

No. 17-13467

IN THE UNITED STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT

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WINN-DIXIE STORES, INC.,  
*Defendant-Appellant,*  
v.  
JUAN CARLOS GIL,  
*Plaintiff-Appellee.*

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On Appeal from a Final Judgment  
of the United States District Court for the Southern District of  
Florida District Court No. 16-cv-23020-SCOLA

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**AMICI NATIONAL FEDERATION OF THE BLIND,  
NATIONAL COUNCIL ON INDEPENDENT LIVING,  
NATIONAL ASSOCIATION OF THE DEAF,  
MISSOURI PROTECTION & ADVOCACY,  
DISABILITY RIGHTS TEXAS, DISABILITY RIGHTS  
BAR ASSOCIATION, DISABILITY RIGHTS  
ADVOCATES, CIVIL RIGHTS EDUCATION AND  
ENFORCEMENT CENTER, ASSOCIATION OF LATE  
DEAFENED ADULTS, AND AMERICAN  
ASSOCIATION OF PEOPLE WITH DISABILITIES IN  
SUPPORT OF PLAINTIFF-APPELLEE'S PETITION  
FOR REHEARING *EN BANC***

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WINN-DIXIE STORES, INC.,  
*Defendant-Appellant,*  
v.  
JUAN CARLOS GIL,  
*Plaintiff-Appellee.*

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

*Amici*, by and through undersigned counsel and pursuant to 11th Cir. R.  
26.1-2(c), hereby submit a complete list of all persons and entities known to have  
an interest in the outcome of the instant matter:

1. Ackerbaum Cox, Esq., Joyce <sup>[1]</sup><sub>SEP</sub>
2. American Association of People with Disabilities
3. American Bankers Association <sup>[1]</sup><sub>SEP</sub>
4. American Hotel & Lodging Association <sup>[1]</sup><sub>SEP</sub>
5. American Resort Development Association
6. Amador, Esq., Angelo I. <sup>[1]</sup><sub>SEP</sub>
7. Asian American Hotel Owners Association
8. Association of Late Deafened Adults
9. ARP Ballentine, LLC <sup>[1]</sup><sub>SEP</sub>

10. ARP Chickamauga, LLC [REDACTED]
11. ARP Hartsville LLC [REDACTED]
12. ARP James Island LLC [REDACTED]
13. ARP Moonville LLC [REDACTED]
14. ARP Morganton LLC [REDACTED]
15. ARP Winston Salem LLC [REDACTED]
16. Association of People with Disabilities
17. Baker & Hostetler, LLP [REDACTED]
18. BI-LO Finance Corp. [REDACTED]
19. BI-LO Holding Finance, Inc. [REDACTED]
20. BI-LO Holding Finance, LLC [REDACTED]
21. BI-LO Holdings Foundation, Inc.
22. BI-LO Holding, LLC [REDACTED]
23. BI-LO, LLC [REDACTED]
24. Brown Goldstein & Levy, LLP
25. Chamber of Commerce of the United States of America
26. Civil Rights Education and Enforcement Center
27. Cronan, Esq., Candace Diane [REDACTED]
28. Della Fera, Esq., Richard [REDACTED]

29. Disability Rights Advocates
30. Disability Rights Bar Association
31. Disability Rights Texas
32. District Judge Robert N. Scola, Jr.
33. Dixie Spirits Florida, LLC [REDACTED]
34. Dixie Spirits, Inc.
35. Entin Law Group, P.A. f/k/a Entin & Della Fera, P.A.
36. Entin, Esq., Joshua M.
37. Ferleger, Esq. David
38. FisherBroyles, LLP
39. Florida Justice Reform Institute
40. Galeria, Esq., Janet [REDACTED]
41. Gil, Juan Carlos [REDACTED]
42. Harned, Esq., Karen R.
43. International Council of Shopping Centers
44. Lazar, Jonathan
45. Lumpkin, Esq., Carol C.
46. Milito, Esq., Elizabeth [REDACTED]
47. Missouri Protection & Advocacy

