is also where they ate their dinner later that evening. JA540-41; DE 20 at 7-8. As his pictures indicate, the patio includes several picnic tables under a roof that keeps the area dry. JA540-41; DE 20 at 8. After lunch, the group toured the historic area with CWF guides and historical interpreters. JA207.

At the end of this tour, the NAPS group returned to Shields Tavern for dinner. JA207. There, they were told that they could seat themselves in certain rooms that the Tavern had reserved for the group. JA476; DE 20 at 8. J.D. and his father selected a two-top table in a corner. JA363. The wait staff provided a brief description of the restaurant, and then began serving J.D.'s class their pre-ordered meals. JA100-01.

Neither Mr. Doherty nor anyone from the school had advised Shields Tavern that the Dohertys planned to bring and eat their own meals there. JA148-49. Nor

did Mr. Doherty inform the wait staff of his intent when he arrived at the restaurant. JA315, 363. Instead, after eating his salad, Mr. Doherty began to unpack a cooler filled with food, cups, utensils and plates. JA315, 479. Mr. Doherty had never attempted to eat his own food at a restaurant before, and said it never occurred to him that this might present a problem for the restaurant. JA316, 474-75.

A waitress spotted Mr. Doherty unloading the contents of his cooler on the table and promptly advised him that he couldn't bring in outside food to Shields Tavern. JA149. Mr. Doherty asked to speak to a manager. JA84. The manager repeated the same policy, which she explained was mandated by state health code regulations. JA149. J.D.'s father rejected the two gluten-free meals the restaurant had pre-prepared for the school group, saying he did not trust them to be gluten-free. JA481; DE 20 at 9.

Chef Zurowski, the Tavern's head chef, then came in and knelt down next to the Dohertys' table and offered to immediately prepare gluten-free meals for Mr. Doherty and J.D. JA317, 481.[5] Specifically, the chef offered to prepare baked chicken breasts and fingerling potatoes, which was a gluten-free variation of the fried chicken meals served to J.D.'s classmates. JA317, 481. J.D.'s expert testified

[5] Shields Tavern's chef testified that he had already prepared the gluten-free meals, as directed by Ms. Clouse's meal orders. JA419. Mr. Doherty testified that the meals were not yet prepared, and that the chef offered to prepare them on the spot. JA317 n.13, 481. For the purposes of CWF's Summary Judgement Motion, the court correctly accepted Mr. Doherty's testimony. JA317 n.13.

that chicken breasts and potatoes are gluten-free. JA336.

J.D.'s father declined the chef's offer, saying he did not believe the restaurant could prepare the food safely. JA318, 481. When asked the basis for his disbelief at his deposition, Mr. Doherty could only speculate that as the chef had just finished preparing gluten-containing fried chicken for J.D.'s classmates, it would have been impossible to prepare a gluten-free meal in that environment. JA318, 481, 484. However, Mr. Doherty had made up his mind in January – over four months earlier – when he emailed the school about his dining plans that he had no intention of eating the restaurant's gluten-free food. JA416-17.

Mr. Doherty knew that he and his son could remain in Shields Tavern, whether or not they accepted the gluten-free meals offered by the head chef. JA318, 464. He knew that they were also free to eat their pre-prepared meals elsewhere in the historic area whenever they wanted, including before or after the visit to Shields Tavern. JA318, 463-64. Instead of choosing either of these options, he insisted that he and his son be allowed eat their pre-prepared meals immediately. JA318, 463-64. A Shields Tavern waitress therefore politely escorted J.D. and his father to the restaurant's outside patio, the same area where the Dohertys had eaten lunch with the rest of the group earlier in the day. JA467, 485; DE 20 at 7-8. The picnic tables on the patio were fully covered by a roof. JA318, 540-41.

The Dohertys were soon joined on the patio by a costumed interpreter, "Big

Dan McKenzie." JA315 n.7. The restaurant's manager sent Big Dan to entertain them while they ate because she could tell they were upset. JA99. Big Dan McKenzie was the only interpreter in the restaurant that night, and he spent approximately 15 minutes with J.D. and his father in an effort to boost their spirits while they ate. JA99, 482. Big Dan remained in 18th century character throughout their conversation and entertained J.D with pirate stories. JA103-04, 482; DE 20 at 11. In fact, J.D. and his father received more personal attention than any other guest that evening from Big Dan, the sole interpreter present at Shields Tavern that night. JA105-06.

J.D. and his father ate outside for 20-30 minutes. JA318, 483. As soon as they finished their meals, they returned to the restaurant. *Id.* J.D. rejoined his school friends, and his father drank coffee with the other chaperones. JA483; DE 20 at 11. After dinner, the group participated in the "Defense of Liberty" program, in which the students were "recruited" to the local militia and taught how to muster and march. JA314, 469. On their way to the next event, the Colonial Dance, Mr. Doherty returned to the restaurant, demanded to see the manager, and threatened to sue the restaurant for violating the ADA. JA470-71; DE 20 at 12. The rest of the group, including J.D., continued to the Colonial Dance. JA314, 472-73; DE 20 at 12. This brought the day's activities to an end. The school group then went to a CWF hotel, spent the night, and left the next morning. JA472; DE 20 at 12.

VII. Procedural History

J.D. filed this lawsuit on July 19, 2017. JA9. CWF moved for summary judgment on January 19, 2018. DE 19. CWF asserted in this motion that J.D. was not disabled under the ADA, that he was not denied a public accommodation because of his disability, and that Shields Tavern provided a reasonable accommodation. *Id*. The district court referred CWF's Motion for Summary Judgment to the Magistrate Judge. DE 32. The Magistrate Judge issued a Report & Recommendation ("R&R") recommending that the district court grant CWF's Motion for Summary Judgment on March 27, 2018. JA311.

In the R&R, the Magistrate Judge recommended that CWF was entitled to summary judgment because Shields Tavern's offer of a gluten-free meal satisfied its obligation under the ADA, and rendered J.D.'s proposed modification unnecessary. JA343. Given this basis for dismissing J.D.'s complaint, the Magistrate Judge did not address CWF's reasonableness and fundamental-alteration arguments. *Id*. The Magistrate Judge also held that a genuine issue of material fact existed regarding whether J.D. was disabled under the ADA. JA331.

J.D. objected to the Magistrate Judge's finding that CWF complied with the ADA because J.D.'s proposed modification was unnecessary. DE 68. CWF, for its part, objected to the Magistrate Judge's finding that a genuine issue of material fact existed regarding whether J.D. was disabled. DE 71. On June 1, 2018, the district

court issued a Final Order overruling both parties' objections, adopting the Magistrate Judge's R&R in full, granting CWF's Motion for Summary Judgment, and entering judgment for CWF. JA420. On June 21, 2018, the district court issued a Correction Order correcting a clerical error in the Final Order, but declaring that the Final Order otherwise remained in full effect. JA426. J.D. timely filed a notice of appeal with the district court on June 26, 2018. JA428. The district court awarded CWF its taxable costs on July 25, 2018. JA430.

