Appeal No. 17-13467

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WINN-DIXIE STORES, INC.,

Defendant-Appellant,

v.

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

BRIEF OF THE RESTAURANT LAW CENTER, AMERICAN BANKERS ASSOCIATION, AMERICAN HOTEL & LODGING ASSOCIATION, AMERICAN RESORT DEVELOPMENT ASSOCIATION, ASIAN AMERICAN HOTEL OWNERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL ASSOCIATION OF THEATRE OWNERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESSES, NATIONAL MULTIFAMILY HOUSING COUNCIL, AND NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT-DEFENDANT WINN-DIXIE STORES, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, *Amici* disclose the following:

1. Ackerbaum Cox, Esq., Joyce
2. American Bankers Association
3. American Hotel & Lodging Association
4. American Resort Development Association
5. Amador, Esq., Angelo I.
6. Asian American Hotel Owners Association
7. ARP Ballentine, LLC
8. ARP Chickamauga, LLC
9. ARP Hartsville LLC
10. ARP James Island LLC
11. ARP Moonville LLC
12. ARP Morganton LLC
13. ARP Winston Salem LLC

14. Baker & Hostetler, LLP

15. BI-LO Finance Corp.

16. BI-LO Holding Finance, Inc.

17. BI-LO Holding Finance, LLC

18. BI-LO Holdings Foundation, Inc.

19. BI-LO Holding, LLC

20. BI-LO, LLC

21. Chamber of Commerce of the United States of America

22. Cronan, Esq., Candace Diane

23. Della Fera, Esq., Richard

24. Dinin, Esq., Scott R.

25. District Judge Robert N. Scola, Jr.

26. Dixie Spirits Florida, LLC

27. Dixie Spirits, Inc.

28. Entin & Della Fera, P.A.

29. Entin, Esq., Joshua M.

30. Galeria, Esq., Janet

31. Gil, Juan Carlos

32. Harned, Esq., Karen R.

33. International Council of Shopping Centers

34. Milito, Esq., Elizabeth

35. National Association of Convenience Stores

36. National Association of Realtors

37. National Association of Theatre Owners

38. National Federation of Independent Businesses

39. National Multifamily Housing Council

40. National Retail Federation

41. Nelson Mullins Riley & Scarborough LLP

42. Opal Holdings, LLC

43. Postman, Esq., Warren

44. Samson Merger Sub, LLC

45. Scott R. Dinin, P.A.

46. Shaughnessy, Esq., Kevin W.

47. Southeastern Grocers, LLC

48. Vermuth, Justin, Esq.

49. Warner, Esq., Susan V.

50. We Care Fund, Inc.

51. Winn-Dixie Logistics, LLC

52. Winn-Dixie Montgomery, LLC

53. Winn-Dixie Montgomery Leasing, LLC

54. Winn-Dixie Properties, LLC

55. Winn-Dixie Raleigh Leasing, LLC

56. Winn-Dixie Raleigh, LLC

57. Winn-Dixie Stores Leasing, LLC

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

59. Winn-Dixie Supermarkets, Inc.

60. Winn-Dixie Warehouse Leasing, LLC

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STATEMENT OF THE ISSUES

1. Whether Internet websites are places of public accommodation under Title III of the Americans With Disabilities Act.

2. Whether the district court has impermissibly expanded Title III's coverage to include websites.

3. Whether requiring businesses to comply with nonexistent regulations and non-binding private sector guidelines violates basic principles of administrative law and due process.

4. Whether the Web Content Accessibility Guidelines have the force of law or deserve any judicial deference.

INTEREST OF *AMICI CURIAE*

The Restaurant Law Center (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The industry is comprised of over one million restaurants and other foodservice outlets employing about 15 million people. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as this one, through *amicus* briefs on behalf of the industry.

The American Bankers Association (the "ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its millions of employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services, often appears as *amicus curiae* in litigation affecting the banking industry.