48. Moot, Esq., Stephanie N.
49. National Association of Convenience Stores [L] [SEP]
50. National Association of Realtors [L] [SEP]
51. National Association of Theatre Owners [L] [SEP]
52. National Association of the Deaf
53. National Council on Independent Living
54. National Federation of Independent Businesses
55. National Federation of the Blind
56. National Multifamily Housing Council [L] [SEP]
57. National Retail Federation [L] [SEP]
58. Opal Holdings, LLC
59. Postman, Esq., Warren
60. Samson Merger Sub, LLC
61. Shaughnessy, Esq., Kevin W.
62. Southeastern Grocers, LLC
63. Vermuth, Justin, Esq.
64. Warner, Esq., Susan V.
65. We Care Fund, Inc.
66. Winn-Dixie Logistics, LLC

67. Winn-Dixie Montgomery, LLC
68. Winn-Dixie Montgomery Leasing, LLC
69. Winn-Dixie Properties, LLC
70. Winn-Dixie Raleigh Leasing, LLC
71. Winn-Dixie Stores Leasing, LLC
72. Winn-Dixie Stores, Inc.
73. Winn-Dixie Supermarkets, Inc.
74. Winn-Dixie Warehouse Leasing, LLC

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *Amici* hereby submit the following disclosure statements:

The American Association of People with Disabilities is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Association of Late Deafened Adults is a non-profit, tax-exempt organization incorporated in Illinois. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The Civil Rights Education and Enforcement Center is a non-profit, tax-exempt organization incorporated in Colorado. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

Disability Rights Advocates is a non-profit, tax-exempt organization incorporated in California. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

Disability Rights Bar Association is an unincorporated group of disability counsel, law professors, legal nonprofits and advocacy groups who share a commitment to effective legal representation of individuals with disabilities. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

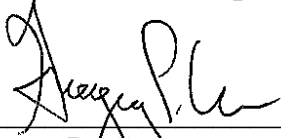
Disability Rights Texas is a non-profit, tax-exempt organization incorporated in Texas. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

Missouri Protection and Advocacy is a non-profit, tax-exempt organization incorporated in Missouri. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The National Association of the Deaf is a non-profit, tax-exempt organization incorporated in Maryland. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The National Council on Independent Living is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.

The National Federation of the Blind is a non-profit, tax-exempt organization incorporated in the District of Columbia. The organization has no parent corporation, and no publicly held company has 10% or greater ownership.



\_\_\_\_\_  
Gregory P. Care  
ATTORNEY OF RECORD FOR *AMICI*

April 22, 2021



## STATEMENT OF COUNSEL

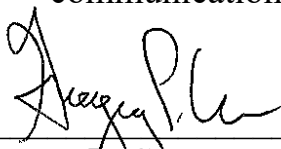
I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. The panel had no live controversy before it at the time of its decision, because the injunction it addressed had expired by its own terms nine months previously and no live issue remained in the case. This violates established precedent in this Circuit, including *United States v. Secretary, Florida Dept. of Corrections*, 778 F.3d 1223 (11th Cir. 2015); *Leedom Mgmt. Group, Inc. v. Perlmutter*, 532 Fed. App'x 893 (11th Cir. 2013).
2. The majority discarded the circuit's established "nexus" standard for determining if there is a sufficient connection between a place of public accommodation's physical site and a good, service, facility, privilege, advantage, or accommodation it provides outside of its physical site (such as its website) such that the offering is subject to the ADA. *Rendon v. Valleycrest Prods.*, 294 F.3d 1279 (11th Cir. 2002); *Haynes v. Dunkin' Donuts, LLC*, 741 Fed. App'x 752, 754 (11th Cir. 2018).

3. In this case regarding discrimination against blind internet users, the majority’s standard of comparison (“a sighted customer who does not have internet access”) violates the established standard under *A.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1294-95 (11th Cir. 2018); *Silva v. Baptist Health South Florida, Inc.*, 856 F.3d 824, 834 (11th Cir. 2017) (a non-disabled person accessing the website).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Did the panel majority err in abandoning the firmly established “nexus” standard, thereby imposing the most narrow standard of any circuit for application of the ADA’s remedial scheme to websites?
2. Does Winn-Dixie’s operation of a website that provides goods, services, facilities, privileges, advantages, or accommodations but is inaccessible to blind customers violate Title III’s prohibition of “different treatment” of individuals with disabilities, 42 U.S.C. § 12182(b)(2)(A)(iii), and the implementing regulation, which requires the furnishing of “appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” 28 C.F.R. § 36.303(c)(1)?



