

No. 17-13467

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

WINN-DIXIE STORES, INC.,

Defendant-Appellant,

v.

JUAN CARLOS GIL,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

**BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF THE BLIND,
AMERICAN COUNCIL OF THE BLIND, AMERICAN FOUNDATION
FOR THE BLIND, ASSOCIATION OF LATE DEAFENED ADULTS,
DISABILITY INDEPENDENCE GROUP, DISABILITY RIGHTS
ADVOCATES, DISABILITY RIGHTS EDUCATION & DEFENSE FUND,
DISABILITY RIGHTS FLORIDA, FLORIDA COUNCIL OF THE BLIND,
NATIONAL ASSOCIATION OF THE DEAF, NATIONAL DISABILITY
RIGHTS NETWORK, NATIONAL FEDERATION OF THE BLIND OF
FLORIDA, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL
RIGHTS AND URBAN AFFAIRS, AND WORLD INSTITUTE ON
DISABILITY IN SUPPORT OF AFFIRMANCE**

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

Counsel for Amici

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

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-1 through 26.1-3, *amici curiae* disclose the following persons or entities not already listed in the previously filed briefs in this matter known to have an interest in the outcome of this appeal:

1. American Council of the Blind
2. American Foundation for the Blind
3. Association of Late Deafened Adults
4. Brown, Goldstein & Levy, LLP
5. Care, Esq., Gregory P.
6. Disability Independence Group
7. Disability Rights Advocates
8. Disability Rights Education & Defense Fund
9. Disability Rights Florida
10. Florida Council of the Blind
11. National Association of the Deaf
12. National Disability Rights Network
13. National Federation of Independent Business Small Business Legal
Center
14. National Federation of the Blind

15. National Federation of the Blind of Florida
16. Restaurant Law Center
17. Washington Lawyers' Committee for Civil Rights and Urban Affairs
18. World Institute on Disability

Amici on this brief certify that they are not publicly held corporations, do not have parent corporations, and that no publicly held corporation owns 10 percent or more of any *amici*'s respective stock.

TABLE OF CONTENTS

| | |
|---|-----|
| CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT | C-1 |
| TABLE OF CONTENTS..... | i |
| TABLE OF CITATIONS | iii |
| IDENTITY AND INTEREST OF THE <i>AMICI CURIAE</i> | 1 |
| STATEMENT OF THE ISSUES..... | 7 |
| SUMMARY OF THE ARGUMENT | 7 |
| ARGUMENT | 8 |
| I. Websites play a pivotal role in equality for persons with disabilities..... | 8 |
| A. Websites provide access to the staples of American society that were previously unreachable by many persons with disabilities..... | 9 |
| B. How blind users (and others with disabilities) access websites..... | 10 |
| C. The role of the Web Content Accessibility Guidelines (WCAG). | 11 |
| II. <i>Amici</i> 's unpreserved "due process" argument lacks merit..... | 15 |
| A. Winn-Dixie has not alleged any violation of due process. | 15 |

B. Public accommodations have long known that their websites must provide effective communication.16

C. The pendency of regulations providing technical guidance does not obviate the existing duty to provide effective communication.....24

CONCLUSION25

CERTIFICATE OF COMPLIANCE.....26

CERTIFICATE OF SERVICE27

TABLE OF CITATIONS

Cases

| | |
|--|--------|
| <i>Access Now, Inc. v. Blue Apron, LLC</i> No. 17-CV-116, 2017 WL 5186354 (D.N.H. Nov. 8, 2017)..... | 25 |
| <i>Andrews v. Blick Art Materials, LLC</i> No. 17-CV-767, 2017 WL 3278898 (E.D.N.Y. Aug. 1, 2017) | 25 |
| <i>Evans v. Georgia Reg'l Hosp.</i> , 850 F.3d 1248 (11th Cir. 2017) | 16 |
| <i>Exxon Corp. v. Busbee</i> , 644 F.2d 1030 (5th Cir. 1981) | 20 |
| <i>Gorecki v. Dave & Buster's, Inc.</i> No. CV 17-1138, ___WL___, D.E. 39 (C.D. Cal. Oct. 10, 2017) | 25 |
| <i>Gorecki v. Hobby Lobby Stores, Inc.</i> No. CV 17-1131, 2017 WL 2957736 (C.D. Cal. June 15, 2017) | 25 |
| <i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972)..... | 24 |
| <i>Groome Res. Ltd., L.L.C. v. Par. of Jefferson</i> , 234 F.3d 192 (5th Cir. 2000)..... | 20 |
| <i>Indigo Room, Inc. v. City of Ft. Myers</i> , 710 F.3d 1294 (11th Cir. 2013) | 16, 17 |
| <i>Liese v. Indian River County Hosp. Dist.</i> , 701 F.3d 334 (11th Cir. 2012) | 20 |
| <i>Nat'l Ass'n of the Deaf v. Harvard Univ.</i> , No. 3:15-CV-30023, 2016 WL 3561622 (D. Mass. Feb. 9, 2016)..... | 19 |
| <i>Pine v. City of W. Palm Beach</i> , 762 F.3d 1262 (11th Cir. 2014) | 24 |
| <i>Reed v. CVS</i> , No. CV 17-3877, 2017 WL 4457508 (C.D. Cal. Oct. 3, 2017)..... | 24 |