The American Hotel and Lodging Association ("AHLA"), founded in 1910, is the sole national association representing all segments of the United States lodging industry, including iconic global brands, hotel owners, REITs, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. Supporting eight million jobs and with over 25,000 properties in membership nationwide, AHLA proudly represents nearly two-thirds of all the hotel rooms available in the United States. The mission of AHLA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AHLA serves the lodging industry by providing representation at the federal, state, and local level in government affairs, education, research, and

communications. AHLA also represents the interests of its members in litigation relating to issues of widespread concern to the lodging industry.

The American Resort Development Association ("ARDA") is the non-profit trade association representing the interests of the time-share and vacation ownership industries. Founded in 1969, ARDA represents more than 700 time-share development and related service corporations. It is the mission of ARDA to foster and promote the growth of the time-share and vacation ownership industry and to serve its members through education, public relations and communications, legislative advocacy, membership development, and ethics enforcement.

The Asian American Hotel Owners Association ("AAHOA") is the largest association of hotel owners in the world. Representing more than 16,500 members nationwide, AAHOA members own nearly one out of every two hotels in the United States. Collectively, AAHOA members own over 22,000 properties, employ over 600,000 workers and account for nearly $10 billion in annual payroll. As small business owners, AAHOA members consistently contribute to the economy through hospitality, real estate development, jobs creation, and community investment.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region

of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The International Council of Shopping Centers ("ICSC"), founded in 1957, is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, brokers, academics, and public officials. ICSC members also include attorneys from around the country who represent both owners/landlords and retail tenants of shopping centers and are keenly aware of the issues shopping centers face. The shopping center industry is essential to economic development and opportunity. Shopping centers are a significant job creator, driver of GDP, and critical revenue source for the communities they serve through the collection of sales taxes and the payment of property taxes. These taxes fund important municipal services like firefighters, police officers, school services, and infrastructure like roadways and parks. Shopping centers are not only fiscal engines however; they are integral to the social fabric of their communities and provide support to local philanthropic and other community endeavors and events. ICSC has 5,099 members in Florida. ICSC members own 10,858 shopping centers in the state employing over 898,290 people.

The National Association of Convenience Stores ("NACS") is an international trade association that represents both the convenience and fuel retailing industries, with more than 2,200 retail and 1,800 supplier company members. The United States convenience store industry has more than 154,000 stores across the United States and had nearly $550 billion in sales in 2016. About 63 percent of the stores in the industry are owned by single-store operators.

The National Association of REALTORS® ("NAR") is the country's largest trade association with over one million members. NAR's membership is composed of residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in all aspects of the real estate industry. NAR's constituents also include approximately 1100 local associations of REALTORS® and 52 state associations of REALTORS®, as well as some 800 multiple listing services owned and operated by one or more local REALTOR® associations. NAR is the leader in developing standards for efficient, effective, and ethical real estate business practices.

The National Association of Theatre Owners ("NATO") is the national trade association of the motion picture theater industry. Its members operate over 33,000 motion picture screens located in all 50 states. NATO's membership includes the largest theater chains in the world as well as hundreds of independent theater owners.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The National Multifamily Housing Council ("NMHC") is the leadership of the trillion-dollar apartment industry. NMHC brings together the prominent owners, managers and developers who help create thriving communities by providing apartment homes for 35 million Americans. NMHC provides a forum for insight, advocacy and action that enables both members and the communities they help build to thrive.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Many of *Amici's* members operate websites in conjunction with their businesses. The members utilize these websites in a variety of ways and for a host of different reasons. Some websites simply provide information about a business' location and hours of operation and, in doing so, only reiterate information available elsewhere (i.e., by calling the business or visiting in person). Other websites function more as advertisements, mirroring ads printed in catalogues or shown on television. Still other websites are more interactive in nature, allowing visitors to purchase products or services online, submit questions to customer service departments, or communicate with fellow visitors on discussion forums. Some of these websites are static, whereas others change constantly. Moreover, many of these websites include content created and controlled by (or links to content created and controlled by) third parties like Google, YouTube, and Facebook. In sum, the websites operated by *Amici's* members are diverse in both form and functionality.

