Appeal No. 17-13467

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WINN-DIXIE STORES, INC.,

Defendant-Appellant,

vs.

JUAN CARLOS GIL,

Plaintiff-Appellee.

Appeal from a Final Judgment of the United States District Court for the Southern District of Florida, Miami Division

Lower Court Case No. 1:16-cv-23020-RNS

REPLY BRIEF OF APPELLANT WINN-DIXIE STORES, INC.

NELSON MULLINS RILEY & SCARBOROUGH, LLP
Susan V. Warner
50 N. Laura Street
41st Floor
Jacksonville, Florida 32202
(904) 665-3600

Attorneys for Appellant

Appeal No. 17-13467
Winn-Dixie Stores, Inc. v. Juan Carlos Gil

CERTIFICATE OF INTERESTED PERSONS/ CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant discloses the following:

1. Ackerbaum Cox, Esq., Joyce
2. American Bankers Association
3. American Council of the Blind
4. American Foundation for the Blind
5. American Hotel & Lodging Association
6. American Resort Developers Association
7. Amador, Esq., Angelo I.
8. Asian American Hotel Owners Association
9. Association of Late Deafened Adults
10. ARP Ballentine, LLC
11. ARP Chickamauga, LLC
12. ARP Hartsville LLC
13. ARP James Island LLC
14. ARP Moonville LLC
15. ARP Morganton LLC
16. ARP Winston Salem LLC
17. Baker & Hostetler, LLP
18. BI-LO Finance Corp.
19. BI-LO Holding Finance, Inc.
20. BI-LO Holding Finance, LLC
21. BI-LO Holdings Foundation, Inc.

22. BI-LO Holding, LLC
23. BI-LO, LLC
24. Brown, Goldstein & Levy, LLP
25. Care, Esq., Gregory P.
26. Chamber of Commerce of the United States of America
27. Cronan, Esq., Candace Diane
28. Della Fera, Esq., Richard
29. Dinin, Esq., Scott R.
30. Disability Independence Group
31. Disability Rights Advocates
32. Disability Rights Education & Defense Fund
33. Disability Rights Florida
34. District Judge Robert N. Scola, Jr.
35. Dixie Spirits Florida, LLC
36. Dixie Spirits, Inc.
37. Entin & Della Fera, P.A.
38. Entin, Esq., Joshua M.
39. Florida Council of the Blind
40. Florida Justice Reform Institute
41. Galeria, Esq., Janet
42. Gil, Juan Carlos
43. Harned, Esq., Karen R.
44. International Council of Shopping Centers
45. Lumpkin, Esq., Carol C.
46. Milito, Esq., Elizabeth
47. Moot, Esq., Stephanie N.
48. National Association of Convenience Stores

49. National Association of the Deaf
50. National Association of Realtors
51. National Association of Theatre Owners
52. National Disability Rights Network
53. National Federation of the Blind
54. National Federation of the Blind of Florida
55. National Federation of Independent Businesses
56. National Multifamily Housing Council
57. National Retail Federation
58. Nelson Mullins Riley & Scarborough LLP
59. Opal Holdings, LLC
60. Postman, Esq., Warren
61. Restaurant Law Center
62. Samson Merger Sub, LLC
63. Scott R. Dinin, P.A.
64. Shaughnessy, Esq., Kevin W.
65. Southeastern Grocers, LLC
66. Vermuth, Justin, Esq.
67. Warner, Esq., Susan V.
68. Washington Lawyers' Committee for Civil Rights and Urban Affairs
69. We Care Fund, Inc.
70. Winn-Dixie Logistics, LLC
71. Winn-Dixie Montgomery, LLC
72. Winn-Dixie Montgomery Leasing, LLC
73. Winn-Dixie Properties, LLC
74. Winn-Dixie Raleigh Leasing, LLC
75. Winn-Dixie Raleigh, LLC

76. Winn-Dixie Stores Leasing, LLC

77. Winn Dixie Stores, Inc., non-public Florida corporation with no parent corporations and no publicly held corporation owns 10% or more of its stock.