SUMMARY OF THE ARGUMENT

To prevail on his ADA claim, J.D. must demonstrate that his proposed modification of bringing his own meal to eat at a restaurant on a no-notice basis is 1) necessary 2) reasonable *and* 3) would not fundamentally alter the restaurant's business. The decision below addressed only the first prong, correctly holding that J.D.'s proposed accommodation was not necessary in light of the restaurant's ability to prepare a gluten-free meal. Although the district court did not reach the latter two inquiries, each provides an independent basis for affirming the decision below.

First, in light of Shields Tavern's thorough and extensive protocols to accommodate guests by providing gluten-free meals, it was not necessary for CWF to permit J.D. to bring his own meal to the restaurant. The restaurant's head chef, who was present the night of J.D.'s visit, has safely and successfully prepared *5,000* gluten-free meals at Shields Tavern without incident. JA96-97. The record contains

extensive evidence regarding the commonly accepted practices he follows to ensure the food he prepares is actually gluten-free. These best practices are remarkably similar to the practices recommended by J.D.'s own expert. In the face of this evidence, J.D. relied almost entirely on his own experience at two other, entirely unrelated restaurants. His experience at those other restaurants has nothing to do with, and no bearing on, his experience and the offerings at Shields Tavern.

As the lower court decision correctly observes, the Shields Tavern head chef's declaration is "the only evidence before the Court regarding Shields Tavern's record for preparing meals for customers who request gluten-free food." JA340. Further, though claiming a general risk that purportedly gluten-free food can theoretically be contaminated by gluten, "J.D. has presented no evidence regarding the actual risk of cross-contamination beyond mere speculation." JA341. In sum, the record is devoid of a genuine dispute that J.D.'s meal would have been the first in 5,000 that Shields Tavern's trained chef had prepared to cause a problem for an individual requesting a gluten-free meal.

The lower court decision should also be affirmed because J.D.'s proposed modification is unreasonable. Deviating from its no-outside-food policy to allow guests to bring and eat their own entire meals would subject Shields Tavern to potential liability. Virginia's health code prohibits food being used for human consumption at Shields Tavern if it was prepared in a home kitchen. The health code

also subjects Shields Tavern to liability for the contamination of food, even if that food was carried into the restaurant by a guest. *See* 12 Va. Admin. Code 5-421-270(B) & 5-421-690. J.D.'s proposed modification would require Shields Tavern to cede control of its raison d'être—providing food to paying guests—and allow any person to enter the restaurant, occupy a table and bring, without prior notice, food that could be offensive, harmful, and at the least confusing to its other guests. By contrast, the restaurant's preparation and sale of gluten-free meals not only allows guests like J.D. to have an experience similar to other diners, but enables Shields Tavern to maintain control over the environment for which it is responsible.

J.D.'s proposed modification would also fundamentally alter the nature of Shields Tavern, providing another basis for affirmance. Shields Tavern, like any other restaurant, stays in business by selling food to customers. Allowing guests to bring in meals to eat at the restaurant—drinks, plates and utensils included—while they occupy table space completely undermines this business model. Unsurprisingly, there is no record evidence that Shields Tavern has ever previously allowed guests to violate its no outside food policy by bringing in and eating entire meals inside the restaurant. To the contrary, it has previously denied a guest's request to bring a pizza into the restaurant. JA189.

Finally, although the district court denied summary judgment to CWF on the grounds that J.D. was not disabled, it did so erroneously. Because J.D. has not shown

that his major life activities are substantially limited, the decision below can also be affirmed on that alternate ground.

ARGUMENT

The ADA entitles all individuals to the "full and equal enjoyment of the goods [and] services" provided by places of public accommodation. 42 U.S.C. § 12182(a). To ensure such full and equal enjoyment, places of public accommodations are required

> to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

§ 12182(b)(2)(A)(ii). J.D. alleges that CWF violated this provision of the ADA by refusing to allow him to eat his own food in Shields Tavern without any prior notice. To prove this claim, he has to show "(1) he is disabled within the meaning of the ADA … and …. [(2) CWF] denied [him] public accommodations because of his disability." *See Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 839 (D.S.C. 2015); *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 94-95 (2d Cir. 2012).

Determining whether J.D. was denied public accommodations because of his disability includes three distinct inquiries: (a) "whether the requested modification is 'reasonable'"; (b) "whether it is 'necessary' for the disabled individual"; and (c) "whether it would 'fundamentally alter the nature of'" the place of public

accommodation. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683, n.38 (2001); *A.L., by and through D.L. v. Walt Disney Parks and Resorts US, Inc.*, 900 F.3d 1270 (11th Cir. 2018). To prevail on this claim, J.D. must satisfy each, and show that his proposed modification was necessary, reasonable, and would not fundamentally alter Shields Tavern's services.

The district court correctly held that J.D.'s proposed modification of eating his own food in the restaurant without prior notice was not necessary because Shields Tavern offered him a gluten-free meal. Consequently, it did not address the reasonableness and fundamental-alteration inquiries, but both provide alternative grounds for granting CWF's motion. Finally, J.D.'s condition, while it may impact him in certain respects, does not constitute a legally cognizable "disability" under the ADA, thus providing a fourth and final basis for affirming the decision below.

I. The District Court Correctly Held That It Was Not "Necessary" For J.D. to Eat His Own Meal at Shields Tavern Where It Could Provide a Gluten-Free Meal

In determining whether a proposed modification is "necessary" under the ADA, courts refer to the "full and equal enjoyment" standard established by 42 U.S.C. § 12182(a). Under this standard, public accommodations must provide disabled guests with an experience "as equal as possible" to that enjoyed by non-disabled guests. *Feldman v. Pro Football, Inc.*, 419 F. App'x 381, 391-92 (4th Cir. 2011); *see also Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir.

2012) (holding that public accommodations have to provide a similar or "like" experience for disabled and non-disabled guests); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 447-49 (8th Cir. 2013) (same). However, public accommodations are not required to provide an "identical" experience for disabled individuals because this would often be impossible. *Feldman* 419 F. App'x at 391-92; *see also Argenyi*, 703 F.3d at 449 (public accommodations "are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons.").

Instead, public accommodations satisfy their obligation by providing "meaningful access" to their goods and services for individuals with disabilities. *Id.* To determine if CWF did so here, the Court must simply decide if CWF's proposal for accommodating J.D. worked in a practical sense, meaning that it would have addressed his needs and allowed him meaningful access to Shields Tavern's goods and services. To answer this question, the Court first must determine which goods and services Shields Tavern provides. *Feldman*, 419 F. App'x at 391. Indisputably, like all other restaurants, Shields Tavern prepares, serves and sells food with the goal of receiving revenues in return. J.D. and his *amici* assert that Shields Tavern additionally provides education and entertainment. In either case, CWF provided J.D. with options that would have allowed him to enjoy all of these goods and services, rendering his proposed modification unnecessary.