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Gregory R. Care  
ATTORNEY OF RECORD FOR *AMICI*

April 22, 2021

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## **INTERESTS OF *AMICI***

*Amici* are organizations committed to implementation of the civil rights of individuals with disabilities to equal access to all aspects of American life. *See* Appendix A (describing each *amicus*). *Amici* submit this brief because they are concerned that the panel majority’s ruling threatens the ability of individuals with disabilities to enforce their federal civil right to use and enjoy the web-based services, privileges, and advantages of public accommodations.

*Amici* hereby certify that no party’s counsel authored the brief in whole or in part, no party or party’s counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici* and their counsel contributed money intended to fund preparation or submission of the brief. *Amici* moved for leave to file this brief.

## **STATEMENT OF THE ISSUES**

1. Whether rehearing *en banc* is justified because the issue addressed by the panel decision is of exceptional importance.
2. Whether rehearing *en banc* is justified because the panel majority’s decision contradicts precedent of this Circuit, including regarding the inability of appellate courts to address matters that are moot, and regarding the standards for determining when a business’s website must comply with the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12181 *et seq.*



## INTRODUCTION

In the midst of a pandemic that has forced Americans to avoid public spaces, the panel majority<sup>1</sup> has held that businesses' websites need not be accessible to the blind and people with print disabilities if they can still go to the physical store to get the services the businesses offer to nondisabled people online. The panel majority ignores the obvious convenience, speed, privacy, and independence of Internet-based access to prescription refills, coupons, store locations, and other information and services. Worse, it ignores the life-threatening consequences of forcing people with disabilities to rely on in-person assistance in physical stores. The panel bases its conclusion on the fact that "nothing prevents Gil from shopping at the physical store."<sup>2</sup> This conclusion is contrary to both reality and decades of legal precedent.

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<sup>1</sup> Maj. Op. at 22, 2021 U.S. App. LEXIS 10024; 2021 WL 1289906; \_\_ F.3d \_\_, \*9. (Hon. Elizabeth L. Branch for the majority, with visiting judge, Hon. Chief Judge Danny C. Reeves (E.D. Ky)), Hon. Jill A. Pryor authored the dissent.

<sup>2</sup> Applying that analysis, Black people required to sit in the movie theater balcony, ride in the back of the bus, or forgo seats at lunch counters would have no civil rights protection either, because they were able to see the film, get where they were going, and eat on the curb.

## ARGUMENT

### I. This Case Involves an Issue of Exceptional Importance.

The Internet has become a fundamental part of the daily lives of the vast majority of Americans. 93% of Americans used the Internet in 2021.<sup>3</sup> The growth of Internet usage is rivaled only by the myriad ways users can harness the Internet for the betterment of their lives through commerce, entertainment, education, and countless other pursuits.

In addition to the convenience, privacy, flexibility, and speed the Internet offers to all users:

In many ways, individuals with disabilities rely on Web content more so than their nondisabled peers because of inherent transportation, communication, and other barriers. A blind person does not have the same autonomy to drive to a covered entity's office as a sighted person. A deaf or hard of hearing person does not have the same opportunity to call a covered entity's office.<sup>4</sup>

The Internet has become even more important as more and more of the services, privileges, and advantages of businesses have moved online. Now, businesses

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<sup>3</sup> Pew Research Center, Internet/Broadband Fact Sheet (Apr. 7, 2021), *available at* <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> (visited Apr. 19, 2021).

