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TESTIMONY OF KRISTIN AIELLO IN OPPOSITION TO LD 2195, AN ACT TO PROTECT BUSINESSES FROM FRAUDULENT OR PREDATORY FINANCIAL SETTLEMENTS BY ALLOWING THOSE BUSINESSES OPPORTUNITIES TO REMOVE ARCHITECTUAL BARRIERS IN NONCOMPLIANCE WITH THE MAINE HUMAN RIGHTS ACT

My name is Kristin Aiello. I am a disability rights attorney, having served as Attorney with Disability Rights Maine for most of my career, and now with Aiello Law in Hallowell. I formerly served as a Commissioner on the Maine Human Rights Commission.

I am here today to ask members of the Committee to oppose LD 2195.

First, LD 2195 puts the Maine Human Rights Act (MHRA) out of compliance with the Americans with Disabilities Act (ADA).

Currently, the standards for access under the MHRA and the ADA are nearly identical. Both of these laws require architectural changes to existing structures only when such changes are “readily achievable,” i.e., easily accomplishable, and able to be carried out without much difficulty or expense. The law defines “readily achievable” with explicit reference to the size and resources of the business in order to accommodate small businesses. 28 CFR 36.304(a). This is a result of careful compromise with the business community.

LD 2195 upsets this balance, creating two standards, which is neither good nor helpful for businesses or for people with disabilities.

Second, LD 2195 discriminates against people with disabilities. No other protected class in the MHRA (such as sex, gender, color, race, sexual orientation or gender identity, religion, age) is required to draft a detailed, onerous notice and have a waiting period as a condition precedent to enforcing their rights.

Third, LD 2195 imposes notice requirements and requirements that will gut the protections of the MHRA for many people with disabilities. Not everyone who

experiences a barrier will be able to meet the bill's demanding notice standards which are detailed and time consuming. Many will require a lawyer, another barrier. One misstep and the notice is not valid and the person with a disability cannot enforce their rights. Many will give up. Moreover, persons who are blind or visually impaired who experience inaccessible websites of public accommodations would not be able to meet the notice standard of going to the physical public accommodation, putting this bill in conflict with existing law. In addition, the notice requirements require mailing by US Mail, meaning one must be able to read and write on paper, which individuals who are blind or visually impaired and those with other print disabilities are likely unable to do independently. They will be shut out of the protections of the Maine Human Rights Act, too.

Fourth, LD 2195 removes incentives for businesses to comply with the law. Under LD 2195, a business can delay doing anything to ensure access until it receives notice that someone was not able to access their public accommodation.

This is because, once notice is received, LD 2195 would grant the business up to two months to make "substantial progress" in removing the barrier described in the notice. This means a business could spend years without actually removing barriers to come into compliance with longstanding access standards and face no penalty.

Fifth, LD 2195 would remove the right of individuals to seek immediate injunctive relief for access, unlike every other protected class, regardless of the circumstances.

Sixth, LD 2195 does not effectively address unscrupulous attorneys. We can all agree that unethical attorneys can and should be held accountable for their actions. Fortunately, there are effective and extensive methods already available to courts and state bar associations to deal with a very few frivolous lawsuits or unscrupulous attorneys. We should use those existing legal mechanisms when needed, rather than deny the civil rights established by the MHRA that aid people with disabilities every day.

LD 2195 is a major roll-back on the rights of individuals with disabilities and it's not helpful for businesses, either, because it creates inconsistent standards with the ADA that businesses must meet in any event. This bill ought not to pass.

Thank you for your consideration.

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February 6, 2024

The Honorable Anne Carney, Senate Chair
The Honorable Matt Moonen, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, Maine 04333

Re: LD 2195, "An Act to Protect Businesses from Fraudulent or Predatory Financial Settlements by Allowing Those Businesses Opportunities to Remove Architectural Barriers in Noncompliance with the Maine Human Rights Act"

Dear Senator Carney, Representative Moonen and Honorable Members of the Joint Committee on the Judiciary:

I am writing to urge this Committee to oppose LD 2195.

I have spent over 25 years representing Maine people who have been discriminated against because of their disabilities, as a former Attorney at Disability Rights Maine and currently in private law practice. I have also served as a Commissioner on the Maine Human Rights Commission. I am not often at the Maine Legislature, but I am compelled to appear before you today to urge you to reject LD 2195, which would amend Subchapter 5 of the MHRA to limit the rights of people with disabilities.

Subchapter 5 of the MHRA gave its protections a broad sweep, declaring that “[t]he opportunity for every individual to have equal access to places of public accommodation without discrimination because of race, color, sex, sexual orientation or gender identity, age, physical or mental disability, religion, ancestry or national origin is recognized as and declared to be a civil right.” 5 M.R.S. § 4591 (“Equal access to public accommodations”). Congress similarly gave Maine’s federal analogue, Title III of the ADA, broad protections to “afford people with disabilities equal access to the wide variety of establishments available to the nondisabled.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 662 (2001).

Subchapter 5 prohibits discrimination in the “full and equal enjoyment to any person, on account of race or color, sex, sexual orientation or gender identity, age, physical or mental disability, religion, ancestry or national origin, any of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodations, advantages,

facilities, goods, services and privileges may depend.” 5 M.R.S. §4592(1) (Denial of public accommodations).