Together, *Amici* vigorously support the goals of Title III of the Americans With Disabilities Act ("Title III" or the "ADA"). However, a series of court decisions – including the decision that forms the basis of this appeal – have created significant confusion regarding the circumstances under which websites may fall within Title III's reach and, more specifically, what measures businesses must take to ensure their websites meet any supposed accessibility requirements that exist under the law. If this Court affirms the lower court's decision at issue on this appeal, *Amici's* members will be forced to do the impossible and try to "comply" with nonexistent, undefined, and potentially ever-changing standards of website accessibility. *Amici* have a strong interest in preventing this result.

STATEMENT OF AUTHORITY TO FILE

With such interest in mind, *Amici* file this Brief in Support of the Appellant with consent of both the Appellant, Winn-Dixie Stores, Inc., and the Appellee, Juan Carlos Gil.

This Brief was not authored, in whole or in part, by either Gil or Winn-Dixie's counsel, nor did either Party or counsel for either Party contribute money intended to fund the preparing or submitting of this Brief. No person other than *Amici* contributed money intended to fund the preparing or submitting of the Brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The lower court's decision in *Gil v. Winn-Dixie Stores, Inc.*, No. CV 16-23020-CIV, 2017 WL 2547242 (S.D. Fla. June 12, 2017), forces businesses into the untenable situation of having to *guess* what the law requires in regards to website accessibility. As a result of *Gil* (and similar decisions across the country), businesses are now subjected to repeated lawsuits concerning their alleged "non-compliance" with non-statutory, non-regulatory, and therefore non-binding accessibility standards.

In *Gil*, the Southern District of Florida held that the alleged inaccessibility of Winn-Dixie's website denied Juan Carlos Gil, a visually impaired individual, "full and equal access" to the goods and services of a "place of public accommodation" in violation of Title III of the ADA. *Id.* at *8. The district court's decision is inconsistent with the actual language of Title III and its implementing regulations, which limit the term "place of public accommodation" to *physical* establishments. The Southern District of Florida and various other courts across the country, ignoring the language of the statute, have begun impermissibly expanding Title III's application to non-physical "spaces" like websites. In doing so, these courts have established a variety of inconsistent standards imposing often shifting and unpredictable obligations on businesses.

To add to this uncertainty, these overreaching courts have failed to point to any discernable or clearly-defined regulations or other guidelines governing website accessibility. In truth, no binding guidelines exist. As a result, it is impossible for businesses to know what actions they must take to ensure their websites meet whatever obligations – if any – are required by Title III. Businesses can try – and many have tried – in good faith to modify their websites to allow access to the disabled, but the lack of definitive regulations and agency guidance means there is no safe haven for compliance. Indeed, such uncertainty not only violates basic principles of administrative law, but also contravenes fundamental notions of due process, as no definitive guidance instructs businesses how to operate ADA-compliant websites.

Accordingly, *Amici* respectfully urge this Court to reverse the decision below and to hold that imposing liability for Winn-Dixie's alleged failure to abide by certain accessibility standards would violate due process.

ARGUMENT

I. By Extending Title III To Websites, Courts Ignore The Statutory Language Of Title III And Create A Patchwork Of Inconsistent Obligations For Nationwide Businesses.

A. Under The Statutory Language of Title III, Websites Are Not "Places Of Public Accommodation."

Title III provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities,

privileges, advantages, or accommodations of any *place* of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). While the statute does not define the term "place," the term is best read as referring to "a physical environment." *See* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/place (last visited September 29, 2017) (defining "place" as "a physical environment;" "a particular region, center of population, or location to visit;" or "a building, part of a building, or area occupied").