J.D. argues that he could only have meaningful access to Shields Tavern if it allowed him to eat his pre-prepared food inside the restaurant, without any prior notice to the restaurant. The district court correctly held that this was unnecessary, however, because the restaurant's head chef offered to prepare J.D. a gluten-free version of the same meal he prepared for J.D.'s classmates. J.D. tries to undermine this holding by questioning whether the meal offered by Shields Tavern would have actually been gluten-free. However, the basis of this contention is the family's experience at two locations in different states entirely unrelated to Shields Tavern. As to Shields Tavern, the relevant place of public accommodation for this lawsuit, there is no evidence in the record that would allow a reasonable juror to conclude that the meal that Shields Tavern would have provided would have included gluten. *See Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) ("A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party . . . ." (internal quotation marks and citation omitted)). Contrary to J.D.'s contention, the decision below did not erroneously draw factual inferences in favor of CWF where the facts were disputed; for instance, it credited an assertion by J.D. that Shields Tavern had not already prepared gluten-free meals. JA338.

A. The Record Offers No Basis for a Reasonable Juror to Conclude that Shields Tavern's Gluten-Free Offering Would Have Contained Gluten

As J.D.'s own expert testified, the ingredients of the alternative meal that Shields Tavern offered – baked chicken and potatoes – do not contain gluten. JA336. J.D. argues that this alternative meal might nonetheless have been contaminated with gluten, thus necessitating him being allowed to eat his outside food in the Tavern. Br. 6, 40-41. However, the record presents no evidence in this regard precluding summary judgment. Principally, J.D. tries to undermine Shields Tavern's ability to prepare gluten-free meals by reference to his past experience at two other restaurants with no relationship to Shields Tavern, which is irrelevant, and by speculation about the Tavern's kitchen procedures, which contentions are without support. Br. 39-41. *See Barber v. Sedgwick Claims Management Services, Inc.*, No. 3:14cv27349, 2015 WL 6126841 at *6 (S.D. W. Va. Oct. 16, 2015) (noting that where the plaintiff "seeks policies governing entities other than the defendant," such request pertains to "irrelevant information"). In fact, J.D.'s father admitted "that he had no specific reason not to trust the kitchen staff at Shields Tavern." JA341.

Shields Tavern has thorough protocols in place to avoid cross-contamination. JA87-88. It cannot be held accountable for other restaurants' protocols, which may be less thorough (and which protocols, in any event, are not in the record). Shields Tavern's head chef testified that he has followed gluten-free protocols 4-5 times per

day to prepare gluten-free meals – or over 5,000 times in his past five years at Shields Tavern – and has *never* received a complaint regarding gluten contamination. JA96-97. J.D. did not present any evidence to the contrary. He instead theorizes that the restaurant could not have avoided cross-contamination from other foods prepared there. Br. 41. But the record does not provide any basis, let alone a reasonable one, for questioning Shields Tavern's ability to prepare gluten-free meals or for the capabilities of Shields Tavern's head chef, Zurowski.

Chef Zurowski completed two years of culinary training, including specific training on gluten-free cooking. JA86-87. He also received additional cross-contamination training from CWF's head chef and through Virginia's "ServSafe" training program, which also specifically addresses cooking for guests with gluten sensitivity. JA87-88. During his time at CWF, he also has attended workshops with other CWF chefs, some of which have focused on gluten-free meal preparation. JA 244. The record further demonstrates that Shields Tavern has established cooking protocols that protect against cross-contamination, as J.D.'s own expert conceded. JA66-74, 89, 338-39. Before preparing the gluten-free meals, Chef Zurowski changes his apron and gloves, which J.D.'s expert considers "proper protocol." JA92, 338 n.30. He then prepares the gluten-free meals in a separate section of its kitchen, which has been cleaned and sanitized using utensils and containers that were cleaned thoroughly before use, which J.D.'s expert testified would prevent cross-

contamination. JA89, 338 nn. 28-29. The restaurant staff also covers its gluten-free meals after preparation, so that the meals cannot be contaminated at this point in the process, either, and then labels them, so that the wait staff will not confuse them with other meals. JA258. The covers are not removed by the wait staff until the meals are delivered to the guests. JA258. Indeed, as the decision below held, the protocol at Shields Tavern "corresponds roughly with what [J.D.'s own expert] testified were best practices with regard to protecting the meal from cross-contamination." JA339.

J.D. attacks Shields Tavern's proposed gluten-free meals as "mythical," because there is a factual dispute about whether or not the gluten-free meals were prepared before or after the non-gluten-free meals for J.D.'s classmates. Br. 38-39, 42. But the restaurant's cooking protocols to avoid contamination regardless of order of preparation are not mythical, and they are not disputed. The decision below properly explained that at summary judgment, it accepted as true the assertion that Chef Zurowski had not yet prepared any gluten-free meals. JA338. However, it held that Chef Zurowski would nonetheless have been able to follow appropriate protocols to prepare a gluten-free meal. JA338-39. These protocols, such as washing and sanitizing a separate counter area over four yards away, changing his apron and gloves, and not reusing oil that had been used for the other dinners to prepare the gluten-free meal, were admitted to be adequate by J.D.'s own expert. *Id.*

As the district court noted, "[t]here is no evidence before the Court indicating that J.D., his father, or [their expert] actually inspected Shields Tavern's kitchen, or made any detailed inquiries as to what ingredients would be used in the offered meal." JA341. To the extent that J.D.'s lawyer-turned-self-trained-gluten-expert found fault in Shields Tavern's cooking protocols, these complaints actually resulted from Mr. Doherty's own conduct. *E.g.*, JA337-38 (noting that Shields Tavern was not informed of where the gluten-free diners would be seated). J.D.'s expert asserted that Shields Tavern should have prepared the Dohertys' gluten-free meals before it prepared the meals for the other diners, to avoid cross-contamination. JA341 n.34. However, accepting J.D.'s version of the status of the Tavern's gluten-free meals, the Tavern had no reason to prepare them beforehand – Mr. Doherty admitted that he did not tell Shields Tavern of his intent to eat his own food either before or upon arrival at the restaurant. JA148-49.

J.D. bears the burden to prove that his proposed modification was necessary *at Shields Tavern*. *See A.L. v. Walt Disney Parks*, 900 F.3d at 1292. As demonstrated above, and as the district court held, J.D. offers no evidence for this proposition aside from his own "mere speculation." JA341. Therefore, he cannot meet this burden.[6]

---

[6] J.D. misreads a recent decision by the Eleventh Circuit to suggest that every case in which the "necessary" element is at issue requires fact-finding by a jury and may not be decided on summary judgment. Br. 30 (citing *A.L. v. Walt Disney Parks*, 900

B. The Offer of Safely Prepared Gluten-Free Meals Allowed Appellant to Experience Shields Tavern Like his Classmates

J.D. was of course free to refuse Shields Tavern's offer of a gluten-free meal. But this does not mean that his preferred modification—bringing his own cooler of food into a restaurant without any prior notice—was a necessary one. JA339-40; *See Montalvo v. Radcliffe*, 167 F.3d 873, 879 (4th Cir. 1999) ("While an ADA plaintiff is under no obligation to accept a proffered, otherwise reasonable modification . . . such rejection does not impose liability . . . for failure to modify. …").