78. Winn-Dixie Supermarkets, Inc.

79. Winn-Dixie Warehouse Leasing, LLC

80. World Institute on Disability

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I. ARGUMENT IN REPLY

A. Issue of Effective Communication not Raised in Trial Court

Both Gil and the Brief of *Amici Curiae* filed in support of Appellee (hereinafter referred to as "Gil *Amici*") argue, for the first time in the history of this case, that Winn-Dixie's website is in violation of the ADA because it does not provide effective communication. (Appellee Br. at 19, 28-30; Gil *Amici* Br. at 16-25.) However, this theory was never advanced or litigated below.

Gil alleged and consistently argued that this case was about access, not effective communication. The concept of effective communication within the ADA is in reference to the provision of auxiliary aids and services. *See* 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303(c). Gil, however, has maintained consistently that Winn-Dixie's website itself is the place of public accommodation and that his *access* to that place is blocked, as if there was an architectural barrier to the physical store. But he has never argued or alleged that Winn-Dixie failed to provide him with certain auxiliary aids or services that denied him effective communication.

Gil alleged in his complaint that the website itself was a place of public accommodation and that "[a]s a result of the inaccessibility of [Winn-Dixie's] website and by the barriers to access in its website (when removal of those barriers is readily achievable)," Winn-Dixie's website was in violation of the ADA. (D.E. 1

¶ 66.) In the Pre-Trial Stipulation, Gil argued that, "[a]s alleged in the Complaint, the Website does not comply with the requirements of the ADA and is inaccessible to Gil – a person who is visually impaired. As such, *Gil's inability to access the Website* impedes his full and equal enjoyment of the goods and services offered by Winn-Dixie." (D.E. 34 at 2 (emphasis added).) Gil asserted that a fact to be litigated in this case was "whether Winn-Dixie through its Website has violated the ADA by denying ***access*** to the Website to individuals with disabilities who are visually impaired . . . ." (*Id*. at 5 (emphasis added).) The parties agreed that a legal issue for determination at trial was "[w]hether Winn-Dixie's website is a place of public accommodation under the ADA." (*Id.* at 6.) Yet, the parties did not submit to the trial court at any time that the issue before the court was whether Gil was denied effective communication via the website.

It is clear that this issue cannot be considered now on appeal. As explained previously:

> This Court has "repeatedly held that 'an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court.'" *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994) (quoting *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991)); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1222 n. 8 (11th Cir. 2004) ("The district court was not presented with and did not resolve an equal protection argument based on Surfside's treatment of private clubs and lodges. Therefore, we will not consider this argument on appeal."); *Lovett v. Ray*, 327 F.3d 1181, 1183 (11th Cir. 2003) ("Because he raises that argument for the first time in his reply brief, it is not properly before us."); *Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) ("Arguments raised for the first time on appeal

> are not properly before this Court."); *Nyland v. Moore*, 216 F.3d 1264, 1265 (11th Cir. 2000) (same); *Provenzano v. Singletary*, 148 F.3d 1327, 1329 n. 2 (11th Cir. 1998) (same); *FDIC v. Verex Assurance, Inc*., 3 F.3d 391, 395 (11th Cir. 1993) (same); *Allen v. State of Ala*., 728 F.2d 1384, 1387 (11th Cir. 1984) (same); *Spivey v. Zant*, 661 F.2d 464, 477 (5th Cir. Unit B Nov. 1981)1 (same); *Easter v. Estel*le, 609 F.2d 756, 758–59 (5th Cir. 1980)2 (same). The reason for this prohibition is plain: as a court of appeals, we review claims of judicial error in the trial courts. If we were to regularly address questions—particularly fact-bound issues—that districts court never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.

Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004).

In only five circumstances may an appellate court consider a new issue on appeal:

> First, an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake. Fourth, a federal appellate court is justified in resolving an issue not passed on below ... where the proper resolution is beyond any doubt. Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.

Wright v. Hanna Steel Corp., 270 F.3d 1336, 1342 (11th Cir. 2001) (quoting *Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994) (quoting *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984) (footnotes and internal citations omitted))) (alteration in original). None of those circumstances are present here, particularly because whether the website denies effective communication to

Gil is fact specific question, not a question of law, and it is the appellee raising this issue for the first time on appeal, not the appellant. As Gil failed to raise the issue of effective communication below and it is not an issue being considered before this Court on appeal, it cannot be advanced now as a reason for this Court to affirm the trial court's decision, as such legal and factual arguments were not considered or ruled upon by the trial court. The Court should disregard the arguments of Gil and the Gil *Amici* regarding effective communication.