<sup>4</sup> Comment to DOJ Supplemental Advance Notice of Proposed Rulemaking "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities," CRT Docket No. 128, RIN 1190-AA65, <https://dredf.org/wp-content/uploads/2016/10/Response-to-RIN-1190-AA65.pdf>, Answer 57 (Oct. 7, 2016) (citations omitted).

expect and encourage, and even require, their customers to use websites to address most of their service needs in advance of, or in the alternative to, coming to the business. According to Winn-Dixie's current website, it offers COVID-19 vaccinations, which can be scheduled only via its website.<sup>5</sup>

At the best of times, access to reservations, prescription refills, pre-orders, deliveries, and other services offers increased convenience, 24/7 flexibility, privacy, and speed for all who are able to use it. But not for those who are blind, according to the panel. For the blind, it maintains, it is sufficient that they can travel to the store, wait for an employee to assist, depend on that employee's discretion, reading ability, and patience to request a good or service, such as a prescription, and wait while the request is fulfilled. While sighted patrons accomplish these things at their convenience, in the privacy of their homes, while doing other things, a person with a disability should be satisfied with sacrificing their privacy, independence, and time in the store.

But these are not the best of times, and websites are far more than a "convenience."<sup>6</sup> In the past year, the COVID-19 pandemic has forced people to rely on websites to meet their needs for goods and services across nearly all

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<sup>5</sup> COVID-19 Vaccine, Winn-Dixie, <https://www.winndixie.com/pharmacy/covid-vaccine> (visited Apr. 19, 2021).

<sup>6</sup> Maj. Op. at 27, 32.

industries.<sup>7</sup> Businesses and customers have a shared need to strictly limit public contact to avoid spreading this highly contagious disease. Over 31 million people have contracted COVID-19 and over 560,000 have died.<sup>8</sup> States across the country and this Circuit have declared public health emergencies and issued stay-at-home orders mandating that people avoid public places.<sup>9</sup> These orders remain in effect to some extent today.<sup>10</sup>

To the extent people are allowed to leave home, the Centers for Disease Control (“CDC”) advises people to both wear masks and stay six feet from

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<sup>7</sup> Craig Guillot, *How retailers are adapting to curbside pickup*, Nat’l Retail Fed’n, (May 13, 2020), <https://nrf.com/blog/how-retailers-are-adapting-curbside-pickup> (visited Apr. 20, 2021); Suzanne Kapner, *Covid-19 Rewrote the Rules of Shopping. What Is Next?*, Wall. St. J., available at: <https://www.wsj.com/articles/covid-19-rewrote-the-rules-of-shopping-what-is-next-11615561232> (Mar. 12, 2021) (visited Apr. 20, 2021); Tamara Charm, et al., *Survey: US consumer sentiment during the coronavirus crisis*, MCKINSEY & CO. (Mar. 24, 2021), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/survey-us-consumer-sentiment-during-the-coronavirus-crisis#> (visited Apr. 20, 2021).

<sup>8</sup> CDC, COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (visited Apr. 20, 2021).

<sup>9</sup> Florida Exec. Order No. 20-91 (April 1, 2020); Georgia Exec. Order 03.14.20.01 (March 14, 2020); Order of State Health Officer (Apr. 30, 2020).

<sup>10</sup> Florida Exec. Order No. 21-45 (through April 26, 2021); Georgia Exec. Order 04.01.21.60 (through May 3, 2021); Order of State Health Officer, Amended April 7, 2021 (through May 5, 2021).

others.<sup>11</sup> Yet, according to the panel majority, blind people, who cannot see whether people around them are within six feet or wearing masks, must go to physical stores, rely on escorting and personal assistance by employees, and remain in stores longer than necessary.

## **II. This Case Merits Rehearing *En Banc* Because the Panel Decision Conflicts with this Circuit’s Precedent.**

### **A. The Panel Had No Live Controversy Before It.**

In this Circuit, an actual case or controversy must exist at all stages of litigation, including appeal. “[A]n action that is moot cannot be characterized as an active case or controversy.”<sup>12</sup> When an event subsequent to appeal eliminates that case or controversy, the appeal must be dismissed as moot.<sup>13</sup> The expiration of an injunction triggers mootness.<sup>14</sup>

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<sup>11</sup> CDC, *Guidance for Wearing Masks*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (April 19, 2021) (visited April 20, 2021).

<sup>12</sup> *Soliman v. U.S. ex rel. INS*, 296 F.3d 1237, 1242 (11th Cir. 2002).