J.D. insists otherwise, arguing that Shields Tavern's proposed modification would not afford him the "comfort and dignity" necessary for his full enjoyment of the restaurant. Br. 33, 36-37. He cites to *Baughman*, 685 F.3d 1131, for this proposition, where Disney offered a motorized wheelchair to a woman with a muscular condition that made it difficult for her to walk or rise from a seated position. The Ninth Circuit concluded that she was entitled to her preferred method of transportation – a Segway – because this method of transportation kept her at eye level with others, which she considered more dignified, as compared to a motorized

F.3d 1270). In that case, the court considered the evidence in the record before concluding that in light of the evidence in that case—*i.e.*, not categorically in every case—"[t]o determine what is 'necessary' requires multiple fact findings *regarding these two disputed behavioral characteristics of plaintiffs' disabilities*." *Id.* at 1298 (emphasis added).

wheelchair, which would have required others to look down at her. But in *Baughman*, Disney's proposal, a motorized wheelchair, differed substantially from the plaintiff's proposal, a Segway, in the manner in which it allowed the plaintiff to experience the park, because it would not allow her to travel in a standing position. In this case, Shields Tavern offered a nearly identical product to that proposed by J.D. – a gluten-free meal – and J.D.'s father simply insisted on having his own. Importantly, a public accommodation is not required to accept a guest's modification simply because the guest prefers it. *See Coleman v. Phoenix Art Museum*, No. CV 08-1833-PHX-JAT, 2009 WL 1097540, at *1 (D. Ariz. Apr. 22, 2009), *aff'd*, 372 F. App'x 793 (9th Cir. 2010) (holding that plaintiff's preferred modification – his "unique hip chair" – was not necessary when museum offered him a wheelchair).[7]

Shields Tavern was respectful of J.D.'s dignity, and as the decision below held, it "did not deny J.D. a like experience as that of nondisabled guests." JA342. It offered him a dining experience that would have allowed him to enjoy the restaurant just like his classmates, receiving a safe and healthy meal that would have appeared from his classmates' perspective nearly identical to their own. This option

[7] J.D. also cites to another Ninth Circuit case, *Lentini v. Cal. Ctr. For the Arts*, 370 F.3d 837 (2004), in which the court held that it was necessary for a wheelchair-bound individual to bring her service animal into a theater even though the theater offered ushers. Again, this case is distinguishable because the theater offered a different means (ushers) for addressing the plaintiff's needs than her preferred means (her service animal). In this case, Shields Tavern offered the same means for addressing J.D.'s alleged needs – a gluten-free meal.

would have allowed him to feel that he was just like his classmates – even more so than Mr. Doherty's production, which included plates, cups, utensils and an obviously different meal. J.D. argues that it would have been "stress-inducing" for him to worry about whether he might become sick from the food. Br. 33. Even accepting this contention, as the trial court accurately observed, "there is some level of risk" any time an individual sits down to a meal, whether of his own making or at a restaurant. A plaintiff's chosen modification is not necessary simply because a public accommodation has failed to eliminate this risk entirely. "It is not enough to show that the [facility's proposed modification] does not eliminate *all* discomfort or difficulty." *See A.L. v. Walt Disney Parks*, 900 F.3d at 1296 (emphasis added).

J.D. and his *amici*, The disAbility Law Center of Virginia ("DLCV") and the National Disability Rights Network ("NDRN"), also contend that the district court erred by focusing on Shields Tavern's food service when determining whether his modification was necessary. They argue education and entertainment are the real services provided by Shields Tavern. As J.D. puts it, "[a]ny food that Colonial Williamsburg provides is incidental to its mission of educating people about colonial America." Br. 44. While other areas of Colonial Williamsburg focus primarily on educating guests about colonial America, Shields Tavern is a restaurant in the business of selling food, enabling it to support the charitable mission of CWF. The restaurant's wait staff serve modern dishes and have no special training in colonial

history. They provide a brief description of the restaurant before food is served which J.D. and his father heard. They do not provide additional historical content during dinner.

Regardless, the trial court viewed Shields Tavern in what it concluded to be the light most favorable to J.D. – as providing guests "the atmosphere of an eighteenth-century colonial tavern" – but still concluded correctly that J.D. was not denied this experience. JA342. The court reached this conclusion because Shields Tavern welcomed the Dohertys to enjoy the experience with J.D.'s classmates. The Dohertys could have done so, and consumed the gluten-free meals the restaurant offered. Critically, they could also have refused those meals and eaten their own food before or after the school group's dinner. In either scenario, they were welcome to enjoy the restaurant's atmosphere. Instead, they insisted on their schedule and insisted on eating their outside food. They opted to eat in the covered Shields Tavern patio, and then returned inside when they were done. But those were their choices, not caused by a lack of reasonable accommodations, and it is undisputed that J.D. enjoyed the Tavern experience with his classmates for nearly an hour before the group moved to the next event on its itinerary.

It also is undisputed that during the short time J.D. ate his meal on the patio with his father, Shields Tavern provided him with an education and entertainment experience that was in fact superior to that of his classmates inside the restaurant.

Specifically, the Shields Tavern manager asked the lone historical interpreter at the restaurant that evening to entertain J.D. and his father while they ate. JA99. The interpreter dedicated 15-20 minutes (or nearly a fourth of the entire scheduled dinner) to entertaining J.D., even though he was one of dozens of children in the Tavern. JA99. The interpreter even tailored his stories to match J.D.'s interests in pirates, describing how the crew of the infamous pirate Blackbeard was jailed in Williamsburg. JA103-04. J.D. received more direct historical interpretation and entertainment than any other guest at the Tavern that night. JA105-06.

"'[F]ull and equal enjoyment' is not so capacious as to 'mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability,'" because this may be impossible. *Feldman*, 419 F. App'x at 392. Instead, public accommodations must provide disabled guests with "meaningful access" to its services, *Argenyi*, 703 F.3d at 449, in a manner "as equal as possible," *Feldman*, 419 F. App'x at 391, to those enjoyed by non-disabled guests, given the constraints imposed by the disabilities themselves. Shields Tavern did so here, allowing J.D. to enjoy the Tavern with his classmates as much as he wished, and in fact provided him special attention that no other guests received. No additional modification was necessary. The district court correctly dismissed J.D.'s claim on this basis. *See Logan v. Am. Contract Bridge League*, 173 F. App'x 113, 117 (3d Cir. 2006) (holding that plaintiff's claim fails if he cannot show that his

preferred modification is necessary to provide access to the service he desires); *Murphy v. Bridger Bowl*, 150 F. App'x 661, 663 (9th Cir. 2005) (same).