B. Gil Misapplies the *Rendon* Nexus Analysis

Gil asserts that this Court, via *Rendon v. Valleycrest Prods.*, 294 F.3d 1279 (11th Cir. 2002), has already determined, in essence, that websites are places of public accommodation. (Appellee Br. at 20.) Winn-Dixie submits that Gil misapprehends the reasoning behind *Rendon* and the nexus theory articulated in that decision. As stated in Winn-Dixie's initial brief, *Rendon* did not expand the ADA's definition of places of public accommodation to apply to virtual, non-physical spaces. *See Rendon*, 294 F.3d at 1285-86. *Rendon* held that a place of public accommodation may not impose intangible barriers that would deny a disabled person access to the goods and services found at the physical location of the place of public accommodation. It did not, however, hold that the intangible, virtual space itself becomes the place of public accommodation. "In the absence of allegations that [a plaintiff's] inability to use [a website] impedes his access to one of

Defendant's physical locations," an ADA Title III claim alleged only inaccessibility of the website must fail. *See Haynes v. Interbond Corp. of Am.*, No. 17-CIV-61074, 2017 WL 4863085, at *5 (S.D. Fla. Oct. 16, 2017). Gil made no such allegations and the evidence at trial bore out that the website, whether it exists or not, created no barrier to Gil's access to Winn-Dixie's physical locations or any of its goods and services.

C. Congressional and Executive Agency Deference

1. Legislative Intent Cannot be Gleaned from Post-Passage Observations

Gil next argues that Congress intended for the ADA to apply to websites because Congress intended to the ADA to be responsive to future changes in technology. (Appellee Br. at 19, 23-26.) In support of this premise, Gil cites to a single sentence in a 1990 United States House of Representatives Report on the ADA's original passage and legislative observations 20 years after the passage of the ADA.

First, any commentary or observations after the passage of the ADA cannot be considered in construing legislative intent. "In trying to learn [legislative] intent by examining the legislative history of a statute, [the courts] look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments whether accepted or rejected and the remarks in debate preceding passage." *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980).

Legislative commentary does not evidence legislative intent because it is not legislative history. *See id*. at 1082; *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); *United Airlines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977), superseded by statute on other grounds as recognized in *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 n.7 (2004). "Legislative observations [made] years after passage of [a law] are in no sense part of the legislative history." *McMann*, 434 U.S. at 200 n.7.

Second, the House Report reference to an information exchange, specifically that the ADA "should keep pace with the rapidly changing technology of the times," was in reference to auxiliary aids and services, not in reference to expanding the definition of places of public accommodation. *See* H.R. REP. 101-485, 108, 1990 U.S.C.C.A.N. 303, 391 (1990). "The Committee wishe[d] to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations *to provide auxiliary aids and services* in the future which today would not be required because they would be held to impose undue burdens on such entities." *Id.* (emphasis added).

> For example, auxiliary aids and services for blind persons include both readers and the provision of brailled documents (see below). A restaurant would not be required to provide menus in braille if it provided a waiter or other person who was willing to read the menu. Similarly, a bookstore need not braille its price tags, stock brailled books, or lower all its shelves so that a person who uses a wheelchair

> can reach all the books. Rather, a salesperson can tell the blind person how much an item costs, make a special order of brailled books, and reach the books that are out of the reach of the person who uses a wheelchair.

Id.

As stated previously, the case that was litigated below was about access to a place of public accommodation, not about the alleged failure to provide auxiliary aids and services once Gil had entered the place of public of accommodation. Accordingly, congressional commentary regarding the provision of auxiliary aids and services should not be looked to for evidence that Congress intended for the ADA to apply to Internet websites as places of public accommodation.

2. Deference to Agency Interpretation is Not Required

Gil and the Gil *Amici* also argue that this Court should defer to the DOJ's "long history of guidance" interpreting Title III to find that websites are places of public accommodation under the ADA. (Appellee Br. at 26-27; Gil *Amici* Br. at 18.) In essence, Gil asks this Court to apply a statutory construction analysis to the ADA and defer to the DOJ's previously stated interpretation. In support of this argument for agency deference, Gil cites to DOJ congressional testimony and amicus briefs submitted after the passage of the ADA in other unrelated litigation. (Appellee Br. at 26-27; Gil *Amici* Br. at 18.) The Court is not required to, and should not, give deference to any of these informal statements that Gil presents as controlling.