Rios v. New York & Co.,
 No. 217CV04676, 2017 WL 5564530 (C.D. Cal. Nov. 16, 2017).....25

Roberts v. U.S. Jaycees,
 468 U.S. 609 (1984)..... 16, 21

Shotz v. Cates,
 256 F.3d 1077 (11th Cir. 2001)19

Silva v. Baptist Health South Florida, Inc.,
 856 F.3d 824 (11th Cir. 2017)20

United States v. AMC Entm’t, Inc.,
 549 F.3d 760 (9th Cir. 2008)..... 19, 20

Statutes

29 U.S.C. § 794d.....13

42 U.S.C. § 1210110

Gen. Laws 1956, § 17-9.1-34(g).....14

Regulations

14 C.F.R. § 382.4313

19 TAC § 66.1014(a)(3)14

19 TAC § 66.28(a)(2).....14

19 TAC § 66.67(f).....14

28 C.F.R. § 36.30217

28 C.F.R. § 36.30318

36 C.F.R. § 1194.113

COMAR § 13A.04.15.0314

COMAR § 13A.04.15.0414

COMAR § 13A.04.15.0714

| | |
|--|----|
| Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80500 (Dec. 21, 2000) | 14 |
| Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5790 (Jan. 18, 2017)..... | 13 |
| N.Y.C. Admin. Code § 23-802(a)..... | 14 |
| Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544 (July 26, 1991) | 17 |
| Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236 (Sept. 15, 2010)..... | 18 |
| 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 (July 26, 2010) | 18 |
| R.I. Admin. Code 23-1-20:4 | 14 |
| <u>Other Authorities</u> | |
| ADA Compliance: Website Accessibility | 22 |
| Alert: Drive-by ADA Website Compliance Letters | 23 |
| Am. Hotel & Lodging Ass’n, Creating an Accessible Presence for the Lodging Industry, quoted in How Hospitality Websites are Impacted by the Americans with Disabilities Act Guidelines..... | 24 |
| Americans with Disabilities Act: Accessibility of Web Information and Services | 22 |
| Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House Committee on the Judiciary, 106th Cong., 2d Sess. 65–010 (2000)..... | 18 |
| Avoiding the Website Accessibility Shakedown, ABA Banking Journal..... | 22 |
| Consent Decree, <i>Nat’l Fed. of the Blind v. HRB Digital LLC and HRB Tax Group, Inc.</i> , No. 1:13-cv-10799 (March 25, 2014) | 15 |

| | |
|--|--------|
| Consent Decree, <i>United States v. Greyhound Lines, Inc.</i> , No. 16-67-RGA (D. De. Feb. 10, 2016) | 15 |
| H.R. Rep. 101-485 (II) (1990), <i>reprinted in</i> 1990 U.S.C.C.A.N. 303..... | 7 |
| Here’s How to Make Sure Your Small Business Is ADA Compliant..... | 24 |
| Internet/Broadband Fact Sheet..... | 9 |
| Is Your Website ADA Compliant?, ABA Bank Marketing | 22, 23 |
| Letter from Deval L. Patrick, Assistant Att’y Gen., to Senator Tom Harkin (Sept. 9, 1996)..... | 18 |
| Press Release, Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports (July 25, 2012)..... | 9 |
| Press Release, One in Five Americans Has Hearing Loss..... | 11 |
| Settlement Agreement Between American Council of the Blind, Bay State Council of the Blind, Robert Baran, and Netflix Inc. | 15 |
| Settlement Agreement Between the U.S.A. and Ahold U.S.A., Inc. and Peapod, LLC, DJ No. 202-63-169 (Nov. 14, 2014)..... | 15 |
| The Impact of Broadband on People with Disabilities..... | 24 |
| W3C, Current Members..... | 21 |
| W3C, Participants in the Accessibility Guidelines Working Group | 12 |
| W3C, Web Content Accessibility Guidelines 1.0 | 12 |
| W3C, Web Content Accessibility Guidelines 2.0 | 12 |
| W3C, Web Content Accessibility Guidelines 2.1 | 15 |
| Washington State Office of the Chief Info. Officer, Policy 188.10 | 14 |
| Window to the Law: Accessible Websites and the ADA..... | 23 |

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amici are disability rights groups committed to advancing equal access to the information and unique benefits provided to the public through websites.