Title III does, however, offer a clear and detailed definition of the term "public accommodation." 42 U.S.C. § 12181(7) (listing twelve distinct categories of physical, brick-and-mortar establishments open to the public at a specific location). Moreover, the ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities not only makes clear that a "place of public accommodation" is limited to the twelve categories listed in the statute, but also equates the word "place" with physical "facilities":

> Can a facility be considered a place of public accommodation if it does not fall under one of these 12 categories? No, the 12 categories are an exhaustive list. However, within each category the examples given are just illustrations. For example, the category "sales or rental establishments" would include many facilities other than those specifically listed, such as video stores, carpet showrooms, and athletic equipment stores.

ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, ADA.GOV, https://www.ada.gov/taman3.html (last visited September 29, 2017) (equating the word "place" with physical "facilities").

Title III's statutory language reflects Congress's intent to limit the statute's reach to physical establishments. Had Congress intended Title III to apply to all businesses offering goods and services to the public, it would not have limited the defined list of public accommodations to only those offered at a "place." Following this basic logic, both the Third and Sixth Circuits have refused to extend Title III to non-physical locations or spaces. *See Ford v. Schering–Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) ("[W]e do not find…the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning."); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–13 (6th Cir. 1997) ("As is evident by § 12187(7), a public accommodation is a physical place…"); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (explaining that places of public accommodation are limited to physical "facilities").

The regulations issued by the DOJ to implement Title III reinforce the fact that places of public accommodation must be physical in nature. The regulations define the term "place of public accommodation" as "a facility," which is further defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104. This language makes clear that places

of public accommodation are only those spaces accessible at a specific physical location.[1]

A website, by contrast, is a purely virtual space that one "accesses" by requesting a web server to transmit certain data to his or her computer from another host source. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) (explaining Internet is "unique medium – known to its users as 'cyberspace' – located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet"). Websites are not located in any particular physical place or facility, and are thus not places of public accommodation under Title III. *See generally Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 544 (E.D. Va. 2003) ("[A]lthough a chat room or other online forum might be referred to metaphorically as a 'location' or 'place,' it lacks the physical presence necessary to constitute a *place*...") (emphasis added).

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[1] Despite the clear meaning of its own definition, the DOJ has noted – in statements not subject to notice-and-comment rulemaking – that "[a]lthough the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations." 28 C.F.R. § 36, Appendix A. Such informal statements are not entitled to the force and effect of law. *See infra* Section II.B. Regardless, the DOJ has been inconsistent in its own "position" and has admitted that there is "uncertainty regarding the applicability of the ADA to Web sites." *See Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43464 (proposed July 26, 2010); *see also* 28 C.F.R. § 36, Appendix A (explaining businesses may meet website accessibility obligations "by providing an accessible alternative for individuals to enjoy its goods and services, such as a staffed telephone information line").

B. Courts Expanding Title III's Coverage To Include Websites Do So Using A Variety Of Inconsistent Legal Analyses, Creating Unworkable Obligations For Businesses.

As described above, Title III and its implementing regulations, as currently written, do not apply to websites. *See Earll v. eBay, Inc.*, No. 5:11–cv–00262–JF (HRL), 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (holding that websites are not places of public accommodation under Title III). While Congress may "amend the ADA to define a website as a place of public accommodation," it has not yet done so (despite having amended the ADA since its passage in 1990). *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-CV-23801, 2017 WL 1957182, at *4, n.3 (S.D. Fla. Feb. 2, 2017). By contrast, courts, having no legislative power, "cannot create law where none exists." *Id.*; *see also J.H. by & through Holman v. Just for Kids, Inc.*, 248 F. Supp. 3d 1210 (D. Utah 2017) ("[T]he law's remedial purpose cannot overcome its plain meaning as written."); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002) ("[C]ourts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights…"); *Rome v. MTA/New York City Transit*, No. 97-CV-2945 (JG), 1997 WL 1048908, at *1 (E.D.N.Y. Nov. 18, 1997) ("[W]hile such reasoning [including non-physical spaces as places of public accommodation] may have a certain logic to it, it is contrary to the statute."). Despite this limit on the scope of

the ADA, some courts have begun expanding Title III's reach to include websites. In doing so, however, these courts have utilized vastly different approaches.