Although courts may give some deference to an agency's construction of a statute, "it 'cannot be argued that such an [agency] interpretation is controlling.'" *Frank Diehl Farms v. Sec'y of Labor*, 696 F.2d 1325, 1330 (11th Cir. 1983) (quoting *Brennan v. Gen. Tel. Co.*, 488 F.2d 157 (5th Cir.1973)). While an executive agency's interpretation of its own ambiguous regulation must be given controlling weight unless clearly erroneous or inconsistent with the regulation or statute, when the language to be interpreted is from Congress, "[t]he court remains the final authority on issues of statutory construction and cannot abdicate its ultimate responsibility to construe the language employed by Congress." *Id*. at 1331 (internal citations omitted); *Auer v. Robinson*, 519 U.S. 452, 461 (1997). Reviewing courts should not blindly defer to agency interpretations and that the amount of deference warranted in a particular case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control." *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

In Gil's Initial Brief, Gil refers to a letter from the Assistant Attorney General to Senator Tom Harkin in September 1996[1] and statements made at a hearing before the Subcommittee of the Constitution of the House Committee on the Judiciary in

[1] Letter from Deval L. Patrick, Assistant Att'y Gen., to Senator Tom Harkin (Sept. 9, 1996), available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/tal712.txt.

2000[2] as evidence of the DOJ's interpretation that Title III applies to Internet websites and advocates deference to that purported guidance. These statements do not qualify as either a regulation or an agency opinion. Gil also cites to briefs submitted by the DOJ as Amicus Curiae in other litigation. Clearly, these do not qualify as regulation or formal agency opinions as well.

These informal statements by the DOJ should not be given the same weight as a formal agency opinion or regulation, particularly where the DOJ has readily admitted that it is unsure if its prior opinion that the ADA applies to website is legally correct. Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43464 (proposed July 26, 2010). Moreover, the DOJ has never promulgated actual regulations concerning websites and, to date, has no apparent intention of doing so. On December 26, 2017, the DOJ formally withdrew the ANPR concerning the accessibility of Web information for public accommodations. Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg 60932 (Dec. 26, 2017). In withdrawing the ANPR, the DOJ also states that "[s]uch

[2] Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong., 2d Sess. 65 (2000), available at http://commdocs.house.gov/committees/judiciary/hju65010.000/hju65010_0f.htm.

ANPRMs had no force or effect of law, and no party should rely upon them as presenting the Department of Justice's position on these issues." 82 Fed. Reg 60933. As the DOJ itself has retreated from its prior position that the ADA applies to Internet websites, the Court should not afford any deference to the DOJ's prior statements considering the applicability of the ADA to Internet websites in this case.

D. The Injunction Does not Give Specificity or Sufficient Notice

1. The Injunction Does Not Provide Specificity

Gil admits that an injunction needs to provide explicit notice of what precisely is required in order for it to meet the proper standards for an injunction. The trial court's injunction, however, does not provide that explicit notice and Gil misconstrues Winn-Dixie's objection to the Injunction.

Winn-Dixie does not take issue with WCAG 2.0 as a general, voluntary guideline for web developers. However, the trial court's injunction effectively turns those voluntary guidelines into the force of law without specifying the requisite degree of compliance required. The trial court ordered Winn-Dixie to "adopt and implement a Web Accessibility Policy which ensures that its website conforms with the WCAG 2.0 criteria" and to require its third party website vendors to conform to the same criteria. (D.E. 67 ¶¶ 3-4.) Gil's own expert, however, testified that no website is ever perfectly in compliance with WCAG 2.0 criteria. (D.E. 64 49:23-50:6.) Thus, the trial court's general statement requiring conformity with the WCAG

2.0 guidelines would impose unspecified and boundless requirements on Winn-Dixie. The guidelines themselves are relatively arbitrary and do not specify standards to achieve 100% compliance, or even 80% compliance with WCAG 2.0. Without specificity, Winn-Dixie will be left in the position of constant fear that even a minor variation from WCAG 2.0 standards could open it up to contempt proceedings.

