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

INITIAL BRIEF OF APPELLANT

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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. ARP Ballentine, LLC
2. ARP Chickamauga, LLC
3. ARP Hartsville LLC
4. ARP James Island LLC
5. ARP Moonville LLC
6. ARP Morganton LLC
7. ARP Winston Salem LLC
8. BI-LO Finance Corp.
9. BI-LO Holding Finance, Inc.
10. BI-LO Holding Finance, LLC
11. BI-LO Holdings Foundation, Inc.
12. BI-LO Holding, LLC
13. BI-LO, LLC
14. Cronan, Esq., Candace Diane
15. Della Fera, Esq., Richard
16. Dinin, Esq., Scott R.
17. District Judge Robert N. Scola, Jr.
18. Dixie Spirits Florida, LLC
19. Dixie Spirits, Inc.
20. Entin & Della Fera, P.A.
21. Entin, Esq., Joshua M.

22. Gil, Juan Carlos

23. Nelson Mullins Riley & Scarborough LLP

24. Opal Holdings, LLC

25. Samson Merger Sub, LLC

26. Scott R. Dinin, P.A.

27. Southeastern Grocers, LLC

28. Warner, Esq., Susan V.

29. We Care Fund, Inc.

30. Winn-Dixie Logistics, LLC

31. Winn-Dixie Montgomery, LLC

32. Winn-Dixie Montgomery Leasing, LLC

33. Winn-Dixie Properties, LLC

34. Winn-Dixie Raleigh Leasing, LLC

35. Winn-Dixie Raleigh, LLC

36. Winn-Dixie Stores Leasing, LLC

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

38. Winn-Dixie Supermarkets, Inc.

39. Winn-Dixie Warehouse Leasing, LLC

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STATEMENT REGARDING ORAL ARGUMENT

Appellant believes that oral argument would aid the Court in addressing the issues presented in this appeal and requests same.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1291, which provides that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. This appeal is of a final judgment in favor of Plaintiff-Appellee Juan Carlos Gil ("Gil") and against Defendant-Appellant Winn-Dixie Stores, Inc. ("Winn-Dixie"), entered by the United States District Court for the Southern District of Florida on July 6, 2017 [D.E. 68], following the entry of a Verdict and Order Following Non-Jury Trial [D.E. 63], entered on June 13, 2017, and an Order and Injunction [D.E. 67], entered on July 6, 2017. Winn-Dixie filed a Notice of Appeal on July 31, 2017. (D.E. 70.)

I. STATEMENT OF THE ISSUES

1. Whether the district court erred by denying Defendant's Motion for Judgment on the Pleadings.

2. Whether Internet websites are places of public accommodation under Title III of the Americans with Disabilities Act ("ADA").

3. Whether the district court erred in rendering a judgment in favor of Gil and awarding injunctive relief.

4. Whether Gil has Article III standing to bring this ADA Title III claim.

II. STATEMENT OF CASE

A. Statement of Facts

1. Winn-Dixie

Winn-Dixie is the owner and operator of a regional chain of grocery stores located in the Southeastern United States. (D.E. 34 at 4.) Winn-Dixie has 495 stores throughout Florida, Georgia, Alabama, Louisiana, and Mississippi, some of which have pharmacies. (*Id.*; D.E. 65 85:2-6.) In its stores, Winn-Dixie offers a full range of grocery goods, and sells both brand name products and its own Winn-Dixie brand products. (D.E. 1 ¶ 18.) Its stores also offer household items, dry goods, and even financial services such as Western Union. (D.E. 1 ¶ 14.) Winn-Dixie partners with manufacturers to offer manufacturer coupons and fliers in its stores, and also

partners with a third-party reward program to help it consistently provide low prices to its customers. (D.E. 65 109:1-17, D.E. 63.)

2. Gil

Gil is a visually impaired individual who resides in Miami, Florida.. (D.E. 65 43:22, 19:17.) As a visually impaired person, Gil uses screen reader software to navigate the Internet and comprehend websites. (*Id.* 20:12-21:13.) Screen reader software is assistive technology that "works with the operating system web browser and individual [Internet web]page to discover and describe the contents of that web page to the user with a user selected voice. The screen reader will take the information from the web page and, based on what it discovers, will use additional functionality to describe it." (D.E. 64 7:21-8:13.)

Gil has been a customer of Winn-Dixie for 16 years. (*Id.* 51:6-7.) In fact, Winn-Dixie was Gil's primary grocery store of choice of the years. (*Id.* 27:4-21, 43:23-44:14.) Gil has shopped at Winn-Dixie's stores and filled prescriptions at Winn-Dixie's pharmacies. (*Id.* 27:22-28:17, 44:8-10.) He has a Winn-Dixie rewards card, and has used the rewards card in Winn-Dixie's stores. (*Id.* 43:15-20.) He has also used coupons in Winn-Dixie's stores. (*Id.* 45:16-18.)

3. Winn-Dixie's Website

Outside of its brick and mortar locations, Winn-Dixie owns and maintains a website at www.winndixie.com. (D.E. 34 at 4.) The current platform of the website

was launched September 2015. (D.E. 65 98:18.) The website platform is composed of templates, content and functionality. (*Id.* 1010:12-103:15.) The template component is the structural makeup of the website and is managed by the information technology area and Winn-Dixie's third party vendors. (*Id.* 103:21-104:9.) Content is managed by the marketing team; content is the information and visuals contained on the website, which is changed weekly to daily. (*Id.* 104:10-105:6.) Functionality is how the website works and that is managed by Information Technology and Winn-Dixie's third-party vendors. (*Id.* 105:7-106:17.)

Not every page and subpage of www.winndixie.com is owned and maintained by Winn-Dixie. (*Id.* 106:18-23.) Some portions of the website are licensed from third-party microsites. (*Id.*) Examples of microsites on the Winn-Dixie website, that are not owned and operated by Winn-Dixie are: the Digital Coupons,[1] which is owned and maintained by Quotient; the Plenti rewards program,[2] which is owned and operated by American Express; the Pharmacy,[3] which is owned and operated by PDX, Inc.; and the Store Locator,[4] which is owned and operated by Google. (*Id.* 106:24-107:24, 111:18-114:9, 117:3-23, 118:19-119:8.)

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1 https://coupons.winndixie.com/

2 https://www.winndixie.com/plenti; https://www.plenti.com/winndixie/sign-up?step=1&emid=3122935d4abd86635919fb20155bb60e (signup for new rewards card)

3 https://www.winndixie.com/pharmacy/manageaccount

4 https://www.winndixie.com/Locator

Winn-Dixie does not conduct any direct sales through the website. (D.E. 65 119:9-11.) Although the website shows what services Winn-Dixie has to offer, all end-user transactions (buying groceries, using coupons, obtaining prescriptions) still must be completed within the physical stores, and individuals must patronize these physical locations in order to access the full-breadth of Winn-Dixie's goods and services. (*Id.* 119:9-11, 118:15-17, 86:5-12.)

For example, Winn-Dixie customers cannot fill prescriptions online. (D.E. 65 118:2-6.) Rather, the customer must have the prescription called into the store pharmacy, and then the prescription can and must be picked up from the physical store. (*Id.* 118:2-10.) Once a Winn-Dixie customer has a current prescription at a store pharmacy, that customer may request to re-fill their prescription online, but the prescription still must and can only be picked up in-store. (*Id.* 118:11-18.)