Amici submit this brief, which was consented to by both parties, because reversing the district court's ruling would threaten the ability of individuals with disabilities to enforce their federal civil right to enjoy the web-based services of public accommodations.

The **National Federation of the Blind** (NFB), the oldest and largest national organization of blind persons, is a non-profit corporation headquartered in Baltimore, Maryland. It has affiliates in all 50 states, including the **National Federation of the Blind of Florida**, Washington, D.C., and Puerto Rico. The NFB and its affiliates are recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The ultimate purpose of NFB is the complete integration of the blind into society on a basis of equality, including equal access to websites.

The **American Council of the Blind** (ACB) is a national grassroots consumer organization representing Americans with vision loss. With 70 affiliates across the country, ACB is committed to securing equal access and opportunity for Americans who are blind and visually impaired. ACB recognizes the value the

internet has made in expanding accessibility, and has worked with private and public partners over the decades to assure progress continues toward making the internet accessible to all.

As the pioneering nonprofit to which Helen Keller devoted much of her extraordinary life, the **American Foundation for the Blind** (AFB), for nearly a century, has been addressing the most critical barriers that needlessly interfere with the rights, needs, and tremendous potential of the more than 24.7 million American children, working-age adults, and seniors who are blind or visually impaired. The AFB has been at the forefront of America's public policy discussion about applying the ADA and other disability rights laws in the digital age. The AFB has a long and distinguished record of providing technical assistance to America's leading corporations and others demonstrating how readily and cost-effectively accessible websites can be achieved.

The **Association of Late Deafened Adults** is a nationwide organization that emphasizes connection, support and inclusion for people who are partially or completely deafened but function primarily in the world of aural communication. As an organization, it has advocated actively on behalf of its members to implement the benefits and protections of state and federal disability laws in matters including movie and live theaters and athletic facilities.

Disability Independence Group, Inc., is a Florida-based, non-profit, disability advocacy center. Our mission is to expand opportunities for participation, education, employment, and acceptance of persons with disabilities through advocacy, litigation, education, and training. Failure to have accessible websites harms the mission in that lack of access to accessible information on the Internet decreases opportunities for persons with disabilities.

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 works to end discrimination in areas such as access to public accommodations, public services, education, and technology. 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.

The **Disability Rights Education & Defense Fund (DREDF)**, based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF works through education, advocacy and law reform efforts. DREDF is nationally recognized for expertise in the interpretation of federal disability rights laws,

including the statute at issue here, and their application to technology including websites.

Disability Rights Florida, Inc. (DRF) is a not-for-profit corporation serving as Florida's federally-established and -funded protection and advocacy system for individuals with disabilities. DRF's constituents participate in the formulation of its goals, including eliminating barriers to inclusion by ensuring equal access to services in the community. Because DRF's constituents rely on the information, goods, and services provided on websites, it is imperative that those websites are accessible for all.

As the largest nonprofit organization in Florida dedicated to improving the quality of life for independence of Floridians who are blind or have low vision, the **Florida Council of the Blind** (FCB) is more than 750 members strong. FCB's members go on line and use mobile phones every day to do what sighted people do. Recognizing that website accessibility is essential for complete independence and full participation in society, FCB has promoted, advocated for, and demonstrated fully accessible websites with their own website for the past 20 years.

The **National Association of the Deaf** (NAD), founded in 1880, is the oldest national civil rights organization in the United States, and is the country's premier organization of, by, and for deaf and hard of hearing individuals. The

mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents through systemic change in all aspects of society, including full access to Web-based services.

The **National Disability Rights Network** is the nonprofit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies in the United States. P&A/CAP agencies are authorized under federal law to represent and advocate for, and investigate abuse and neglect of, individuals with disabilities. The P&A/CAP system comprises the Nation's largest provider of legal-based advocacy services for persons with disabilities.

Founded in 1968, the **Washington Lawyers' Committee for Civil Rights and Urban Affairs** is a non-profit civil rights organization established to eradicate discrimination by enforcing civil rights laws through litigation. In furtherance of this mission, the Committee's disability rights project strives to guarantee equal access to all aspects of society to persons within the disability community. The project has recently focused on equal access to technologies and services on behalf of blind individuals who use talking screen readers, including equal access to online businesses, kiosks, and mobile applications.

World Institute on Disability (WID) is a disability policy and practice institute committed to full participation in the social and economic fiber of our

communities by persons with disabilities. WID has been at the cutting edge of access to the internet and all it represents since its inception.

No party's counsel authored this 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.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly applied the 11th Circuit’s “nexus” test when it found that Winn-Dixie violated Title III of the Americans with Disabilities Act (ADA) because its website was inaccessible to Mr. Gil who sought to use the website to utilize Winn-Dixie’s store pharmacies, in-store coupons, and other in-store services.