LD 2195 would amend the Maine Human Rights Act (MHRA)—which prevents discrimination by public accommodations such as stores, theaters, arenas, professional offices, and any establishment that offers goods or services to the general public—to require an exacting written notice letter and then a two-month waiting period for the business to remove the barrier or to simply show “substantial progress” toward removing it.

This waiting period would apply equally to older buildings and to those built since 1993, which have had the benefit of the Department of Justice Standards for Accessible Design—promulgated in 1991—since long before they were constructed.

No other rights under the Maine Human Rights Act have a similar waiting period. Imagine, for example, if a business could pay its employees less than minimum wage and then, when called on it, take two months to remedy the situation (or simply make “substantial progress” toward remedying it) with no obligation to repay the shortfall before or after the notice? Imagine a business with a “whites only” sign being permitted two months to revise that policy?

Moreover, LD 2195 removes any incentive for businesses to comply proactively with the Maine Human Rights Act. Instead, they would be able to wait for a person with a disability to send a letter before even considering accessibility. And because the letter is required to contain specified information,¹ it may well require a person with a disability to retain an attorney to request access to an inaccessible business in a fashion that would ultimately be enforceable.

An unrepresented person with a disability could, assuming they don’t have a print disability,² write a demand letter, mail their letter by “regular mail,” wait 60 days, receive a response “delivered by regular mail” and find that -- after two months -- the business’s only response was that their letter was inadequate. LD 2195 requires the individual to visit a location, even if they cannot get in the front door due to barriers. It places the burden squarely on the individual with the disability to get it right or they can’t meet the notice requirement and seek to enforce their rights. Moreover, because the law encompasses online addresses and storefronts, there may be no physical location for an individual to visit in Maine, so they, too, cannot meet the requirements of LD 2195.

¹ The “Notice” in proposed section 4594-I requires that the notice from an individual with a disability must “(A) be in writing; (B) be delivered by regular mail; (C) Contain a description of the architectural barrier specific enough to allow the owner to identify the barrier; and (D) Specify in detail the circumstances under which the individual was actually limited in or prevented from accessing the place of public accommodation, including the address of the place of public accommodation, the date of the limitation or prevention, whether the individual requested assistance with removal of the architectural barrier and whether the barrier was temporary or permanent.”

² Individuals with print disabilities may include individuals who cannot effectively read or write print because they may have a visual, physical, perceptual, developmental, cognitive, learning disability, or traumatic brain injury, for example. These individuals may not be able to comply with LD 2195’s notice requirements, which require the ability to write on paper, see and read words on paper, mail paper, receive and review paper, for starters.

Rather than reducing the power of the plaintiff's lawyers as its proponents intend, LD 2195 would effectively turn those attorneys into gatekeepers of accessibility. It would also make access lawsuits longer and more expensive because the first motion to dismiss will likely be based on the form of the demand letter.

It is my understanding that there may be an amendment proposed to make LD 2195 applicable to digital technology only, not architectural barriers such as storefronts. But this would not solve the problem, it would only burden the rights of blind or visually impaired individuals or others with print disabilities who are denied access to accessible digital technology.

Digital technology, such as websites and social media, is central to peoples' lives, and has transformed the way we all communicate, get news, shop, are educated and even make friends. Businesses are required to have accessible websites and media.³ As one court aptly said, “[n]ow that the Internet plays such a critical role in the personal and professional lives of Americans, excluding disabled persons from access to covered entities that use it as their principal means of reaching the public would defeat the purpose of this important civil rights legislation.” *Natl' Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 575 (D. Vt. 2015).

The vast majority of ADA and MHRA attorneys and plaintiffs are seeking solutions to fix real denials of access. But LD 2195, at least by its title, “An Act to Protect Businesses from Fraudulent or Predatory Financial Settlements ...” attempts to portray a few bad apples as a landslide and “fraudulent or predatory financial settlements” as an epidemic. This just isn’t so.

To the extent that there are unethical attorneys, they should be held accountable for their actions. Fortunately, there are effective and extensive methods already available to courts and state bar overseers to deal with a very few frivolous lawsuits or unscrupulous attorneys. We should use those existing legal mechanisms when needed, rather than deny civil rights established by the MHRA that aid people with disabilities every day.

LD 2195 would discourage voluntary compliance and would even discourage informal resolution -- since everyone would have to have a lawyer. It would punish people with disabilities without in any way deterring the bad guys. The vast majority of honest citizens who just want access to businesses would have to wait an extra two months (or more), while the very small handful of dishonest lawyers using Title III to extort settlements would simply move their extortion to the demand letter stage.

³ Title III of the ADA covers services offered electronically, such as through websites and smartphone apps. See, e.g., *Andrews v. Blick Arts Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Del-Orden v. Bonobos, Inc.*, 17 Civ. 2744 (PAE), 2017 WL 6547902, at *1 (S.D.N.Y. Dec. 20, 2017). As one influential decision put it, the alternative is “arbitrary” disparities in Title III’s coverage, given the ubiquity of electronic commerce today. *Natl' Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 572 (D. Vt. 2015). In *Scribd*, the Court found that Title III requires an entity that sells a subscription service to books and other publications online and through apps to make its service accessible to people with visual impairments. Also see *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.* 37 F.3d 12, 19 (1st Cir. 1994) (service establishments do not require a person to physically enter a space).

LD 2195 is a barrier to ensuring full participation of people with disabilities in society. I urge this Committee to vote ought not to pass.

Thank you.

Sincerely,

Kristin Aiello

Kristin L. Aiello