<sup>13</sup> *Id.* (“[i]f events that occur subsequent to . . . an appeal deprive the court of the ability to give the . . . appellant meaningful relief, then the case is moot and must be dismissed.’ . . . ‘Any decision on the merits of a moot case or issue would be an impermissible advisory opinion.’” *Id.* (internal citations omitted, emphasis added); see also *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

<sup>14</sup> *E.g.*, *Local No. 8-6, Oil, Chemical & Atomic Workers Int’l. Union v. Missouri*, 361 U.S. 363, 367-68, 371 (1960); *United States v. Sec’y, Fla. Dep’t. of Corr.*, 778 F.3d 1223, 1226-30 (11th Cir. 2015); *Leedom Mgmt. Grp., Inc. v. Perlmutter*, 532 Fed. App’x 893, 895-96 (11th Cir. 2013).

The district court in this case issued an injunction to “expire in three years” from July 5, 2017.<sup>15</sup> Therefore, this appeal became moot on July 5, 2020, over nine months before the panel issued its decision. The underlying case sought only injunctive relief, so no other live issue remained. Appellee’s claim for attorneys’ fees does not give this Court jurisdiction to continue the case.<sup>16</sup>

The parties’ failure to raise the question of mootness does not change the analysis; the existence (or not) of jurisdiction is a threshold issue Courts determine *sua sponte*, if needed. As this Court found in *United States v. Secretary, Florida Dept. of Corrections*:

[a]lthough the parties did not raise any question about mootness, we have an obligation to notice and decide mootness issues. . . . We must address it at the outset because we have no jurisdiction to decide moot questions. . . . We conclude that, like the proverbial tree, if an issue falls in the forest of federal law, courts must take notice of the sound even if the parties did not hear it.<sup>17</sup>

Because this case was moot before the opinion’s issuance, the panel had no jurisdiction. The panel’s decision is contrary to this Circuit’s precedent prohibiting advisory opinions and must be vacated and the appeal dismissed.

**B. The Panel Rejected this Circuit’s Precedent Regarding Application of the ADA to Websites and the Comparison Standard for Discrimination.**

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<sup>15</sup> July 5, 2017 Order & Injunction, ¶ 9 (D.Ct., Doc. 67).

<sup>16</sup> *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1619 (2020).

<sup>17</sup> 778 F.3d at 1226-27 (internal citations omitted).

The panel majority rejected Circuit precedent and developed a new standard for when ADA requirements apply to businesses' websites. The majority rejected the longstanding "nexus" approach articulated by this Court in *Rendon v.*

*Valleycrest Products*, 294 F.3d 1279 (11th Cir. 2002), and applied repeatedly throughout the Circuit – in at least 21 cases decided by 16 different judges.<sup>18</sup> This