II. J.D.'s Proposed Modification Was Not Reasonable

For J.D. to prevail on his ADA claim, he must demonstrate that his proposed modification is not only "necessary," but also that it is "reasonable." *See PGA Tour*, 532 U.S. at 683, n.38. As with necessity, J.D. bears the burden of proof on this element of his claim. *See A.L. v. Walt Disney Parks*, 900 F.3d at 1292. A plaintiff may succeed in proving necessity but fail to prove a modification is reasonable. *Id.* "Facilities are not required to make any and all possible accommodations that would provide full and equal access to disabled patrons; they need only make accommodations that are reasonable." *Baughman*, 685 F.3d at 1135. Nor must a public accommodation provide "the maximum accommodation or every conceivable accommodation possible." *See Lewis v. Zilog, Inc.*, 908 F. Supp. 931, 947-48 (N.D. Ga. 1995) (dismissing ADA case in employment context). If public accommodations were so obligated, "[t]he term 'reasonable,' as it is employed in the ADA, would have no meaning…" *Id.*

The district court concluded that J.D.'s proposed modification was not necessary, so it expressly declined to decide whether this modification was reasonable. JA343. J.D.'s proposal that he be allowed to bring and eat his own food in Shields Tavern without any prior notice was not reasonable, though, and thus

provides an alternative basis to affirm the district court's grant of summary judgment to CWF. *See id.*; *A.L. v. Walt Disney Parks,* 900 F.3d at 1298 ("[T]his Court has the power to affirm a grant of summary judgment on any basis supported by the record."); *Garnett v. Remedi Seniorcare of Virginia, LLC*, 892 F.3d 140, 142 (4th Cir. 2018) (affirming district court holding on alternative grounds). This issue was fully briefed below, and is also argued in J.D.'s brief in this Court. Br. 44-46.

This Court has explained that in considering whether a proposed modification is reasonable:

> [A] court may grant summary judgment in favor of a defendant if the plaintiff fails to present evidence from which a jury may infer that the accommodation is reasonable on its face, *i.e.,* ordinarily or in the run of cases, or if the defendant establishes as a matter of law that the proposed modification will cause undue hardship in the particular circumstances.

Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 464 (2012). In providing reasonable accommodations that would provide full and equal access, "facilities may consider the costs of such accommodations, disruption of their business and safety." *Baughman*, 685 F.3d at 1135.

J.D.'s proposed modification of being allowed to bring in and consume his own food in the restaurant, without any advance notice to the restaurant, is not reasonable on its face "ordinarily or in the run of cases." *Halpern*, 669 F.3d at 464. To begin with, such a modification to the Tavern's policies would be highly disruptive. Persons could arrive unannounced and claim on the spot that a food

allergy prevents them from eating the restaurant's food. Shields Tavern must take them at their word, let them occupy a table and eat food they brought with them, whether prepared at home or purchased from a competitor. The food might conflict with the restaurant's menu (*e.g.*, pizza in a French restaurant) or could have an unpleasant aroma or appearance, but the restaurant would be powerless to stop its consumption in the face of a food allergy claim. Indeed, the food might trigger food allergies or food sensitivities in the paying guests. Such an experience could keep paying customers from returning, if it didn't propel them immediately out of the restaurant. At the very least, allowing diners to bring their own food confuses other patrons about what kinds of food Shields Tavern actually serves, disrupting its effort to establish its own consistent brand.

This modification also presents safety and liability risks for Shields Tavern. Poorly-prepared outside food could get other patrons sick. Under Virginia law, Shields Tavern would be legally responsible for such food poisoning, even if it did not prepare the food. *See* 12 Va. Admin. Code 5-421-690. Virginia law also provides that "[f]ood prepared in a private home shall not be used or offered for human consumption in a food establishment unless the home kitchen is inspected and regulated by the Virginia Department of Agriculture and Consumer Services." 12 Va. Admin. Code 5-421-270(B). *See Herschaft v. N.Y. Bd. of Elections*, No. 00CV2748, 2001 WL 940923 at *6 (E.D.N.Y. Aug. 13, 2001) (holding that "an

accommodation that would require a defendant to violate an otherwise constitutional state law is inherently unreasonable”). In addition to this kind of health-code violation, food poisoning from outside food could lead to lawsuits by other guests, or even from the persons who introduced the contaminated food to the restaurant. Asking Shields Tavern to cede control of its dining space to guests who prefer to eat their own food, and to incur the safety and liability risks that outside food presents, is unreasonable.

The obvious unreasonableness of the proposed modification is supported by the lack of evidence that Shields Tavern had ever allowed guests to bring in an entire meal in violation of its no outside food policy, particularly with no notice and Mr. Doherty’s admission he had never attempted this himself before at any restaurant. *See Herbert v. CEC Entertainment*, No. 6:16cv385, 2016 WL 5003952 at *5 (W.D. La. July 6, 2016) (finding a proposed accommodation “plausibly reasonable” because the same request had allegedly been granted multiple times in the past).

Mr. Doherty’s proposed modification was also unreasonable in this particular circumstance. Mr. Doherty knew by at least January 2017 that he intended to bring food to Colonial Williamsburg for him and his son and not eat Shields Tavern’s offerings, and yet he never bothered to tell Shields Tavern of this plan. Instead, J.D.’s father demanded the proposed accommodation for his son in a busy restaurant with after-the-fact notice, after he himself consumed one course the restaurant

presented. He effectively insisted that the wait staff make a split second decision, while all the other demands of a very busy restaurant swirled around them, whether they should violate their long-established no-outside-food policy, which is itself grounded in local health codes.

For the reasons stated above, in addition to J.D.'s requested accommodation not being necessary, it was also unreasonable and the ADA therefore does not require Shields Tavern to grant that modification.

III. J.D.'s Proposed Modification Would Fundamentally Alter Shields Tavern

Even if an ADA plaintiff's proposed modification is both necessary and reasonable, a place of public accommodation does not have to provide it if doing so would "fundamentally alter the nature of" the public accommodation. *See PGA Tour*, 532 U.S. at 683, n.38; *see also Halpern*, 669 F.3d at 464 (public accommodations must make "'reasonable,' but not 'substantial' or 'fundamental,' modifications to accommodate persons with disabilities.") This Court has defined a "fundamental alteration" as a "modification to an essential aspect of [a public accommodation's] program." *See id.* As with reasonableness, the district court's decision declined to address this prong of the inquiry, but it provides an alternate basis for affirmance because J.D.'s proposed modification would fundamentally alter the nature of Shields Tavern. This issue was fully briefed below.