The website also allows Winn-Dixie's customers to browse coupons and weekly ads for in-store promotions. (D.E. 65 108:15-111:17.) The digital coupons featured on the website are manufacturer coupons, which are offered by product manufacturers and are not unique to Winn-Dixie. (*Id.* 108:15-109:5.) All manufacturer coupons available on the Winn-Dixie website also are available in hard copy format in the physical store locations. (*Id.* 109:11-17; *see* https://coupons.winndixie.com/.) Similarly, the weekly ads featured online are a reprint of the weekly ad flyers advertising the in-store promotions available in Winn-

Dixie's physical stores. (D.E. 65 109:18-111:12; *see e.g.*, https://coupons.winndixie.com/weeklyad/?store=247&s=.) The Weekly Ads only feature about 10-15% of the available in-store promotions. (*Id.* 111:8-17.) Thus, in order for a customer to avail themselves of all of savings available at Winn-Dixie, the customer must go to the grocery store.

Winn-Dixie rewards program is called Plenti. The primary way Winn-Dixie customers sign up for a Plenti rewards card is at the checkout register in the physical stores. (D.E. 65 114:10-24.) Customers may also request a rewards card by calling into Winn-Dixie's call center. (*Id*.) The website allows Winn-Dixie's customers to add coupons onto their pre-existing rewards account. (*Id.* 113:4-22.) However, to actually obtain the savings, the customer has to go into the Winn-Dixie store and make a purchase. (*Id.* 86:5-12.)

Although the current website functions with screen reader software, Winn-Dixie is undertaking efforts to reformat the website to be more screen reader friendly. (D.E. 65 78:1-6.) To that end, in 2017 Winn-Dixie set aside $250,000 to fund an audit and potential redesign of the website. (*Id.* 95:1-11, 121:24-122:3.) This budge was based on the insight and experience gleaned from company executives who previously worked on a similar website accessibility redesign project. (*Id.* 96:2-14.)

Practically speaking, in order to fully redesign the website, Winn-Dixie must collaborate with the six different third parties that own and manage microsites found on Winn-Dixie's website. (D.E. 65 92:1-9, 119:20-25.) Winn-Dixie currently is in the process of educating not only its internal personnel with website accessibility standards, but also its third party partners, as those companies have not yet consistently taken the same initiative in making their own websites more accessible. (*Id.* 92:1-7, 115:2-14.) Due to Winn-Dixie's need to collaborate with these third-parties, and the continuously-evolving and interconnected nature of websites generally, this project is both costly and time-consuming. (*Id.* 122:14-125:2.)

4. Gil Stops Shopping at Winn-Dixie

In 2016, after patronizing Winn-Dixie for sixteen years, Gil learned of the existence of Winn-Dixie's website. (D.E. 65 28:18-20.) Friends at various organizations, such as the National Federation of the Blind, the American Council of the Blind and the Center for Independent Living all recommended that Gil visit the Winn-Dixie website. (*Id.* 47:19-49:3.) On June 20, 2016, Gil tried to visit Winn-Dixie's website with a MacBook Pro and a Dell Latitude laptop. (*Id.* 55:8-9, 60:25-61:1-2.) Although Gil successfully accessed the website, Gil experienced that the website was incompatible with his screen reader software. (*Id.* 30:9-11.) Thereafter, Gil determined that he would voluntarily stop patronizing Winn-Dixie's stores. (*Id.* 37:4-38:7, 52:18-53:18.)

B. Course of Proceedings and Disposition Below

1. The Pleadings

On July 1, 2016, Gil initiated this lawsuit. (D.E. 1.) On August 5, 2016, Winn-Dixie answered the complaint and asserted affirmative defenses thereto. (D.E. 7). Thereafter, the parties participated in discovery.

2. Motion for Judgment on the Pleadings

On October 24, 2016, Winn-Dixie filed a Motion for Judgment on the Pleadings. (D.E. 15.) Winn-Dixie asserted that its website is not a physical location, and, therefore, not subject to the ADA. Winn-Dixie also asserted that Gil failed to allege that the website prohibited him from accessing Winn-Dixie's physical locations. Therefore, Gil also failed to assert a cognizable ADA claim under the *Rendon* nexus theory. Gil filed his response in opposition on November 7, 2016, and Winn-Dixie replied on November 17, 2016. (D.E. 18; D.E. 19.)

On March 15, 2017, the lower court denied Winn-Dixie's motion. (D.E. 32.) The lower court recognized that under *Rendon*, the ADA can apply to "intangible barriers, . . . that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges." (*Id.* at 7.) Although Gil did not allege that the website denied him access to Winn-Dixie's physical stores, the lower court found that Gil sufficiently alleged that Winn-Dixie's website denied him of his "equal access to the services, privileges, and advantages of Winn-Dixie's physical stores

and pharmacies." (*Id.* at 7-8.) The court did not make a determination as to whether Winn-Dixie's website itself is a public accommodation. (*Id.* at 8.)

3. Trial

On March 17, 2017, the parties filed a Joint Pretrial Stipulation. (D.E. 34.) The parties stipulated that:

> 1. Gil is visually impaired and has a qualified disability under the ADA;
>
> 2. Winn-Dixie owns and operates its stores, and owns and maintains the website which was launched in September 2015;
>
> 3. The website contains information on store locations, Winn-Dixie brand products, recipes, cooking tips, and product recalls;
>
> 4. The website permits visitors to access a third-party website by which they can manage their prescriptions; and
>
> 5. That the website was not designed specifically to integrate with screen reader software or to take into account Web Content Accessibility Guidelines ("WCAG") 2.0 Basic Level.

(D.E. 34 at 4.) The parties also agreed that the legal issues remaining for the lower court's determination were whether Gil had standing to bring his claim, and whether Winn-Dixie's website is a place of public accommodation under the ADA. (D.E. 34.) On June 5 and 6, 2017, the lower court held a bench trial on this matter. The lower court heard testimony from Gil, Rodney Cornwell, Winn-Dixie's corporate representative, and Chris Keroack, Plaintiff's website accessibility expert. Gil and Cornwell testified on the first day trial, and Keroack on the second day. (D.E. 65 19-72, 72-135; D.E. 64 3-59.)

a. Testimony of Juan Carlos Gil

Gil testified that, before realizing that Winn-Dixie had a website one to two years ago, Gil shopped at the Winn-Dixie stores, filled prescriptions at its stores, and used coupons in its stores. (D.E. 65 43:15-45:18.) Upon trying to use the website on June 20, 2016, Gil noticed that it had minimal functionality. (*Id.* 9-11.) Gil testified that the minimal functionality of Winn-Dixie's website has deterred him from patronizing Winn-Dixie's physical stores. (D.E. 65 37:16-24, 52:23-53:18.) Gil did not specify how Winn-Dixie's website impeded his use and enjoyment of the physical stores. (*Id.*) Gil offered no other testimony of how the website prohibited or otherwise disrupted his access to the physical stores he has been patronizing for the last sixteen years.

b. Testimony of Rodney Cornwell

Cornwell, Winn-Dixie's corporate representative, is the Vice President of the Information Technology department and has knowledge of Winn-Dixie's website and its features. (D.E. 65 72:24-73:9, 81:14-19.) Cornwell testified as to the functionality of the website, and substantiated that no sales are conducted through the site, and that customers have to visit the store in order to pick up prescriptions or use coupons. (*Id.* 119:9-11, 118:2-14, 83:11-14, 86:5-12.)