1. The "Spirit of the Law" Approach

Some courts – including those in the First and Seventh Circuits – construe the language of Title III broadly "to effectuate its [remedial] purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (internal quotation marks and citation removed). According to these courts, the "core meaning of Title III's anti-discrimination provision is that the owner or operator of a store, hotel, restaurant, dentist's office, theater, website, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and using the facility in the same way that nondisabled persons do." *Doe v. Mutual Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). Courts utilizing this "spirit of the law" approach consider not whether businesses offer goods or services to the public *at a physical place of public accommodation*, but instead ask whether businesses offer goods or services to the public via *any* platform. Using this analysis, several courts have held that purely online businesses – those with no connection to any physical storefront, theater, or any other type of "public accommodation" listed in Section 12181(7) – are nonetheless places of public accommodation covered under Title III.

These courts are focused on achieving a particular result, rather than effectuating the clear text of the ADA. *See Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) ("[E]xcluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA…'") (quoting *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994)).

2. The "Nexus" Approach

Other courts – including the Ninth and Eleventh Circuits – utilize a narrower approach, holding that Title III imposes obligations on non-physical spaces or processes only when a sufficient "nexus" exists between the non-physical space or process in question and some other concrete, physical space. *See Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279, 1280-81, 1285 (11th Cir. 2002) (looking to nexus between remote technological eligibility process and access to "the privilege of competing in a contest held *in a concrete space*") (emphasis added); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000) (reading Title III to "suggest[] that some connection between the good or service complained of and an actual physical place is required").

Under this approach, a business' website runs afoul of Title III *only* when it impedes a disabled individual's "full and equal enjoyment" of the goods and services offered at that business' physical establishment(s). *See National Fed'n of the Blind*

v. Target Corp., 452 F. Supp. 2d 946, 954-955 (N.D. Cal. 2006) (holding plaintiffs had alleged sufficient facts to state claim under Title III when plaintiffs "alleged the inaccessibility of Target.com denie[d] the blind the ability to enjoy the services *of Target stores*") (emphasis added). In *Gil*, the Southern District of Florida seemingly expanded upon this approach in holding that Winn-Dixie's website *itself* was a service of a physical place of public accommodation and therefore must be accessible. *Gil*, 2017 WL 2547242, at *7.

If, on the other hand, a website has no effect on a disabled individual's ability to access the goods or services available at a related physical establishment, the website cannot form the basis of a Title III claim. *See Gomez*, 2017 WL 1957182, at *4 ("Because Plaintiff has not alleged that Defendant's website impeded his personal use of [Defendant's] retail locations, his ADA claim must be dismissed."); *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13–1387–DOC (RNBx), 2014 WL 1920751, at *8–9 (C.D. Cal. May 14, 2014) (holding website was not place of public accommodation because there was not sufficient nexus between website and defendant's physical kiosks); *Young v. Facebook*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) ("Facebook operates only in cyberspace, and is thus not a place of public accommodation… Although Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which [the plaintiff] sought access are offered to the public."); *Ouellette v. Viacom*, No. CV 10-133-M-

DWM-JCL, 2011 WL 1882780, at *4-5 (D. Mont. Mar. 31, 2011) (holding online theater websites, by themselves, were not physical places and were not sufficiently connected to any physical structure), *report and recommendation adopted*, No. CV 10-133-M-DWM-JCL, 2011 WL 1883190 (D. Mont. May 17, 2011); *Access Now*, 227 F. Supp. 2d at 1319-20 (rejecting application of Title III to website because it was not physical location nor means of accessing concrete space).