A. Allowing Guests to Eat Their Own Meals Inside Shields Tavern Would Drastically Undermine Its Food Service Business

Allowing diners to eat their own meals at Shields Tavern, in place of ordering food prepared by the restaurant, would fundamentally alter and drastically undermine the nature of Shields Tavern's business. Shields Tavern is a restaurant that sells food to customers. This is its raison d'être. Mr. Doherty acknowledged as much in his deposition when he testified that restaurants like Shields Tavern are "in business to make money." JA457; DE 20 at 20. He also acknowledged that allowing other guests to do as he proposed would turn restaurants into "covered picnic areas." JA487; DE 20 at 20. Food service to paying customers is "an essential aspect" — *the* essential aspect, in fact — of Shields Tavern's business, and the modification that Plaintiff proposed would fundamentally alter the nature of this service. *Halpern*, 669 F.3d at 464. Indeed, it would replace the service altogether.

This is not a case where a plaintiff seeks an incidental change to a company's business. Rather, the modification J.D. seeks here would alter Shields Tavern's fundamental business model. It is a restaurant which offers gluten-free and other meals for sale. The sales on these meals help it earn revenue, which allow the restaurant to continue to exist. Under J.D.'s theory, persons can demand to bring their own food or a competitor's food, regardless of the protocols the Tavern has put in place to accommodate guests with dietary restrictions. This proposed accommodation threatens the Tavern's viability. It is akin to requiring a hotel not

to charge for its rooms, or a movie theater not to charge a ticket admission fee. The ADA does not go so far. *See Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1275 (11th Cir. 2006) (historic theater did not have to eliminate regular seats to accommodate handicapped patrons because this "would directly impact [the theater's] ability to compete with other venues, possibly resulting in lost revenue"); *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 644 (N.D. Tex. 1995) (music venue did not have to ban smoking because this modification "would endanger Defendant's viability as a business, and such modifications are not required").

The Fourth Circuit's holding in *Montalvo* is particularly instructive here. In that case, a father tried to enroll his 12-year-old son in a karate school known as U.S.A. Bushidokan. The son wanted to join this karate school in particular because his friends had already started lessons there. The son had AIDS, and U.S.A. Bushidokan was a "combat-oriented" school in which the students' sparring was often bloody. The school denied the boy's enrollment, fearing that he may transmit AIDS to other students. The father argued that the karate school should have "soften[ed]" its karate program to accommodate his son. This Court disagreed, holding that the school was not required to make such a fundamental alteration:

> U.S.A. Bushidokan's unique niche in the martial arts market was its adherence to traditional, "hard-style" Japanese karate, and the contact between participants, which causes the bloody injuries and creates the risk of HIV transmission, was an integral aspect of such a program. To require U.S.A. Bushidokan to make its program a less combat-oriented, interactive, contact intensive version of karate would constitute a

> fundamental alteration of the nature of its program. *The ADA does not require U.S.A. Bushidokan to abandon its essential mission and to offer a fundamentally different program of instruction*.

Montalvo, 167 F.3d at 879 (emphasis added). By the same token, Shields Tavern was not required to abandon its essential mission of food service, including gluten-free offerings, to accommodate J.D. as he demands in this lawsuit.

B. J.D.'s Arguments to the Contrary Are Unavailing

Although J.D. does not address this issue in his opening brief, his attempts below to undermine this conclusion are unavailing. First, he argued that he paid for his meals at Shields Tavern. The undisputed record shows, however, that Mr. Doherty asked the school months before the trip to refund him for the cost of meals during the trip, as he and his son would not eat them. JA416-17. Ultimately, the NAPS fundraising efforts covered the entire cost of the trip, but Mr. Doherty did not learn that the gluten free meals were ordered and paid for until this litigation. JA461-62. He had no idea as he began to unpack his cooler full of food, plates, cups and utensils in the Tavern that the school had already purchased gluten free meals. Regardless, a public accommodation does not have to alter the essential nature of its service, even if the plaintiff has agreed to pay for the new service that it requests. *See Montalvo*, 167 F.3d at 879 (karate program did not have to provide new form of martial arts to paying customer).

J.D. also assailed the exceptions Shields Tavern makes to its no-outside-food policy, arguing that these exceptions prove that guests eating their own meals in the Tavern would not fundamentally-alter the Tavern's business. However, unlike J.D.'s proposed modification, the restaurant's limited exceptions to its no-outside-food policy do not undermine its ability to earn revenue through food service, and do not present safety and liability risks.

None of Shields Tavern's limited exceptions allow guests to bring entire outside meals to eat in the restaurant. First, the exceptions allow babies and toddlers to bring baby food, Cheerios and other snack items. JA64. These guests are too young to order anything from Shields Tavern's menu, so allowing them to eat snacks does not deprive the restaurant of revenue. In fact, this policy likely drives food sales by occupying small children so their parents can purchase food. Without such a policy, families with young children might avoid Shields Tavern altogether. Also, health hazards, and the liability flowing from them, are the other bases for Shields Tavern's no-outside-food policy, and toddler snacks, like Cheerios, do not pose a significant health risk.

Second, Shields Tavern also allows patrons to bring wine and cakes into the restaurant. JA64. But CWF earns revenue from these products, by charging a plating fee for cakes and a corking fee for wine when a guest asks to consume these products in the restaurant. JA64. Additionally, the risk of foodborne illness from

cakes and wine is low. JA64-65. And unlike the modification J.D. seeks, this exception does not allow guests to bring a whole meal to Shields Tavern, meaning they still purchase food and drink from the restaurant as they occupy its table space. In sum, the exceptions Shields Tavern makes to its no-outside-food policy do not undermine the reasons for this policy, nor prevent the restaurant from selling meals.

Finally, J.D.'s *amicus* DLCV provides a list of theme parks that it alleges allow guests to bring outside food. Specifically, DLCV references Walt Disney's resorts, King's Dominion, Busch Gardens, and Six Flags. DCLV Br. 12-13. The policies adopted by these theme parks actually support CWF's fundamental-alteration argument. First, of the four, only Walt Disney specifies that outside food may be brought into dining locations as opposed to the park itself. J.D. has never argued that he was prohibited from eating his own food *anywhere on the premises in Colonial Williamsburg*, only from eating it *in* its restaurants. Indeed, CWF welcomed J.D. to eat his own food while visiting Colonial Williamsburg – and he did, on the patio behind Shields Tavern. Notably absent from DCLV's *amicus* brief is any data indicating restaurants (as opposed to outdoor theme parks) commonly allow patrons to bring and eat their own meals. Second, it is remarkable that all four theme parks cited by DCLV require advance notice to enable the accommodation. According to the links DCLV cites, Six Flags requires guests to obtain in advance a medical sticker from security; Walt Disney requires guests to contact security upon

arrival at the park; Busch Gardens requests that guests "go straight to the cashier and ask to speak with a supervisor" upon arrival at a meal facility, and King's Dominion also requests guests to visit Guest Services.

IV. J.D. Is Not "Disabled" Within the Meaning of the ADA

The district court held that there existed a genuine issue of material fact regarding whether J.D.'s gluten sensitivity constitutes a disability under the ADA. JA421, 23. CWF is not aware of any prior court holding that gluten sensitivity may be a disability. The District Court erred in reaching this conclusion because, even if J.D.'s gluten sensitivity causes all of the symptoms he claims, this impairment still does not substantially limit a major life activity.