Cornwell testified that Winn-Dixie is currently educating itself on web accessibility, and is considering the regulations currently applied to federal agency

websites. (D.E. 65 76:1-3.) Winn-Dixie also is educating its third party developers on the site reformat, as those third party microsites must integrate into Winn-Dixie's website. (*Id.* 91:20-25.) As of the date of trial, twelve to thirteen meetings had already occurred between the Winn-Dixie IT team since December 2016. (*Id.* 77:22-25.) With respect to the functional approach to reformat its website, Cornwell stated:

> [T]here's a lot of detail in there and there's a lot of different ways of approaching this, depending on the technologies and what you got in place.
>
> The thing that is more complex here is not necessarily the technical way of achieving this. It's more about getting an understanding of what should be the standard, making sure all of the third parties, as well as us, are following it, getting everybody educated, putting in processes to ensure it moving forward, so there's a lot of complexity from that point of view. It's more of an implementation.
>
> And there's a lot of touch points in a website. So you can see every little button, every little page, everything has got to be tagged appropriately, so you got to go through every little thing, right, if you want to be truly 100 percent accessible, right.

(D.E. 65 124:13-125:2.) Due to this complexity, the cost to reformat Winn-Dixie's website is approximately $250,000. (*Id.* 95:25.)

c. Testimony of Chris Keroack

On day two of trial, Gil's expert, Chris Keroack, testified. Keroack was submitted as an expert in web accessibility. (D.E. 64 9:21-10:6.) Keroack conducted a brief, high-level overview accessibility audit of the key features of Winn Dixie's website. (*Id.*) During his examination, Keroack found that Winn-Dixie's

website functioned with screen reader software, although that functionality at times was flawed. (D.E. 64 22:15-26:1-22.)

When testifying as to the different types of accessibility standards by which a website could be measured, Keroack highlighted the Web Content Accessibility Guideline 2.0 ("WCAG 2.0") standards, which created by a private consortium in 2012. (D.E. 47:21-49:17, 64:7-14.) Keroack advocated the use of the WCAG standards because it would be massive undertaking for an entity to design a website to work with all screen reader software and, thus, the WCAG standards offered a base level of accessibility that should work with the widest audience of screen reader software and computer systems. (D.E. 64 30:16-32:23, 49:18-22.) Keroack, however, noted that he had never tested a website and found that it perfectly met all WCAG standards:

> Question: Isn't it true that you've never tested a website and found that it perfectly met all of the WCAG standards?
>
> Answer: Correct.

(D.E. 64 49:23-25.) Even after a website has been fixed to completely adhere to WCAG standards, Keroack noted, "the only way for it to be absolutely perfect is if they never modified any other code on the site for any reason in any capacity." (D.E. 64 50:4-6.)

Finally, Keroack disputed the fact that revamping Winn-Dixie's website would cost $250,000, instead opining that it would cost approximately $37,000,

which was based on paying a developer $200 an hour for 80 to 100 hours. (D.E. 64 36:13-15, 55:6-11.) When questioned whether this labor estimate was an appropriate estimate for a website that was generally in "good shape," Keroack retreated from prior sworn testimony wherein he indicated that it would cost that much to reconfigure a website if it was "in good shape and there wasn't a whole lot of remediation needed. . . ." (*Id.* 55:6-57:6.) After this inconsistent statement, Keroack admitted that he only conducted a high-level analysis, and agreed that he actually had "no idea as to what the full extent of any accessibility issues with the Winn-Dixie website might be." (*Id.* 57:7-22.)

4. The Lower Court's Verdict and Order

On June 13, 2017, the lower court entered a Verdict and Order Following Non-Jury Trial. (D.E. 63.) The lower court found that there was no dispute that Gil was an individual with a qualified disability and was a customer of Winn-Dixie, and that Winn-Dixie's brick-and-mortar stores are places of public accommodation under the ADA. (*Id.* at 1.) The lower court determined that remaining issues were: "(1) whether Winn-Dixie's website is subject to the ADA as a service of a public accommodation, or, in the alternative, whether the website is a public accommodation in and of itself; (2) whether Gil was denied the full and equal enjoyment of Winn-Dixie's goods, services, facilities, privileges, advantages, or

accommodations because of his disability; and (3) whether the requested modifications to Winn-Dixie's website are reasonable and readily achievable." (*Id.*)

The lower court found that "[s]ince Gil alleges that he tried unsuccessfully to access Winn-Dixie's website and that he intends to patronize Winn-Dixie stores again if he can access Winn-Dixie's website, he ha[d] sufficiently alleged both an injury in fact and a sufficient likelihood that he will continue to be affected by the inaccessibility of the website," and, as such, Gil had standing to bring his claim. (D.E. 63 at 8.) The lower court then determined that:

> The [c]ourt need not decide whether Winn-Dixie's website is a public accommodation in and of itself, because the factual findings demonstrate that the website is heavily integrated with Winn-Dixie's physical store locations and operates as a gateway to the physical store locations. Although Winn-Dixie argues that Gil has not been denied access to Winn-Dixie's physical store locations as a result of the inaccessibility of the website, the ADA does not merely require physical access to a place of public accommodation. Rather, the ADA requires that disabled individuals be provided "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). The services offered on Winn-Dixie's website, such as the online pharmacy management system, the ability to access digital coupons that link automatically to a customer's rewards card, and the ability to find store locations, are undoubtedly services, privileges, advantages, and accommodations offered by Winn-Dixie's physical store locations. These services, privileges, advantages, and accommodations are especially important for visually impaired individuals since it is difficult, if not impossible, for such individuals to use paper coupons found in newspapers or in the grocery stores, to locate the physical stores by other means, and to physically go to a pharmacy location in order to fill prescriptions.

> The factual findings demonstrate that Winn-Dixie's website is inaccessible to visually impaired individuals who must use screen reader software. Therefore, Winn-Dixie has violated the ADA because the inaccessibility of its website has denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its sighted customers.

(*Id.* at 10.) The lower court also determined that Gil's request remediation was readily achievable and reasonable for Winn-Dixie, and ordered Winn-Dixie to undertake remediation measures in conformity with the WCAG 2.0 Guidelines. (*Id.* at 11.)

The lower court directed the parties to "meet and confer to attempt to agree on the time periods for the following terms which shall be included in the injunction and . . . file a joint report with their positions by no later than June 30, 2017." (D.E. 63 at 12.) On June 30, 2017, the parties filed their Joint Report. (D.E. 66.) On July 6, 2017, the lower court entered an Order and Injunction. (D.E. 67.) On July 6, 2017, final judgment was entered in favor of Gil. (D.E. 68.) This appeal ensued.