3. Lessons From *Netflix*

As a result of the inconsistent legal analyses courts have used in assessing whether a particular website falls within the purview of Title III, entities with a broad geographic presence now face exposure to liability based on a patchwork of disparate theories based upon where a plaintiff lives or in what geographic forum a claim is brought. Two cases involving the online streaming service Netflix – in which district courts on opposite sides of the country reached different results – are illustrative of this point. In *National Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196 (D. Mass. 2012), the United States District Court for the District of Massachusetts (following the "spirit of the law" approach) held that Netflix's video streaming website *is* a place of public accommodation under Title III, even though its web-based services are unrelated to any physical space. However, in *Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012), the United States District Court for the Northern District of California (following the "nexus" approach) held that

Netflix's online streaming service *is not* a place of public accommodation within the meaning of Title III because Netflix's services are *only* available online.

These *Netflix* decisions – under which the same website is a place of public accommodation in one judicial district but is not in another – demonstrate the untenable reality that businesses now face in determining their obligations, if any, under Title III. Under this legal landscape, businesses who operate nationally or across several states but maintain one website (including many of *Amici's* members) must navigate a messy patchwork quilt of inconsistent obligations under which it is impossible to predict which judicial districts will impose Title III liability and which will not. This unworkable system comes directly from the fact that Title III – as currently written – simply does not speak to website accessibility. While *Amici* do not doubt courts' intentions in stretching Title III to include websites, these courts are impermissibly attempting to rewrite the law – and are doing so in vastly different ways. Such inconsistencies cannot continue.

II. Requiring Businesses To Comply With Nonexistent Guidelines Violates Basic Principles Of Administrative Law And Due Process.

A. The Department Of Justice Has Not Yet Implemented Guidelines Addressing Website Accessibility For Private Businesses.

In order to make a claim for disability discrimination under Title III, a plaintiff must allege that the defendant engaged in one of the specifically prohibited actions described in the DOJ's implementing regulations. *See PGA Tour. Inc. v. Martin*,

532 U.S. 661, 681-82 (2001) (explaining that whether defendant has engaged in unlawful discrimination under Title III depends on whether defendant committed an act specifically prohibited by regulation). While the statute itself lists the broad categories of discrimination that are unlawful under Title III, it does not proscribe or mandate specific conduct. Instead, Title III requires the DOJ to issue implementing regulations that establish accessibility standards and put covered entities on notice of their specific obligations under the law. 42 U.S.C. § 12186(b); *see also* 28 C.F.R. § 36.101 (describing purpose of DOJ's regulations). The DOJ has enacted such regulations, which delineate the particular obligations covered entities must fulfill or meet in order to ensure full access is provided to all individuals. Under this framework, absent a violation of a specific guideline established in the regulations, there can be no violation of Title III's general prohibitions. *See United States v. Nat'l Amusements, Inc.*, 180 F. Supp. 2d 251, 258-260 (D. Mass. 2001) ("The Attorney General argues that because the Cinemas' theaters are in violation of these general regulatory provisions, he should be able to state a claim…absent a violation of a specific regulation…. The Court disagrees."). The existing regulations currently contain *no* provisions governing the accessibility of websites or online content. In fact, in 2010, the DOJ admitted as much, explaining that it had been "unable to issue specific regulatory language on Website accessibility." 28 C.F.R. § 36, Appendix A.

In July of 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking ("ANPR"), in which it explained that it was "*considering* revising the regulations implementing title III of the ADA in order *to establish requirements* for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web ('Web') accessible to individuals with disabilities." *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43460 (proposed July 26, 2010) (emphasis added). The ANPR did not set forth any proposed regulations or guidelines but simply indicated the DOJ's desire to eradicate "remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III" and "make clear to entities covered by the ADA their obligations to make their Web sites accessible." 75 Fed. Reg. 43464. To this end, the ANPR explicitly explains that the DOJ has yet to adopt regulations regarding website accessibility and even questions whether the agency should adopt regulations in the first place.