The lack of requisite specifications, exemplifies the very reason why Congress, not the trial court, should be left to draft and decide the requisite technical standards under the ADA. At this juncture, there has been no such direction from the legislative branch, but courts should not create their own ad hoc pronouncements, where accessibility standards may change from case to case. It is not the province of the courts to create law where Congress and the DOJ have failed to act.

2. The Injunction does Not Provide Sufficient Notice

Gil argues that the lack of website-specific regulations does not act as bar to the entry of an injunction requiring a business to modify its website. Gil then cites to several cases for the proposition "that technical standards are not required to carry out the mandates of the ADA." (Appellee Br. at 36-37.)

The cases cited by Gil are not analogous to this case, as each of the cases relied upon involved situations where the absence of technically specific regulations was not determinative, because the scope and applicability of the underlying statute

was not in doubt. For example, *Reich v. Montana Sulphur & Chem. Co*., 32 F.3d 440 (9th Cir. 1994), concerned the enforcement of an Occupational Safety & Health Administration ("OSHA") subpoena issued in the course of a workplace safety investigation of a chemical manufacturer and welding safety. The chemical manufacturer asserted that OSHA did not have authority to issue the subpoena because there are no OSHA-issued regulations concerning welding. *Reich*, 32 F.3d at 442-45. The chemical manufacturer asserted that in the absence of such welding standards, it could not be violation of any regulations. *Id.* at 445. The first inquiry by a court in reviewing the propriety of an agency subpoena is whether Congress granted that agency the authority to investigate. *Id.* at 444. The court found that "the regulations also do not define the entire universe of OSHA's investigatory authority" because each employer has a general duty to "'furnish to each of his employees employment and a place of employment which are free from recognized hazards'" and OSHA has broad investigatory powers to ensure employers are meeting this general duty. *Id.* (quoting 29 U.S.C. § 654(a)(1)).

In the context of the ADA, the cases cited for this proposition all concerned areas where the statute or the regulations in question actually mandated the accessibility feature. *See, e.g.*, *Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014) (finding that the Title II of the ADA requires local governments to maintain accessible on-street public parking and that regulations existed concerning the

same); *Access Now, Inc. v. Holland Am. Line-Westours, Inc.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001) (finding absence of regulations specific to cruise ships did not bar action from proceeding where law was settled that public accommodations on cruise ships are covered by the ADA); *Scharff v. County of Nassau*, No. 10 CV 4208 DRH AKT, 2014 WL 2454639 (E.D.N.Y. June 2, 2014) (finding ADA requires local governments to provide pedestrian crossing signals even if crossing signals are not specifically included in the definition of "facilities"). However, in none of these cases was it in doubt as to whether the ADA applied to the entity or facility in question or that the alterations were not required.

In this case, however, it is far from settled that Title III of the ADA applies to Internet websites. In fact, as discussed in the Appellant's Initial Brief, the weight of the case law indicates that the ADA, as currently written, does not apply to Internet websites. The absence of DOJ regulations, generally or technically, only underscores and emphasizes this conclusion. Where the DOJ has failed to act and Congress has not specified that Internet websites are covered by the ADA, the courts should not step in to fill that void.

E. Gil Lacks Standing

Gil argues that he submitted sufficient evidence to the trial court to support standing. He asserts that the evidence shows that he suffered an injury-in-fact "when he was unable to avail himself of the goods and services on the Website. . . ."

(Appellee Br. at 39-41.) Gil further clams that his testimony shows that he was deterred from patronizing Winn-Dixie's physical stores because of the alleged inaccessibility of the website and that he will return to patronizing Winn-Dixie's physical stores when the website is altered. (*Id.* at 41.) Gil asserts that this intent to return also establishes causation. (*Id.* at 42-43.)

However, the very nature of Gil's argument evidences that he lacks the requisite standing to maintain his claim, as he lacks the concrete injury required by *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. Gil readily admits that the website was not preventing his physical access to the stores and the goods and services contained therein. In essence, Gil's refusal to patronize Winn-Dixie's stores is a voluntary boycott because he is unhappy with the website. The website is not blocking Gil's access to Winn-Dixie's stores, goods or services, a fact born out at trial. Gil's voluntary cessation of patronizing Winn-Dixie's stores does not and cannot suffice as the concrete injury-in-fact required for Article III standing. Therefore, Gil's claim must fail.