III. SUMMARY OF ARGUMENT

The lower court erroneously held that Winn-Dixie's website acted as an actual barrier to his physical access to Winn-Dixie's brick-mortar stores, despite its reluctance to address whether the website is even a public accommodation subject to the regulations under the ADA. As explained below, Internet websites are not places of public accommodation under the ADA, either independently or through the nexus theory. Gil failed to even allege that Winn-Dixie's website is an actual

barrier to his physical access to Winn-Dixie's buildings and the services and goods solely available therein. Thus, the lower court erred when it denied judgment on the pleadings in favor of Winn-Dixie, as Gil could not maintain this suit as a matter of law. Its order denying judgment on the pleadings should be reversed and judgment entered in favor of Winn-Dixie.

The lower court further erred when it found that Gil had been denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Winn-Dixie through the inaccessibility of its website and, therefore, that Winn-Dixie violated the ADA. The record evidence shows that Gil had full access and equal enjoyment of Winn-Dixie's facilities, goods and services for eighteen years and that the website was not an actual hindrance to his access to those goods and services. Further, in the absence of any statutory or regulatory guidance, the lower court's order and subsequent injunction are overly broad and improperly create new law and standards.

For all of the foregoing reasons, the lower court's judgment should be reversed and this Court should hold that Internet websites are not places of public accommodation.

IV. ARGUMENT

A. Standard of Review

The standard of review for "the denial of a motion for judgment on the pleadings [is] *de novo*." *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1273 (11th Cir. 2008). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). The Court "must accept the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party." *Id.*

The factual findings made by a district court following a bench trial are reviewed for clear error. *Renteria-Marin v. Ag-Mart Produce, Inc.*, 537 F.3d 1321, 1324 (11th Cir. 2008). The Court "review[s] conclusions of law made by a district judge following a bench trial *de novo*." *Id.* "On appeal, the standard of review for the grant of a permanent injunction is abuse of discretion." *Simmons v. Conger*, 86 F.3d 1080, 1085 (11th Cir. 1996).

B. The Lower Court Erred in Denying Judgment on the Pleadings

The lower court's denial of judgment on the pleadings in favor of Winn-Dixie was in error because websites are not places of public accommodation under the ADA and the website is not a barrier to Gil's access and enjoyment of Winn-Dixie's physical stores and the goods and services therein. Gil purported to bring a single

claim for violation of Title III of the ADA against Winn-Dixie, asserting that Winn-Dixie's website is a place of public accommodation and not in compliance with the ADA. (D.E. 1 ¶¶ 20-21, 67.) "Title III is meant to prevent owners of public places of accommodation from creating barriers that would restrict a disabled person's ability to enjoy the defendant entity's goods, services, and privileges." *Morgan v. Christensen*, 582 F. App'x 806, 809 (11th Cir. 2014). Thus, the viability of Gil's claim hung on a single legal determination: whether Winn-Dixie's website is a place of public accommodation that is subject to the ADA. The pleadings made clear that it is not.

1. ADA Statutory and Regulatory Framework

The ADA was initially passed into law in 1990 and amended in 2008. Americans with Disabilities Act of 1990, Pub. L. 101–336, 104 Stat. 328 (1990); ADA Amendments Act of 2008, Pub. L. No. 110-325. 122 Stat. 3553 (2008). To date, however, Congress has not expanded the ADA's definition of places of public accommodations to include Internet websites. Similarly, the United States Department of Justice, which enforces the ADA, has not promulgated any rules or regulations to govern website accessibility.

On July 26, 2010, the Department of Justice ("DOJ") issued an Advance Notice of Proposed Rulemaking ("ANPR"), in which it notified the public 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" and requested written comments from the public on the potential proposed rule. Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010). In the ANPR, the DOJ did not set forth any proposed regulations. Instead, the DOJ advised that:

> Although the Department has been clear that the ADA applies to Web sites of private entities that meet the definition of ''public accommodations,'' inconsistent court decisions, *differing standards for determining Web accessibility*, and repeated calls for Department action *indicate remaining uncertainty regarding the applicability of the ADA to Web sites of entities covered by title III*. For these reasons, the Department is exploring what regulatory guidance it can propose to make clear to entities covered by the ADA their obligations to make their Web sites accessible.

75 Fed. Reg. 43464 (emphasis added). Thus, while the DOJ's position during the previous administration had been that the ADA applies to Internet websites, it also acknowledged that its own interpretation may not be legally correct. The public comment period closed on January 24, 2011 and the DOJ never took any further action. In fact, on July 20, 2017, the current administration released its Unified

Agenda of Regulatory and Deregulatory Actions,[5] which shows that the DOJ's rulemaking for Titles II and III of the ADA for websites is now inactive. Current Unified Agenda of Regulatory and Deregulatory Actions, Current 2017 Inactive Actions List at 8, available at https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf.

While the DOJ has issued very specific regulations for the accessibility guidelines for the physical locations of public accommodations, *see generally* 2004 ADAAG, 36 C.F.R. § 1191 *et. seq.*, there is no guidance for a public accommodation as to what it would need to do to its website to comply with the ADA, even if the statute did apply to Internet websites. For that reason:

> [I]n light of the rapidly developing technology at issue, and the lack of well-defined standards for bringing a virtually infinite number of Internet websites into compliance with the ADA, a precondition for taking the ADA into "virtual" space is a meaningful input from all interested parties via the legislative process. As Congress has created the statutorily defined rights under the ADA, it is the role of Congress, and not [the courts], to specifically expand the ADA's definition of "public accommodation" beyond physical, concrete places of public accommodation, to include "virtual" places of public accommodation.

[5] This document provides "an updated report on the actions administrative agencies plan to issue in the near and long term." *See* Current Unified Agenda of Regulatory and Deregulatory Actions, Executive Office of the President, at https://www.reginfo.gov/public/do/eAgendaMain.

Access Now, Inc. v. Southwest Airlines, Co., 227 F. Supp. 2d 1312, 1321 n.13 (S.D. Fla. 2002). Applying that same analysis here, Winn-Dixie's website is clearly not a place of public accommodation, nor did it bar Gil's access to Winn-Dixie's physical locations. Accordingly, since the ADA only covers physical locations, or discrimination that bars access to physical locations, Gil's ADA claim based on alleged inaccessibility of Winn-Dixie's website failed as a matter of law.