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<sup>18</sup> *E.g.*, *Haynes v. Dunkin' Donuts, LLC*, 741 Fed. App'x 752, 754 (11th Cir. 2018) (citing *Rendon*, 294 F.3d at 1283); *Ariza v. Walters & Mason Retail, Inc.*, No. 20-cv-25047, 2021 WL 354187, at \*2–3 (S.D. Fla. Feb. 1, 2021) (Bloom, J.); *Abdinoor v. Lewis Rental Props. Ltd. P'ship*, No. 9:20-cv-80801-WPD/WM, 2020 WL 6041846, at \*2 (S.D. Fla. Oct. 13, 2020) (Matthewman, J.); *Reddish v. Ovadia*, No. 19-CV-62322, 2020 WL 5097807, at \*3 n.2 (S.D. Fla. Aug. 11, 2020) (Valle, M.J.), *report & recommendation adopted*, 2020 WL 5096878 (S.D. Fla. Aug. 28, 2020) (Williams, J.); *Gomez v. Dadeland Dodge, Inc.*, No. 19-23682-Civ, 2020 WL 8919440, at \*2–3 (S.D. Fla. Apr. 24, 2020) (Torres, M.J.); *Price v. City of Ocala, Fla.*, 375 F. Supp. 3d 1264, 1269 (M.D. Fla. 2019) (Moody, J.); *Price v. Escalante - Black Diamond Golf Club LLC*, No. 5:19-cv-22-Oc-30PRL, 2019 WL 1905865, at \*3 (M.D. Fla. Apr. 29, 2019) (Moody, J.); *Haynes v. Kohl's Dep't Stores, Inc.*, 391 F. Supp. 3d 1128, 1134 (S.D. Fla. 2018) (Middlebrooks, J.); *Gomez v. Gen. Nutrition Corp.*, 323 F. Supp. 3d 1368, 1375–76 (S.D. Fla. 2018) (Cooke, J.); *Fuller v. Steps Clothing, Inc.*, No. 18-cv-62904, 2018 WL 6818733, at \*1 (S.D. Fla. Dec. 28, 2018) (Bloom, J.); *Fuller v. Mazal Grp. LLC*, No. 18-cv-60456-BB, 2018 WL 3584700, at \*3 (S.D. Fla. July 25, 2018) (Bloom, J.); *Gomez v. Deli Mgmt., Inc.*, No. 18-cv-22288-UU, 2018 WL 11299047, at \*2–3 (S.D. Fla. July 24, 2018) (Ungaro, J.); *Price v. Everglades Coll., Inc.*, No. 6:18-cv-492-Orl-31GJK, 2018 WL 3428156, at \*2 (M.D. Fla. July 16, 2018) (Presnell, J.); *Fuller v. Smoking Anytime Two, LLC*, No. 18-cv-60996-UU, 2018 WL 3387692, at \*2–3 (S.D. Fla. July 11, 2018) (Ungaro, J.); *Haynes v. Pollo Operations, Inc.*, No. 17-cv-61003, 2018 WL 1523421, at \*2 (S.D. Fla. Mar. 28, 2018) (Gayles, J.); *Buchholz v. Aventura Beach Assocs., Ltd.*, No. 17-23154-CIV, 2018 WL 318476, at \*3– (S.D. Fla. Jan. 5, 2018) (Moreno, J.); *Gil v. Winn Dixie Stores, Inc.*, 242 F. Supp. 3d 1315, 1321 (S.D. Fla. 2017) (Scola, J.); *Gomez v. La Carreta Enters.*, Case No. 17-61195-CIV, 2017 U.S. Dist. LEXIS 202662, at \*7–9 (S.D. Fla. Dec.

indicates just how out of step the majority's holding is with the widespread understanding of this Circuit's precedent.

Rather than following *Rendon*, the majority, citing no precedent of this Circuit or elsewhere, created a new standard out of whole cloth – namely, that an inaccessible communication or online gateway (called an “intangible barrier”) to a business is discriminatory only if there is no other way to get the information or service. The majority adopts the narrowest definition of “necessary” possible and stands the ADA, which states “[n]o individual shall be discriminated against on the basis of disability,”<sup>19</sup> on its head.

Discrimination is not limited to exclusion, but encompasses providing lesser services, such as movie theaters limiting certain individuals to the balcony (or the back of the bus).<sup>20</sup> The statute, itself, makes clear that prohibited discrimination

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6, 2017) (Dimitrouleas, J.); *Pankey v. Aetna Life Ins. Co.*, No. 6:16-cv-1011-Orl-37GJK, 2017 WL 1089330, at \*6 (M.D. Fla. Mar. 23, 2017) (Dalton, J.); *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801, 2017 WL 1957182, at \*3–4 (S.D. Fla. Feb. 2, 2017) (Lenard, J.); *Petrano v. Nationwide Mut. Fire Ins. Co.*, No. 1:12-cv-86-SPM-GRJ, 2013 WL 1325045, at \*8 (N.D. Fla. Jan. 24, 2013) (Jones, M.J.), *report & recommendation adopted*, 2013 WL 1325030 (N.D. Fla. Mar. 27, 2013); *Access Now, Inc. v. Southwest Airlines*, 227 F. Supp. 2d 1312, 1319–21 (S.D. Fla. 2002) (Seitz, J.).

<sup>19</sup> 42 U.S.C. § 12182(a) (emphasis added).