The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more major life activities…." *See* 42 U.S.C. § 12102(1)(A);[8] *Haulbrook v. Michelin N. Am.*, 252 F.3d 696, 702 (4th Cir. 2001).

[8] Below, J.D. placed great emphasis on the impact that the 2008 ADA Amendments Act (the "ADAAA") has on his case. Congress did explain that one of its purposes in enacting these amendments was "to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." § 12102(4)(B). However, while conveying this message, the ADAAA did not alter the definition of "disability." Therefore, under both the ADA and the ADAAA, a plaintiff must prove the same elements to establish a disability: (i) a physical or mental impairment that, (ii) substantially limits, (iii) one or more major life activities. "[T]he ADAAA still requires that the qualifying impairment create an 'important' limitation [on a major life activity] …. Therefore, even under the relaxed ADAAA standards, a plaintiff is still required to plead a substantially limiting impairment." *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d 502, 513 (E.D. Pa. 2012). The ADAAA corrected past misunderstandings about the

As the Magistrate Judge noted, the record is unclear regarding which of J.D.'s health issues are actually caused by his sensitivity to gluten. JA330, 580. However, even if this Court assumes that J.D.'s gluten sensitivity causes all of the symptoms that he references, he still is not disabled under the ADA because this gluten sensitivity does not "substantially limit" one of his "major life activities."

This issue provides an independent fourth basis for affirming the decision below. As with fundamental alteration, J.D. does not address this issue in his brief in this Court, but it was fully briefed below. J.D. implies that CWF was required to bring a cross-appeal to raise this issue, Br. 30 n.3, but the fact that the decision below denied summary judgment to CWF on this ground but granted it summary judgment on an alternate ground, making it the prevailing party, does not necessitate a cross appeal. In fact, this Court has dismissed a cross-appeal as "not properly taken" in similar circumstances "as it merely seeks affirmance of the district court's judgment on an alternate ground." *Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 155-56 (4th Cir. 2012).

---

definition of disability, but it did not expand this definition to the point of rendering every impairment a disability. *See Koller*, 850 F. Supp. at 513; *see also* 28 C.F.R. § 36.105 ("not every impairment will constitute a disability within the meaning of this section.").

A. J.D. Cannot Identify A "Major Life Activity" "Substantially Limited" By His Gluten Sensitivity

In determining whether J.D. is substantially limited in the major activities of his life, the Court can only consider the life activities he identifies. *See Kravtsov v. Town of Greenburgh,* No. 10-CV-3142 (CS), 2012 WL 2719663, at *10 (S.D.N.Y. July 9, 2012) ("plaintiff must…*identify the activity claimed to be impaired*… and show that his impairment substantially limits the major life activity *previously identified*" (internal quotations omitted; emphases added)). In this case, J.D.'s counsel stipulated that J.D. would not testify at trial, and his father could only identify two activities impacted by J.D.'s gluten-sensitivity: (1) he may not be able to join the military when he's older, and (2) he cannot bike to McDonald's or to the corner store to eat a Snickers bar or ice cream. Neither is a major life activity.

"A major life activity is an activity that is 'of central importance to daily life….'" *Beaton v. Metro. Transportation Auth. New York City Transit*, No. 15 CIV. 8056 (ER), 2016 WL 3387301, at *5 (S.D.N.Y. June 15, 2016) (quoting *Capobianco v. City of New York*, 422 F.3d 47, 56 (2d Cir. 2005)). J.D.'s interest in joining the military is commendable, but this type of service is not a major life activity. *See Burrell v. Cummins Great Plains, Inc.*, 324 F. Supp. 2d 1000, 1012–13 (S.D. Iowa 2004) (rejecting plaintiff's contention that "the inability to enroll in the military" was a major life activity substantially limited by his diabetes); *see also Reinhart v. Shaner*, No. CIV.A. 02-T-1315-N, 2004 WL 419911, at *3 (M.D. Ala. Feb. 9, 2004)

(same). Even if joining the military were a major life activity, J.D. is far from military age, so this alleged limitation is speculative.

Riding a bike to McDonald's or to the corner store to eat a Snickers bar or ice cream are not major life activities, either. Considered in the light most favorable to J.D., his father seems to mean that J.D. cannot eat foods containing gluten which he might otherwise enjoy. But carefree eating is not a major life activity. As the Court observed in *Fraser v. Goodale*, "[i]f a person is impaired only from eating chocolate cake, he is not limited in a major life activity because eating chocolate cake is not a major life activity." 342 F.3d 1032, 1040 (9th Cir. 2003).

Neither of the activities identified by J.D.'s father is a "major life activity." J.D., therefore, cannot prove disability because he is constrained in his case by the life activities that he identifies. *See Kravtsov*, 2012 WL 2719663, at *10; *Nolan v. Vilsack*, No. CV1408113ABFFMX, 2016 WL 3678992, at *5 (C.D. Cal. June 30, 2016) (no genuine issue of disability when plaintiff "admitted in his deposition that neither his celiac disease nor his dyslexia significantly affects his work as a firefighter or his day-to-day living"); *Kelly v. Kingston City Sch. Dist., Inc.*, No. 116CV00764MADDJS, 2017 WL 976943, at *3 (N.D.N.Y. Mar. 13, 2017) (plaintiff cannot be disabled if he admits his Celiac Disease is "well managed with a strict diet").

B. The Decision Below Erred in Denying Summary Judgment as to J.D.'s Alleged Disability

The Magistrate Judge inappropriately looked beyond the life activities identified by Mr. Doherty and concluded that J.D. may be limited in the life activity of "eating." Eating is a major life activity. *See* § 12102(2)(A). However, courts that have found plaintiffs disabled based on this life activity have focused on the physical act of eating, or the conditions in which the plaintiff can eat, and not the scope of food options available for consumption. *See, e.g., Kravtsov*, 2012 WL 2719663, at *1 (plaintiff may be substantially limited in the life activity of eating when he "must eat in a reclining or semi-reclining position and continue to recline for ten to fifteen minutes or more afterwards"). If a plaintiff's impairment only narrows the range of available food options, the plaintiff is not disabled. *See Land v. Baptist Med. Ctr*., 164 F.3d 423, 425 (8th Cir. 1999) (finding plaintiff not disabled even though she "cannot eat foods containing peanuts or their derivatives" because "the record does not suggest that [she] suffers an allergic reaction when she consumes any other kind of food or that her physical ability to eat is in any way restricted").[9]

---

[9] The Magistrate Judge stated that reliance on *Land*, and any case that cites to it, is "problematic" because it pre-dates the ADAAA. But *Land* and other pre-ADAAA cases still provide persuasive authority if their reasoning remains sound under the ADAAA. The Eighth Circuit's reasoning that the plaintiff in *Land* was not disabled because her physical ability to eat was not limited by the plaintiff's peanut allergy withstands the ADAAA's directive to construe "substantial [] limit[ations]" more