2. Websites are not Places of Public Accommodation

In denying judgment on the pleadings, the lower court specifically declined to "determine whether Winn-Dixie's website is a public accommodation in and of itself." (D.E. 32 at 8.) The lower court, however, should have found that websites are not, and cannot, be places of public accommodation. Title III prohibits disability discrimination in places of public accommodation. 42 U.S.C. § 12182. The statute lists twelve finite and definitive categories of physical entities that qualify as places of public accommodation. 42 U.S.C. § 12181(7). While nationally there is a split of authority on whether Title III applies to non-physical locations,[6] this Court has

[6] The Third, Sixth, Ninth and Eleventh Circuits have limited Title III to physical locations. *See Ford v. Schering–Plough Corp*., 145 F.3d 601, 613 (3d Cir. 1998) (holding "public accommodation" and the list of examples in the statute were not ambiguous and did not refer to non-physical access); *Parker v. Metro. Life Ins. Co*., 121 F.3d 1006, 1011 (6th Cir.1997) (en banc) (noting that "a public accommodation is a physical place"); *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1114 (9th Cir.2000) (finding that places of public accommodation are "actual, physical places."); *Nat'l Fed'n of the Blind v. Target Corp*., 452 F. Supp. 2d 946, 952 (N.D. Cal. 2006) ("The Ninth Circuit has declined to join those circuits which

held unequivocally that Title III only applies to access to physical spaces. *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1285-86 (11th Cir. 2002) (finding Title III prohibits tangible and non-tangible barriers to "concrete space"). This Court has yet to rule on whether a website is a place of public accommodation under the ADA. However, in *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002), the court explicitly answered that question in the negative. In that case, Judge Patricia A. Seitz held the plain language of the ADA and its enforcing regulations, as well as the prior rulings of the Eleventh Circuit, show the ADA only extends to access to physical locations. *Id.*

The court observed first the ADA protects persons with disabilities from discrimination in "any place of public accommodation." *Southwest Airlines, Co.*, 227 F. Supp. 2d at 1317 (citing 42 U.S.C. § 12182(a)). That phrase is defined exclusively in terms of physical locations. As Judge Seitz explained, the ADA

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have suggested that a 'place of public accommodation' may have a more expansive meaning."). The First and Seventh Circuits have allowed a more expansive definition, *see Carparts Distribution Ctr., Inc. v. Automotive Wholesalers Assoc. of New England, Inc.*, 37 F.3d 12, 19-20 (1st Cir.1994) (holding that "public accommodations" encompasses more than actual physical structures, including insurance companies); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (noting, in dicta, that a "place of public accommodation" encompasses facilities open to the public in both physical and electronic space, including websites). A few select district courts have determined that Internet websites are places of public accommodation under the ADA. *See, e.g.*, *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 570–71 (D. Vt. 2015).

enumerates twelve particular categories of places of public accommodation, none of which include websites. *Id.* at 1317 (citing 42 U.S.C. § 12181(7)). "Furthermore . . . the applicable federal regulations also define a 'place of public accommodation' as 'a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the [twelve (12) enumerated categories set forth in 42 U.S.C. § 12181(7).]'" *Id.* at 1317-18 (citing 28 C.F.R. § 36.104.5). The applicable regulations define "facility" 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." *Id.* at 1318 (citing 28 C.F.R. § 36.104.). As such, both the ADA and its corresponding regulations speak of places of public accommodation exclusively in physical terms of real or personal property.

Second, "[i]n interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA governs solely access to physical, concrete places of public accommodation." *Southwest Airlines, Co.*, 227 F. Supp. 2d at 1318 (citing *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283-84 (11th Cir. 2002); *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1241 (11th Cir. 2000)). "Because Congress has provided such a comprehensive definition of 'public accommodation,'

[the Eleventh Circuit] think[s] that the intent of Congress is clear enough." *Stevens*, 215 F.3d at 1241. Ultimately,

> Where Congress has created specifically enumerated rights and expressed the intent of setting forth "clear, strong, consistent, enforceable standards," courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. ***To expand the ADA to cover "virtual" spaces would be to create new rights without well-defined standards.***

Southwest Airlines, 227 F. Supp. 2d at 1318 (emphasis added). Other courts have followed suit and held that websites are not places of public accommodation. *See Gomez v. Bang & Olufsen America, Inc.*, No. 1:16-cv-23801-JAL, 2017 WL 1957182, at *3-4 (S.D. Fla. Feb. 2, 2017) (finding that websites are not places of public accommodation under the ADA); *Kidwell v. Fla. Comm'n on Human Relations*, No. 2:16-cv-00403-UA-CM, 2017 WL 176897, at *5 (M.D. Fla. Jan. 17, 2017) (same); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) (same).

Here, Gil's allegations solely involved Winn-Dixie's website, and his alleged inability to access and patronize the website, not Winn-Dixie's brick and mortar stores. (*See, e.g.*, D.E. 1 ¶¶ 27, 30, 31.) Gil repeatedly emphasized in his Complaint that it was the website that is inaccessible, not the physical stores. However, as stated above, the ADA only applies to physical facilities. To apply the ADA to Gil's claim of website accessibility would be to create the very "new rights without well-

defined standards" as warned by the court in *Southwest Airlines*. *Southwest Airlines*, 227 F. Supp. 2d at 1319.

If the lower court's ruling stands, whenever a website offers services similar to a physical location, denying equal access to *that website* is a violation of the ADA. This is nothing more than an alternative way to say that websites which are associated with a physical, public accommodation should be treated like they are public accommodations. Websites are not public accommodations and should not be regulated under those standards.

If websites should be treated as public accommodations and regulated under the ADA, this is a decision best left to Congress. Congress has had ample opportunity to expanded the ADA's definition of places of public accommodations to include internet websites, but it has declined to take action. Congress clearly understands its prerogative to regulate Internet websites, as it has chosen to regulate the websites of federal agencies. *See* 29 U.S.C. § 794d; Rehabilitation Act Amendments of 1992, PL 102–569, Oct. 29, 1992, 106 Stat 4344. As to private entities, it has simply chose not to do so. It is not the province of the courts to write and make laws in place of Congress, but this is what the lower court has done by its orders below. Pursuant to the plain language of the statute and its regulations, the ADA only applies to physical locations, thus Gil's claim failed and the lower

properly should have entered judgment in favor of Winn-Dixie. On this basis alone, the trial court's order should be reversed.

3. Winn-Dixie's Website Does Not Impede Gil's Access to Winn-Dixie's Physical Stores

In his Complaint, Gil, perhaps conceding that the ADA does not apply to websites, alleged that, there is a direct nexus between Winn-Dixie's website and its stores and, therefore, the website is a physical extension of its stores. (D.E. 1 ¶ 20.) As such, Gil argued that because of this nexus, the website became a place of public accommodation and was subject to the ADA. The lower court agreed and found "that [Gil had] sufficiently alleged a nexus between Winn-Dixie's website and its physical stores such that the Defendant is not entitled to judgment as a matter of law." (D.E. 32 at 8.) However, in coming to this conclusion, the lower court misapplied Eleventh Circuit precedent..

The Eleventh Circuit has held, unequivocally, that Title III only applies to concrete, physical spaces. *Rendon*, 294 F.3d at 1285-86. Notably, this Court further held that it would permit a Title III claim where the plaintiff could demonstrate that an intangible barrier impedes his ability to access a physical location. *Id.* at 1284 n.8. Gil failed to make such a showing.

In *Rendon*, a television game show used an automated telephone answer system to select contestants for its game show; potential contestants would call a toll-free number to participate in a phone quiz via an automated system in order to

be selected to appear on the show. *Rendon*, 294 F.3d at 1281. The plaintiffs were disabled persons whose impairments prevented them from registering their entries "either because they were deaf and could not hear the questions on the automated system, or because they could not move their fingers rapidly enough to record their answers on their telephone key pads." *Id.* at 1280–81. The show's production company moved to dismiss the suit on the basis that the telephone dialing system was not a physical place of public accommodation.