II. CONCLUSION

It is clear that websites, particularly such as Winn-Dixie's where goods and

services are not directly sold to the consumer on the website, are not places of public accommodation under the ADA. Congress has not expanded the ADA to include Internet websites and the DOJ has not promulgated regulations to govern Internet websites. Even under the nexus theory, as articulated in *Rendon*, an intangible website does not become a place of accommodation by virtue of having an association to a physical location. In order to state or prove an ADA claim under the nexus theory, Gil must have shown that Winn-Dixie's website acted as a barrier to his access to Winn-Dixie's brick-and-mortar stores and the goods and services contained therein. This he failed to do, as he enjoyed full access and enjoyment of Winn-Dixie for sixteen years before he learned of the website. For these reasons alone, Gil's ADA claim must fail. Further, in the absence of any statute or regulation pertaining to websites, the lower court's injunction amounts to legislating from the bench, creating new rights and standards that are the province of Congress.

For the reasons stated in Winn-Dixie's Initial Brief and within this Reply, the district court's denial of judgment on the pleadings in favor of Winn-Dixie and judgment awarded in favor of Gil should be reversed and judgment awarded in favor of Winn-Dixie.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH, LLP
50 N. Laura Street
41st Floor

Jacksonville, Florida 32202
Tel: (904) 665-3600
Fax: (904) 665-3699

By: s/Susan V. Warner
Susan V. Warner
Florida Bar No. 38205
e-mail: susan.warner@nelsonmullins.com

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 3,877 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

s/Susan V. Warner
Susan V. Warner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this **27th** day of December, 2017 upon:

Joshua M. Entin, Esq.
josh@entinlaw.com
Richard Della Fera, Esquire
Richard@entinlaw.com
Candace D. Cronan, Esq.
candace@entinlaw.com

Scott R. Dinin, Esq.
Scott R. Dinin, P.A.
4200 NW 7th Avenue
Miami, Florida 33127
Tel: (786) 431-1333
inbox@dininlaw.com

Entin & Della Fera, P.A.
633 S. Andrews Avenue, Suite 500
Ft. Lauderdale, Florida 33301
Tel: (954) 761-7201
Attorneys for Plaintiff

Attorney for Plaintiff

Carol C. Lumpkin, Esq.
carol.lumpkin@klgates.com
Stephanie N. Moot, Esq.
stephanie.moot@klgates.com
K&L GATES LLP
Southeast Financial Center
200 South Biscayne Blvd., Suite 3900
Miami, Florida 33131-2399
Phone: (305) 539-3900
Fax: (305) 358-7095
Counsel for Amicus Curiae, The Florida Justice Reform Institute

Kevin W. Shaughnessy, Esq.
kshaughnessy@bakerlaw.com
Joyce Ackerbaum Cox, Esq.
jacox@bakerlaw.coln
BAKER & HOSTETLER, LLP
SunTrust Center, Suite 2300
200 South Orange Avenue
Orlando, Florida 32801
Tel: (407) 649-4000
Counsel for Amici Curiae in Support of Appellant

Karen R. Harned, Esq.
Elizabeth Milito, Esq.
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Washington, D.C. 20004
(202) 406-4443
Counsel for Amicus Curiae National Federation of Independent Business Small Business Legal Center

Justin Vermuth, Esq.
AMERICAN RESORT DEVELOPERS ASSOCIATION
1201 15th Street, NW
Washington, D.C. 20005
Counsel for Amicus Curiae American Resort Developers Association

Angelo I. Amador, Esq.
RESTAURANT LAW CENTER
2055 L Street, NW
Washington, D.C. 20036
(202) 331-5913
Counsel for Amicus Curiae Restaurant Law Center

Gregory P. Care
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
Tel: (410) 962-1030
gpc@browngold.com
Counsel for Amici in Support of Appellee

Warren Postman, Esq.
Janet Galeria, Esq.
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337
Counsel for Amicus Curiae Chamber of Commerce of the United States of America

s/Susan V. Warner
Susan V. Warner