Despite issuing the ANPR and collecting comments from the public nearly seven years ago, the DOJ has yet to take the next step in enacting an official regulation addressing website accessibility – issuing a Notice of Proposed Rulemaking ("NPRM"). After several delays, the DOJ indicated, under the Obama Administration, that it did not expect to publish a related NPRM until 2018 at the

earliest. More recently, the Trump Administration put the ANPR on its list of "inactive" regulations. *2017 Inactive Regulations*, REGINFO.GOV, https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf (last visited October 4, 2017). Thus, while the ANPR may be indicative of the DOJ's plans to promulgate binding regulations *in the future*, it in no way imposes *present* obligations on places of public accommodation.

Given that no regulations currently impose clearly-defined obligations regarding website accessibility, businesses are simply not on notice of what Title III may require of them. This in mind, requiring businesses to comply with some undefined accessibility requirements violates fundamental principles of fairness and due process. *See Robles v. Dominos Pizza LLC*, No. CV1606599SJOSPX, 2017 WL 1330216, at *5 (C.D. Cal. Mar. 20, 2017) (dismissing plaintiff's complaint and finding merit in defendant's argument that requiring websites to meet undefined accessibility standards violates due process) (quoting *U.S. v. AMC Entm't, Inc.*, 549 F.3d 760 (9th Cir. 2008)); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."); *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (explaining that "those

regulated by an administrative agency are entitled to know the rules by which the game will be played") (internal quotations omitted), *abrogated on other grounds by Perez v. Mortg. Bankers Ass'n,* 135 S. Ct. 1199 (2015).

B. The Web Content Accessibility Guidelines Do Not Have The Force Of Law.

In an attempt to side-step the absence of applicable regulations addressing website accessibility, the Southern District of Florida explained that "[r]emediation measures in conformity with the WCAG [Web Content Accessibility Guidelines] 2.0 Guidelines will provide Gil and other visually impaired customers the ability to access Winn-Dixie's website." *Gil*, 2017 WL 2547242, at *8. As an initial matter, the WCAG are a set of non-mandatory accessibility guidelines developed by the Web Accessibility Initiative (the "WAI"), a subgroup of the World Wide Web Consortium. The WAI is a private-sector "international community where Member organizations, a full-time staff, and the public work together to develop Web standards." *About W3C*, W3.ORG, https://www.w3.org/Consortium/ (last visited September 29, 2017). The WAI described the initial version of the WCAG as a "reference document for accessibility principles," and the WCAG 2.0 makes clear that its guidelines are merely "recommendations." *Web Content Accessibility Guidelines 1.0*, W3.ORG, https://www.w3.org/TR/WAI-WEBCONTENT/ (last visited September 29, 2017); *Web Content Accessibility Guidelines 2.0*, W3.ORG, https://www.w3.org/TR/WCAG20/ (last visited September 29, 2017). These

disclaimers in mind, the WCAG are merely meant to assist people in understanding the technical tools that may be used to make websites more accessible and do not create binding requirements.

In an appendix published along with the DOJ's 2010 revisions to its implementing regulations, the agency noted that it had not "issue[d] specific regulatory language on Website accessibility" but mentioned that "[a]dditonal guidance is available in the [WCAG]…which are *developed and maintained by* the [WAI]." 28 C.F.R. § 36, Appendix A (emphasis added). Importantly, the fact that the DOJ has referenced the WCAG does not somehow transmute such non-binding guidance into mandatory rules under Title III. Similarly, such "references" are not entitled to any deference. Because the Appendix is more akin to an informal policy statement or guidance document and is in no way an authoritative determination, it does not warrant *Chevron* deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all which lack the force of law – do not warrant *Chevron*-style deference.") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). *Auer* deference is also inappropriate, as any position that the WCAG are mandatory is plainly at odds with the actual language of the regulations themselves, which do not proscribe any website content, templates, or functionality. *See Zhou*