This Court, however, found that the ADA applied to the use of the telephone dialing system because the system acted as a barrier to the disabled individuals' access to a *specific physical location*: the television studio where the gameshow was filmed. *Rendon*, 294 F.3d at 1284 n.8. *Rendon* "involve[d] only the question of whether Title III encompasses a claim involving telephonic procedures that, in [that] case, tend to screen out disabled persons from participation in a competition held in a tangible public accommodation." *Id.* at 1282. The Eleventh Circuit found that the "definition of discrimination provided in Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges and intangible barriers, such as eligibility requirements and screening rules or discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges" at the physical

location. *Id.* at 1283 (internal citations omitted). "[A]n intangible barrier may result as a consequence of a defendant entity's failure to act, that is, when it refuses to provide a reasonable auxiliary service that would permit the disabled to gain access to or use its goods and services." *Id.* at 1284 n.7 (citing 42 U.S.C. § 12182(b)(2)(A)(iii)).

This Court further observed, in dicta, that "a place of public accommodation may [not] exclude persons with disabilities from services or privileges performed *within the premises of the public accommodation* so long as the discrimination itself occurs off site . . . ." *Id.* at 1284 n.8. "At most, [the ADA] require[s] a nexus between the challenged service and the premises of the public accommodation." *Id.* The Court found such a nexus in *Rendon* because the plaintiffs were "seeking to participate on equal terms in the phone quiz only because it [was] a necessary prerequisite of appearing on the televised contest in which they could potentially win a large sum of money. The phone quiz is therefore a *means of access* to the public accommodation, not an end in itself." *Id*. at 1286 n.10.

Put another way, the telephone dial-in in *Rendon* was the equivalent to a wheelchair ramp into a building. The Court found that this metaphorical wheelchair ramp did not exist in *Rendon*. Thus, the disabled person was physically prevented from entering the building, in violation of the ADA. The lower court in this case, however concluded that "[i]n *Rendon*, the issue was not that the inaccessibility of

the automated phone system prevented the plaintiffs from physically accessing the television studio, but rather that the inaccessibility of the phone system prevented the plaintiffs from accessing a privilege (the opportunity to be a contestant on the television show) afforded by the television studio." (D.E. 32 at 7.) This distinction is inapposite and misses the reasoning of *Rendon*.

While appearing on the television show may be a "privilege," such a privilege can only be afforded *in the physical space of the television studio*. The privilege and the access to the physical space are one in the same under the ADA. Thus, following this Court's reasoning in *Rendon*, when a plaintiff wishes to assert a Title III claim on the basis of a nexus theory, he must alleged that there exists an intangible barrier, such as a policy that screens out disabled persons, that impedes or blocks his access to a concrete, physical location.

Southwest Airlines similarly considered this nexus theory and held that the ADA *might* apply to a non-physical website where a particular form of discrimination prevents a disabled person from accessing a specific physical location, looking to *Rendon* for guidance. *Southwest Airlines*, 227 F. Supp. 2d at 1319-21. The court in *Southwest Airlines* did not find a sufficient nexus between the plaintiff's inability to use the defendant airline's website and access to any physical location. *Id.* Particularly since "the Internet is 'a 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.'" *Id.* at 1321 (quoting *Voyeur Dorm, L.C. v. City of Tampa*, 265 F.3d 1232, 1237 n.3 (11th Cir. 2001)). "In recognizing the requirement that a plaintiff establish 'a nexus between the challenged service and the premises of the public accommodation,' [this Court] noted that the plaintiffs in *Rendon* stated a claim under Title III of the ADA because they sought "'the privilege of competing in a contest held in a *concrete space* . . .'" *Id.* (quoting *Rendon*, 294 F.3d at 1284 (emphasis added)). No such allegation was present in *Southwest Airlines* and that claim failed.

More recently, Judge Joan A. Leonard considered the nexus theory as it pertains to Internet websites in *Gomez v. Bang & Olufsen Am., Inc*., No. 1:16-cv-23801-JAL, 2017 WL 1957182, (S.D. Fla. Feb. 2, 2017). Judge Leonard concluded that:

> Based on the text of the ADA, the Eleventh Circuit's reasoning in *Rendon* and the rationale employed by other courts who have construed the ADA in the context of commercial websites, the [c]ourt concludes that a website that is wholly unconnected to a physical location is generally not a place of public accommodation under the ADA. However, if a plaintiff alleges that a website's inaccessibility impedes the plaintiff's "access to a specific, physical, concrete space[,]" and establishes some nexus between the website and the physical place of public accommodation, the plaintiff's ADA claim can survive a motion to dismiss.

Gomez, 2017 WL 1957182, at *3. Thus, in order to state a claim under the ADA, a plaintiff must allege "an actual (not hypothetical) impediment to the use of [the defendant's] [physical] retail location." *Id.* at *4. Because the plaintiff in *Gomez*

failed to allege that the website blocked his access and enjoyment of a physical location, the action was dismissed.

Similar to *Gomez* and *Southwest Airlines*, Gil did not allege that his inability to access the website blocked his ability to access Winn-Dixie's physical stores. First, the Complaint was devoid of any allegations suggesting the alleged inaccessibility of Winn-Dixie's website made Winn-Dixie's brick and mortar stores inaccessible to Gil. Gil alleged generally that Winn-Dixie's website has information on Winn-Dixie's store locations, but Gil does not assert the alleged inaccessibility of that information on the website prevented him from visiting a Winn-Dixie store or a pharmacy. In fact, Gil specifically alleged that he "***is*** a customer of Winn Dixie grocery and pharmacy stores . . . ." (D.E. 1 ¶ 22.)

Second, Gil alleged that he is "unable to participate in the shopping experience online" and that he "continues to desire to patronize [Winn-Dixie's] website," not its physical locations.[7] (D.E. 1 ¶¶ 30-31.) Gil made no allegation, nor could he, that the Winn-Dixie website's alleged inaccessibility was a physical barrier to his entry to Winn-Dixie's stores or that it would bar him from use of Winn-Dixie's services. In short, Gil did not allege that the inaccessibility of Winn-Dixie's website prevents access to Winn-Dixie's stores or pharmacies, generally, or that it impacted *his* ability

[7] As noted previously, Winn-Dixie does not conduct any sales or shopping via its website. (*See generally* https://www.winndixie.com/ .)

to access a Winn-Dixie store, individually. Consequently, even under the nexus theory, Gil's claim failed as a matter of law. Accordingly, the lower court's order should be reversed and judgment entered in favor of Winn-Dixie on the pleadings.

C. The Lower Court's Erred in awarding Judgment in Favor of Gil

1. Winn-Dixie's Website is not a Place of Public Accommodation or a Service Subject to the ADA

In its Verdict and Order Following Non-Jury Trial, the lower court made the same errors in its legal conclusions as it did in its Order denying Judgment on the Pleadings. Once again, the lower court demurred on the question of whether a website itself is a place of public accommodation, instead determining that the website was subject to the ADA via the *Rendon* nexus theory. For the same reasons set forth above, the lower court's legal conclusions in the Verdict and Order were in error in finding that Winn-Dixie's website is subject to the ADA. However, the lower court further compounded this error when it framed the question as not only whether the website was itself a place of public accommodation, but "whether Winn-Dixie's website is subject to the ADA as a *service of* a public accommodation." (D.E. 63 at 1 (emphasis added).) Aside from the fact that the parties did not agree this was an issue for determination by the lower court, *see* D.E. 34 at 4-7, this once again misapprehends the ADA and *Rendon*.