<sup>20</sup> *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) *affirmed by Gayle v. Browder*, 352 U.S. 903 (1956) (segregated buses unconstitutional); *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1133 (9th Cir. 2003).



includes “otherwise treat[ing] differently”<sup>21</sup> and preventing people with disabilities from “full and equal enjoyment.”<sup>22</sup> The majority’s analysis also ignores the Department of Justice ADA regulations authorized by Congress, which repeatedly prohibit “discrimination,” different treatment,<sup>23</sup> and unequal opportunities,<sup>24</sup> and require “full and equal” access<sup>25</sup> Those regulations are entitled to *Chevron* deference,<sup>26</sup> but the majority provided no deference.

The majority further developed a new comparator standard, implicitly rejecting, not just cases involving disability discrimination, but all discrimination

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<sup>21</sup> 42 U.S.C. § 12182(a) and (b)(2)(A)(iii).

<sup>22</sup> *Id.* at § 12182(a) and (b)(2)(A)(i).

<sup>23</sup> *See, e.g.*, 28 C.F.R. § 36.201(a); 28 C.F.R. § 36.303(a).

<sup>24</sup> 28 C.F.R. § 36.202(b).

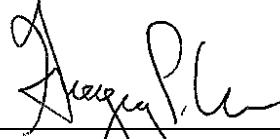
<sup>25</sup> 28 C.F.R. § 36.201(a); 28 C.F.R. § 36.301.

<sup>26</sup> *Schwarz v. The Villages Charter Sch., Inc.*, 165 F. Supp. 3d 1153, 1182 (M.D. Fla. 2016), *aff'd sub nom. Schwarz v. Bd. of Supervisors ex rel. Villages Cmty Dev. Districts*, 672 Fed. App'x 981 (11th Cir. 2017); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The majority also ignored the Department of Justice’s own construction of its regulations as covering public accommodations’ websites, expressed both in this case, Statement of Interest by United States of America (Entered: 12/12/2016) (D.Ct. Doc. 23), and in public statements. *See, e.g.*, Advance Notice of Proposed Rulemaking, 75 Fed. Reg. 43,460, 43,463 (July 26, 2010) (“rather than being limited to those goods and services provided ‘at’ or ‘in’ a place of public accommodation. . . . the ADA mandate for ‘full and equal enjoyment’ requires nondiscrimination by a place of public accommodation in the offering of all its goods and services, including those offered via Web sites.”). That construction is entitled to *Auer* deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

cases. Rather than comparing blind individuals' online access to services to the access given to similarly-situated sighted individuals using the website, the panel majority—without any authority—established a comparator of “a sighted customer who does not have internet access.”<sup>27</sup> A sighted customer without internet is hardly comparable to a blind customer who pays for internet service and is prohibited from using it to access a business, any more than white riders who do not ride the bus are comparable to Black riders forced to sit at the back.

### CONCLUSION

The panel's opinion addresses an issue of exceptional importance and is contrary to this Circuit's precedent and should be reconsidered *en banc*.



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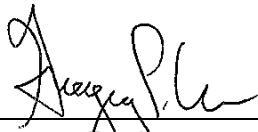
*Counsel for Amici*

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<sup>27</sup> Maj. Op. at 27 n.20.

## CERTIFICATE OF COMPLIANCE

1. This brief contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 29-3.
2. 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 in Times New Roman 14-point font.
3. In making this certification, I have relied on the word count feature of the word-processing program used to prepare this brief.



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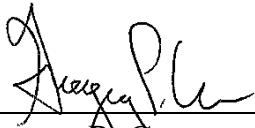
Gregory P. Care  
Counsel for *Amici*

April 22, 2021

### CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 22, 2021.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.



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Gregory P. Care  
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April 22, 2021

## APPENDIX A

### INTERESTS OF AMICI

*Amicus* **American Association of People with Disabilities** (“AAPD”) organizes the disability community to be a powerful voice for change. AAPD is committed to eliminating barriers to community integration, independent living, equal opportunity, economic self-sufficiency, and civic participation.

*Amicus* **Association of Late Deafened Adults** (ALDA) is a nationwide non-profit organization that advocates for measures that enable people to participate in public life equally with people whose hearing is normal. ALDA is concerned that the decision, if left standing, will sanction the already prevalent failure of businesses to make their online materials accessible to our members and others similarly situated.