Notwithstanding the symptoms he allegedly experiences when he ingests gluten, J.D. does not suggest that he is limited in the physical act of eating. He is able to ingest food like anyone else. If he sticks to a gluten-free diet, he digests the food without incident. And J.D. does not struggle to avoid gluten. Gluten is not an unavoidable ingredient in food, but rather exists only in wheat, barley, rye, and triticale. JA337. His own expert testified that "there are tens of thousands of products that are certified gluten-free." JA407-08. J.D. has managed to avoid gluten effectively for years and, consequently, is in good health. Thus, he is not disabled.[10]

The court reached the same conclusion in *Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-CV-00344-RMW, 2015 WL 4694049 (N.D. Cal. Aug. 6, 2015) ("*Phillips I*"), holding that even Celiac Disease – let alone gluten sensitivity

---

broadly because the plaintiff's ability to eat, the court concluded, was in no way limited, substantially or otherwise. This reasoning is why courts continue to rely on *Land* and other pre-ADAAA cases, and why this Court should, too. *See, e.g., Hustvet v. Allina Health Sys.,* 283 F. Supp. 3d 734, 740 (D. Minn. 2017) ("The Court recognizes that [*Land*] and other cited cases apply the pre-amendment ADA standards, but the Court still finds the cases persuasive in view of the current standards.").

[10] J.D. and his *amici*, Scott Hayes and Virginia Food Allergy Advocates, supply this Court with a number of articles and studies regarding the gluten-free lifestyle. These sources are not in the record and thus cannot resolve the factual question of whether J.D. is disabled. Moreover, CWF is not asking this Court to hold that no individual with Celiac Disease or gluten sensitivity is capable of proving he or she has a disability. Rather, the evidentiary record establishes that this Court need only hold that this particular plaintiff has not proved he is disabled, because of his admissions regarding his own experience and limitations, from his alleged gluten sensitivity.

– does not substantially limit a major life activity because a sufferer can simply "avoid the consequences of her alleged disability by avoiding the ingestion of gluten." *Id.* at *4.[11]

The Magistrate Judge also concluded that he could not consider Appellant's ability to avoid gluten because this constitutes a "mitigating measure" that the ADAAA directed the Court to disregard. JA331. This was an error because allergy avoidance is not a mitigating measure. The statute instructs courts to make disability determinations "without regard to the ameliorative effects of mitigating measures." § 12102(4)(E). It identifies "learned behavioral . . . modifications" as one such mitigating measure. *Id.* In so doing, the ADA directs courts to disregard proactive tasks that plaintiffs perform to ameliorate their conditions, like insulin injections for a diabetic. But abstaining from gluten is not a proactive, affirmative task. It is simply the avoidance of certain foods. Thus, this Court can consider whether such

[11] The *Phillips I* court held that Celiac Disease does not even "limit" (let alone "*substantially* limit") a major life activity, denying the plaintiff's claim in that case under the ADA, and a California statute which, unlike the ADA, "covers conditions that merely 'limit' a major life activity." *Id.* at *3-4. As the Magistrate Judge in this case noted, the court allowed the plaintiff in *Phillips I* to refile her claim, and allowed the plaintiff's second attempt to proceed past a motion to dismiss because, at that juncture, the court had to accept her allegation that she could not eat any food provided by the restaurant in question. *See Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-CV-00344-RMW, 2015 WL 7429497, at *3 (N.D. Cal. Nov. 23, 2015) ("*Phillips II*"). However, this case is at the summary judgment stage, where the Court can consider the entire record, which establishes a lack of limitations and that J.D. can eat any food he wants among "tens of thousands" of options.

avoidance renders the impairment a non-issue. *See Capobianco,* 422 F.3d at 59 n.9 (distinguishing between mitigation, meaning "amelioration of the impairment itself," and "simple avoidance of activities affected by the impairment.").

Notably, no case cited by the district court held that gluten-avoidance was a mitigating measure that the court had to disregard. Therefore, in reaching this conclusion, the Magistrate Judge had to go outside the realm of gluten cases, and relied instead on *Rohr v. Salt River Project Agric. Imp. & Power Dist*., 555 F.3d 850 (9th Cir. 2009) and *Kravtsov*. This reliance was misplaced because the mitigating measures involved in those cases were proactive in nature, not the avoidance of a single substance. The plaintiff in *Rohr* "had to follow a 'very demanding regimen' to manage his diabetes. In addition to daily injections of insulin, he had to test his blood sugar three to four times a day, could not eat large meals or skip meals and needed to snack on something every few hours." *Rohr* at 855. The plaintiff in *Kravtsov* was hypoglycemic and had to eat 8-10 times per day to maintain healthy blood-sugar levels.

Unlike the plaintiffs in those cases, J.D. does not need to take proactive steps such as injecting himself with insulin daily, pricking his finger for blood three to four times per day, or eating 8-10 small meals per day. He only needs to avoid gluten. The Court can consider his ease in doing so when determining if he is disabled. As the Ninth Circuit noted in *Fraser*, "[n]ot every [dietary]

impediment…is a substantial limitation of the major life activity of eating." 342 F.3d at 1041. No one can eat whatever he or she wants whenever he or she wants without experiencing some detrimental health effects. If avoiding certain types of foods is a "mitigating measure" that the Court must disregard, then nearly everyone has an eating disability. In determining whether J.D. is disabled, the Court should consider the eating limitations he faces "as compared to most people in the general population" (28 C.F.R. § 36.105(d)(1)(v)) – *i.e.*, reasonably diligent people who avoid foods that cause them discomfort. J.D. experiences no complications if he avoids gluten, and thus there is no genuine issue as to whether he is disabled. Therefore, this Court can affirm the district court's decision on this alternative basis, as well.

CONCLUSION

For the foregoing reasons, CWF respectfully requests that this Court affirm the district court's grant of CWF's Motion for Summary Judgement, dismissal of the Complaint, award of taxable costs[12] and entry of judgment in favor of CWF.

[12] Because the district court did not err in granting CWF summary judgment, it properly awarded costs to CWF.

Dated: October 19, 2018

Respectfully submitted,

/s/ Dana L. Rust
Dana L. Rust (VSB # 28408)
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(Office) (804) 775-1000
(Fax) (804) 698-2158
drust@mcguirewoods.com

Counsel for Defendant-Appellee
Colonial Williamsburg Foundation

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,987 words, excluding the parts exempted by Rule 32(f).

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

/s/ Dana L. Rust
Dana L. Rust (VSB # 28408)
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(Office) (804) 775-1000
(Fax) (804) 698-2158
drust@mcguirewoods.com

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2018, I electronically filed the foregoing with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to all counsel of record.

/s/ Dana L. Rust
Dana L. Rust (VSB # 28408)
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, Virginia 23219
(Office) (804) 775-1000
(Fax) (804) 698-2158
drust@mcguirewoods.com