Winn-Dixie's website is not a service in of itself. The evidence presented at trial was clear that the website merely acts at most as a duplicate or supplement to

the goods and services provided in Winn-Dixie's stores. There was no evidence presented at trial that the website is the sole location or access to any of Winn-Dixie's goods and services. Moreover, the evidence was clear that for Gil, or any other patron, to avail themselves of any of Winn-Dixie's goods and services, that person *must* go to one of Winn-Dixie's brick-and-mortar stores. To borrow from the previous analogy, the website does not act as a ramp into Winn-Dixie's physical stores. Instead, the website is more akin to a poster on a wall, advertising what goods and services can be found in Winn-Dixie's physical stores. That alone does not convert the website into either a place of public accommodation or a service of a place of public accommodation that would be subject to the ADA.

The lower court, however, took issue with Gil's alleged inability to receive the exact same access and services as a sighted person, implying that the ADA mandates that disabled persons must have the identical access as non-disabled persons. (D.E. 63 at 10; D.E. 64 at 64-68.) This is not what the ADA requires. In fact, Judge Leonard addressed this very issue in *Gomez*, stating:

> Plaintiff's grievance seems to be that Defendant's website does not provide a blind person with the same online-shopping experience as non-disabled persons. However, the ADA does not require places of public accommodations to create full-service websites for disabled persons. In fact, the ADA does not require a place of public accommodation to have a website at all. All the ADA requires is that, if a retailer chooses to have a website, the website cannot impede a disabled person's full use and enjoyment of the brick-and-mortar store.

Gomez, 2017 WL 1957182, at *4. The services of Winn-Dixie are its pharmacy services, the ability to use manufacturer coupons, the ability to enjoy the in-store promotions and use a rewards card: all services that are readily available in Winn-Dixie's stores and can only be used in that location. Winn-Dixie conducts no sales on its website, and the features in place on the website still require an in-store visit in order for the customer to take advantage of the end-user experience. The website is at most an additional and alternative means of accessing the information about those services. That, however, does not elevate the website to a "service" that is subject to the ADA. The lower court erred in finding that Winn-Dixie's website was a service

2. The Lower Court Erred in Finding that the Website Acts as a Barrier to Gil's Access to Winn-Dixie's Stores

The lower court next erred in finding that "the inaccessibility of [Winn-Dixie's] website . . . denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its sighted customers." (D.E. 63 at 10.) While the lower court correctly determined that the success of Gil's ADA claim, if legally sustainable, turned on whether Winn-Dixie denied Gil "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation," *see* D.E. 63 at 1, the lower court ignored the record evidence that indisputably

showed that Winn-Dixie's website was not and could not be a barrier to Gil's access to Winn-Dixie's stores, goods and services.

Gil was a customer of Winn-Dixie for sixteen years. (D.E. 65 51:6-7.) It was his main grocery store; he bought groceries, filled prescriptions at the pharmacy and used coupons in the store. (*Id.* 43:23-44:14, 45:10-21.) He availed himself of all the goods and services of Winn-Dixie unfettered for years before he even became aware of the existence of the website in 2015 or 2016. (*Id.* 25:13-28:25.) Thus, the existence of the website, regardless of whether it is accessible to visually-impaired persons or not, had **no** bearing whatsoever on Gil's ability to access Winn-Dixie's stores and the goods and services therein. Even if the ADA could apply to Winn-Dixie's website via the *Rendon* nexus theory, the evidence before the lower court was clear that website absolutely did not deny Gil the "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of Winn-Dixie.[8] The lower court should have entered judgment in favor of Winn-Dixie on this factual basis alone and its judgment should be reversed.

[8] Even as to the full enjoyment of the website, Gil's own expert testified that screen reader software does function with Winn-Dixie's website. (D.E. 64 55:3-5.)

3. The Lower Court Erred in Finding that the Modifications to the Website were Reasonable and Readily Achievable and Entering Injunctive Relief

The lower court erroneously found that the modifications requested by Gil were reasonable and readily achievable *solely* because "Winn-Dixie has presented no evidence to establish that it would be unduly burdensome to make its website accessible to visually impaired individuals." (D.E. 63 at 11.) The lower court further determined that "[r]emediation measures in conformity with the WCAG 2.0 Guidelines [would] provide Gil and other visually impaired consumers the ability to access Winn-Dixie's website and permit full and equal enjoyment of the services, facilities, privileges, advantages, and accommodations provided through Winn-Dixie's website." (*Id.*)

The lower court then entered an injunction requiring Winn-Dixie to modify its website to conform with WCAG 2.0 criteria. (D.E. 67.) The lower court also ordered that "[t]he website must be accessible by individuals with disabilities who use computers, laptops, tablets, and smart phones." (D.E. 67 at 1.) Winn-Dixie also was ordered to "require any third party vendors who participate on its website to be fully accessible to the disabled by conforming with WCAG 2.0 criteria." (*Id.*)

The standard for injunctive relief pursuant to the ADA, requires the *movant* to establish: "(a) a substantial likelihood of succeeding on the merits; (2) a

substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is granted; and (4) an injunction would not harm the public interest." *Doe v. Judicial Nominating Comm'n for Fifteenth Judicial Circuit of Florida*, 906 F. Supp. 1534, 1545 (S.D. Fla. 1995) (quoting *Gold Coast Publications, Inc. v. Corrigan*, 42 F.3d 1336, 1343 (11th Cir.1994), cert. denied, 516 U.S. 931, 116 S.Ct. 337, 133L.Ed.2d 236 (1995)). Moreover, "[w]here, as here, mandatory relief is sought, as distinguished from maintenance of the status quo, a strong showing of irreparable injury must be made, since relief changing the status quo is not favored unless the facts and law clearly support the moving party." *Id.* (quoting *Doe v. New York University*, 666 F.2d 761, 773 (2d Cir.1981)).

The lower court's ruling: (1) failed to keep the burden on the movant; (2) failed to make a determination as to whether the ADA "clearly supports" Gil's request for relief; and (3) did not take into consideration the lack of guidance in instituting Gil's overly broad demands.

First, the lower court's ruling erroneously placed the burden on Winn-Dixie to establish that the remediation would be unduly burdensome to complete. (D.E. 63 at 11.) The injunctive relief rises and falls on Gil's ability to establish an injury pursuant to the ADA, which he failed to do. Nevertheless, even if the burden were on Winn-Dixie to establish harm, the lack of guidance in itself establishes a substantial harm because there is absolutely no way to measure whether Winn-

Dixie's remediation efforts are sufficient to comply with the ADA. Winn-Dixie could be required to expend insurmountable resources in order to remain in perpetual compliance with the lower court's order.

Second, as explained above, the lower court did not make a determination as to whether Winn-Dixie's website itself is a public accommodation. Gil simply could not establish a showing of irreparable injury since Winn-Dixie's website is not a public accommodation. Finally, even if Winn-Dixie's website was arguably subject to the ADA and it was found to be inaccessible, Title III of the ADA only requires an entity to make *reasonable* modifications and readily achievable barrier removals or alternative methods if there is a barrier to access for a disabled individual. *Ass'n for Disabled Americans, Inc. v. Concorde Gaming Corp*., 158 F. Supp. 2d 1353, 1362 (S.D. Fla. 2001). The ordered modifications, however, are not reasonable, readily achievable or based on any legal, established standards.