Hua Zhu v. U.S. Atty. Gen., 703 F.3d 1303, 1309 (11th Cir. 2013) (refusing to defer to agency position under *Auer* because such position was "plainly erroneous and inconsistent with the regulation's unambiguous and obvious meaning") (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Finally, the DOJ's passing references are not even entitled to *Skidmore* deference, as the agency has been inconsistent regarding its "position" on website accessibility and has admitted that there is "uncertainty regarding the applicability of the ADA to Web sites." *See* 75 Fed. Reg. 43464; 28 C.F.R. § 36, Appendix A (explaining that places of public accommodation may meet website accessibility obligations "by providing an accessible alternative for individuals to enjoy its goods and services, such as a staffed telephone information line"); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of such a judgment 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.") (emphasis added).

C. Non-Binding Private Sector Accessibility "Recommendations" Do Not Set Clearly Defined Accessibility Standards.

Even if the WCAG were somehow binding, which they are not, it is unclear what steps a business must take to ensure compliance with these "recommendations." The WCAG 2.0 is divided into three different conformance levels – A, AA, and AAA. The criteria for complying with each of the three varying

levels of "success criteria" differ greatly and indicate a different level of accessibility and design feasibility (with AAA being the most accessible but least feasible). Even within the three levels, however, there are various terms or criteria that are vague or subject to different interpretations.

The DOJ has itself acknowledged the difference between the various conformance levels but has not clearly indicated which – if any – level of compliance may be required under Title III. *See* 75 Fed. Reg. 43465 (seeking feedback regarding whether DOJ should adopt WCAG 2.0's Level AA success criteria or should consider adopting another success criteria level). To this end, no court – including the Southern District of Florida – has indicated which level of success criteria is sufficient under Title III.

Under this framework, it is impossible for businesses to know if and when they have ensured sufficient accessibility. If a business takes measures to comply with the WCAG Level A success criteria, a plaintiff may claim that Level AA compliance is required. Once that business complies with Level AA, another plaintiff may insist upon Level AAA. There is no limit to the compliance challenges businesses will face. Even if a business achieves compliance with the WCAG Level AAA success criteria, another private interest group could promulgate another, more

exacting standard of accessibility.[2] This never-ending uncertainty underscores the importance of creating website accessibility guidelines through proper notice-and-comment rulemaking and *not* through litigation. *See Access Now*, 227 F. Supp. 2d at 1318 ("To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."). In order to maintain effective websites in an operationally feasible manner, businesses need – and are entitled to – a uniform set of accessibility guidelines that both put them on notice of their obligations under the law and also clearly define when compliance has been achieved. The WCAG do neither.

CONCLUSION

In urging this Court to overturn the Southern District of Florida's decision in *Gil*, *Amici* do not seek to undermine the ADA and its important purpose. Instead, *Amici* aim to stress the importance of creating consistent and clearly-defined obligations for the many businesses who utilize websites. Decisions like *Gil* work directly against this objective and cannot be allowed to stand. For this and the

[2] Other "alternative" sources of website accessibility guidelines already exist. For example, pursuant to Section 508 of the Rehabilitation Act of 1973, the "Electronic and Information Technology Accessibility Standards" impose binding website accessibility regulations on federal agencies. U.S. Department of Justice, Civil Rights Division, *Accessibility of State and Local Government Websites to People with Disabilities* (2003), https://www.ada.gov/websites2_prnt.pdf. Apple, another private organization, has also promulgated its own accessibility standards. There is considerable variance amongst these already-existing "standards" of accessibility.

foregoing reasons, *Amici* respectfully request that this Court overturn the Southern District of Florida's decision and find in favor of Winn-Dixie on this appeal.

Respectfully submitted this 17th day of October, 2017.

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