*Amicus* **Civil Rights Education and Enforcement Center** (“CREEC”) is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC’s efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to places of public accommodation and that Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq., can be effectively enforced to ensure equal access and independence. CREEC joins this amicus brief because the panel

majority's ruling threatens to exclude people with disabilities from "the economic and social mainstream of American life." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting S. Rep. No. 101–116, p. 20 (1989)).

*Amicus Disability Rights Advocates* (DRA) is a non-profit public interest legal center that specializes in high-impact civil rights advocacy on behalf of persons with all types of disabilities throughout the United States. DRA has successfully challenged inaccessible websites including those of Target, Scribd, and the San Francisco Federal Credit Union, resulting in commitments by these businesses to ensure their websites are accessible.

*Amicus Disability Rights Bar Association* (DRBA) was started by a group of disability counsel, law professors, legal nonprofits and advocacy groups who share a commitment to effective legal representation of individuals with disabilities. Members of DRBA commonly believe that the fundamental civil rights of people with disabilities are inadequately represented in our society including in the area of access to the Internet including all the information, goods, and services available through websites.

*Amicus Disability Rights Texas* (DRTX) is a nonprofit organization designated to serve as the Protection and Advocacy System ("P&A") for the State of Texas. See Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Tex. Att'y Gen. Op. No. JC-0461 (2002). Its purpose is to protect and advocate for the

legal and human rights of individuals with disabilities, and it is authorized to do so under the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041 *et seq.*; Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §§ 10801 *et seq.*; and Protection and Advocacy for Individual Rights Act, 29 U.S.C. § 794e. In accordance with its federal mandate, Disability Rights Texas has the authority, among other things, to pursue administrative, legal, and other appropriate remedies to ensure the protection of rights of persons with disabilities. 29 U.S.C. § 794e(f)(3); 42 U.S.C. § 10805(a)(1)(B). One of DRTX's priority areas is protecting the rights of people with disabilities under the ADA. DRTX has filed numerous amicus briefs to ensure that courts and litigants follow the antidiscrimination mandates in the ADA.

*Amicus Missouri Protection & Advocacy Services* (“Mo P&A”) is the state-designated protection and advocacy system for people with disabilities in Missouri, and is part of a nationwide network of 57 federally mandated protection and advocacy organizations. Mo P&A submits this brief because it is concerned that the majority opinion in this case threatens the rights of people with disabilities to access business websites on an equal basis with non-disabled consumers; and that the majority opinion wrongly interprets the plain language of Title III of the ADA.

**The National Association of the Deaf (“NAD”)** The National Association of the Deaf (NAD), founded in 1880 by deaf and hard of hearing leaders, is the oldest national civil rights organization in the United States. As a non-profit serving all within the USA, the NAD has as its mission to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing people in this country. The NAD is supported by affiliated state organizations in 49 states and D.C. as well as affiliated nonprofits serving various demographics within the deaf and hard of hearing community. Led by deaf and hard of hearing people on its Board and staff leadership, the NAD is dedicated to ensuring equal access in every aspect of life: health care and mental health services, education, employment, entertainment, personal autonomy, voting rights, access to professional services, legal and court access, technology, and telecommunications.

**The National Council on Independent Living (“NCIL”)** is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. NCIL works to advance independent living and the rights of people with disabilities. NCIL’s members include individuals with disabilities, Centers for Independent Living, Statewide Independent Living Councils, and other disability rights advocacy organizations. Members of NCIL’s leadership helped draft the Americans with Disabilities Act and NCIL has advocated and will



continue to advocate for courts to enforce the law's intent of providing full and equal opportunities to enjoy everyday activities for people with disabilities, including those that are facilitated online that make up the fabric of American life.

Amicus **National Federation of the Blind** is the oldest and largest national organization of blind persons and a non-profit corporation committed to the complete integration of the blind into society on a basis of equality. Amicus submits this brief because it is concerned that the panel majority's ruling threatens the ability of individuals with disabilities to enforce their federal civil rights to receive reasonable accommodations in the workplace.