The most blatant example of infeasibility is shown by the lower court's order requiring third party vendors to also maintain WCAG 2.0 criteria. There is no way for Winn-Dixie to mandate third-party vendors to maintain these standards, other than ceasing business which would cause undue harm. Furthermore, while a few mandates of the remediation order by the lower court are *technically* feasible, there was no finding or holding by the lower court as to what level of compliance would be sufficient in order for Winn-Dixie to be fully compliant or not in contempt of the

lower court's order. The lower court merely summarily required Winn-Dixie to make its website accessible in accordance with the WCAG 2.0 criteria. However. Gil's own expert testified that no website is ever perfectly in compliance with WCAG 2.0. (D.E. 64 49:23-50:6.) The only way to ensure complete compliance with WCAG 2.0 is for a company to remediate its website and then never make any changes again. (*Id.*). This is simply not practical.

Moreover, the level of accessibility of every website is dependent on the screen reader software, browser and computer operating system in use by each individual visually impaired person. (D.E. 64 42:8-46:25.) Therefore, Winn-Dixie could alter its website to adhere as closely as possible to WCAG 2.0 criteria, constantly monitor the website to ensure its accessibility, and yet, the website may still have accessibility issues for another individual using a different screen reader software and computer system than Gil. Thus, even while making alterations to the website is technically feasible, in the absence of any statutory or regulatory guidelines for compliance, there are no definite standards in place and the lower court's order does not provide them either. Instead, the lower court's injunction creates "new rights without well-defined standards," the precise situation the court advised the judiciary to avoid in *Southwest Airlines*.

For these reasons, the lower court erred in granting injunctive relief and finding the modifications to Winn-Dixie's website were reasonable and readily achievable.

4. The Lower Court Erred in Finding Gil had Standing to Bring the Underlying Suit

The lower court correctly recognized that in order to have Article III standing to bring suit, Gil needed to show: 1) an injury in fact; 2) a causal connection between the injury and the conduct complained of; and 3) that the injury would likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The lower court then made the following findings as to Gil's standing:

> Since Gil alleges that he tried unsuccessfully to access Winn-Dixie's website and that **he intends to patronize Winn-Dixie stores again if he can access Winn-Dixie's website**, he has sufficiently alleged both an injury in fact and a sufficient likelihood that he will continue to be affected by the inaccessibility of the website. In addition, there is a causal connection **between the injury and the alleged inaccessibility of the website**.

(D.E. 63 at 8 (emphasis added).) Thus, the lower court determined that the injury to be redressed was Gil being able to patronize Winn-Dixie's brick-and-mortar stores, and that there was a causal connection between that physical access and the website being inaccessible.[9] However, "Article III standing requires a concrete injury even

[9] This finding is in direct contradiction to the lower court's finding the ADA violation was based upon the accessibility of website itself and that Gil need not prove his access to the physical stores was impeded to state a claim.

in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016). Gil failed to show that he has suffered a concrete injury.

Gil chose to stop patronizing Winn-Dixie by his own volition. Gil was a customer of Winn-Dixie for sixteen years. (D.E. 65 51:6-7.) It was his main grocery store; he bought groceries, filled prescriptions at the pharmacy and used coupons in the store. (*Id.* 43:23-44:14, 45:10-21.) He made a personal choice to stop going to Winn-Dixie's stores because he was upset that the website did not function with screen reader software to his satisfaction. (*Id.* 37:4-38:7, 52:18-53:18.) This is *not* an injury.

"[T]hose who seek standing under Title III must show either that they intend to return to a noncomplying public accommodation, or that defendant's inaction deterred plaintiff from visiting an offending site." *Gomez v. Dade County Fed. Credit Union*, 610 F. App'x 859, 864 (11th Cir. 2015). Gil testified that he was "deterred" from visiting Winn-Dixie's stores because the website did not work with his screen reader software. (D.E. 65 37:7-19.) When an individual is "deterred" from visiting an establishment, courts have recognized that deterrence may be a cognizable injury-in-fact. *Dade County Fed.*, 610 F. App'x at 863. However, in those cases, the barriers at issue were actual, physical barriers to the store's services. *See, e.g.*, *Pickern v. Holiday Quality Foods, Inc.*, 293 F.3d 1133, 1135-36 (9th Cir.

2002) (finding injury-in-fact where plaintiff deterred from visiting store with physical architectural barriers); *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 188 (2nd Cir. 2013) (plaintiff deterred from accessing store due to "seven to eight-inch step").

Moreover, courts have found no injury-in-fact when a claimant makes conclusory allegations of "deterrence," with no specificity as to how the conduct actually deterred or injured him. *See, e.g.*, *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939 (9th Cir. 2011) (no injury-in-fact where plaintiff failed to identify barrier and how his disability was affected by them so as to deny him full and equal access); *Vogel v. Salazar*, No. SACV 14–00853–CJC, 2014 WL 5427531, at *2 (C.D. Cal. Oct. 24, 2014) ("[D]eterrence cannot merely be conjectural or hypothetical."); *Campbell v. Grady's Bar, Inc.*, No. 0:10–CV–60648–LSC, 2010 WL 2754328, at *2 (S.D. Fla. Jul. 12, 2010) (no injury-in-fact where there was no allegation that the plaintiff could not enter the establishment because of any specific architectural barrier).

Similarly, Gil has neither sufficiently pled nor proven a concrete injury-in-fact here. Gil's complaint alleges that he is unable to visit the Winn-Dixie stores because he is not able to comprehend Winn-Dixie's website, but offered no evidence of how exactly the website deterred him from visiting the stores. Moreover, and of equal importance, there is no evidence, whatsoever, tending to show that the

intangible website, functional or not, acts as a *physical* barrier to Gil patronizing Winn-Dixie's stores. Considering that Gil used Winn-Dixie as his main grocery store for sixteen years, it stretches credulity to find that the sudden awareness of the existence of a website acted as an instant physical barrier to Gil's access. His voluntarily cessation of patronizing Winn-Dixie's physical stores, cloaked in terms of "deterrence," is not an injury-in-fact contemplated by Article III.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013). As stated previously, if Congress decides to apply the ADA to websites, it may do so through the legislative process. But until that time, Gil's purported inability to access Winn-Dixie's website cannot form the concrete injury-in-fact necessary for Article III standing under the ADA. To determine that standing exists in this case, where there is no actual barrier to Gil's access to Winn-Dixie's stores, would be to expand the rights of the ADA and Article III standing by judicial fiat. For these reasons, the Court should properly reverse the district court's ruling that Gil had standing to bring his claim and reverse the judgment below.

V. CONCLUSION

It is clear that websites are not places of public accommodation under the ADA. Even under the Court's nexus theory, as articulated in *Rendon,* the intangible

website does not become a place of accommodation by virtue of having a nexus to the physical location. In order to state or prove an ADA claim under the nexus theory, Gil must show that the 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. Gil's ADA must fail. Further, in the absence of any statute or regulations 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 all the foregoing reasons, 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.

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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 brief contains 10,477 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 10th day of October, 2017 upon:

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