2. Whether Winn-Dixie had adequate notice of its duty to provide full and equal enjoyment of its services via its website, including its obligation to provide effective communication to patrons, through either: the text of Title III and its regulations detailing effective communication that have existed since 1991, the U.S. Department of Justice’s (DOJ) public statements since 1996 that the ADA’s mandate of equal access applies to websites, or the many acknowledgements of this published by the *amici* supporting reversal.

SUMMARY OF THE ARGUMENT

The ADA and its regulations made it clear, decades ago, that public accommodations like Appellant, Winn-Dixie, must communicate effectively with patrons with disabilities. Consistent with Congress’ intent that application of the ADA “should keep pace with the rapidly changing technology of the times,”¹ courts and the DOJ have applied the law’s mandate to websites, which are a unique

¹ H.R. Rep. 101-485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 391.

tool capable of promoting the inclusion and independence the ADA was enacted to achieve.

Even many of the *amici* seeking reversal have observed elsewhere that ADA compliance requires accessible websites, and that the consensus Web Content Accessibility Guidelines (WCAG) version 2.0 is an appropriate measure of accessibility. Thus, the district court correctly ruled that Winn-Dixie's website, which failed to provide full and equal access to information and services, did not comply with the ADA, and could be remedied by enhancing it consistent with WCAG 2.0 standards.

ARGUMENT

I. Websites play a pivotal role in equality for persons with disabilities.

Three years after the ADA became law, the World Wide Web transitioned from a network used almost exclusively by researchers into a means for large-scale commerce, entertainment, communication, and much more.² While many Americans take for granted the ability to access goods, services, and information over the Internet, serious barriers remain for people with disabilities. Because the technology and techniques that make websites accessible are readily available, these barriers to inclusion that the ADA sought to eradicate over 27 years ago are

² The Birth of the Web, <https://home.cern/topics/birth-web> (last visited December 20, 2017).

gratuitous. The result is the exclusion of up to 52.4 million Americans with disabilities.³

A. Websites provide access to the staples of American society that were previously unreachable by many persons with disabilities.

Individuals with disabilities often rely on websites to overcome the systemic transportation, communication, architectural, and other barriers that pervade our society. A blind person can review and save coupons using a website that would have otherwise required a sighted assistant. A deaf or hard-of-hearing person can participate in a conversation through a Web-based platform more freely than they would be able to in person. Many autistic people can more independently review information about a store's offerings online. And the 24-hour-a-day availability of information and transactions on websites provides a level of independence and convenience that cannot be replicated through any other means.

The lack of accessible websites has far reaching effects on virtually every aspect of the lives of individuals with disabilities. Congress described in the ADA the deprivation of individual opportunity and the "billions of dollars in unnecessary

³ Eight-eight percent of Americans (280.5 million) use the Internet. Of that group, 18.7% have disabilities. Internet/Broadband Fact Sheet, <http://www.pewinternet.org/fact-sheet/internet-broadband/>; Press Release, Nearly 1 in 5 People Have a Disability in the U.S., Census Bureau Reports (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

expenses resulting from dependency and nonproductivity.”⁴ Those effects are compounded as the “baby boomer” generation reaches the age at which visual, hearing, and other impairments are beginning to affect their ability to access website-based information.

B. How blind users (and others with disabilities) access websites.

Websites are constructed with computer binary code (1s and 0s) that typifies “digital information” that presents information and reacts to user input. Internet users employ technology, usually in the form of a Web browser, to interpret that programming into an understandable format. Because digital information is inherently flexible, it can be rendered in nearly any format, such as audio, text, and graphics. That flexibility is a tremendous boon for persons with disabilities.

A properly coded website allows a blind person to interact with the same website that sighted persons use. Blind users employ keyboard commands instead of a mouse, and use screen reader software to read the website code “behind the screen” and present the information in the user’s chosen format. That format will vary depending on the user’s needs, including: synthetic speech of the text that sighted persons read with their eyes; braille versions of the text, provided to the user on his peripheral device; or enlarged text and images.

⁴ 42 U.S.C. § 12101(a)(8).

There are several popular screen reader programs, including Job Access With Speech (JAWS), but their role is the same. If the website is designed properly, vision is irrelevant: the screen reader software will read a text description of an image, identify headings and links and other navigational cues on the page, tell users what information to put into form fields, and the like.⁵ However, screen readers do not remedy an improperly designed website. If the website lacks proper coding, the information on that website will not be communicated effectively.⁶

Proper website coding also includes captioning so that deaf and hard-of-hearing users, of which there are 48 million in the U.S.,⁷ may access audio content. Closed captioning is a user-activated system that displays text on, for instance, product demonstration videos or advertisements.

C. The role of the Web Content Accessibility Guidelines (WCAG).

Compliance with WCAG 2.0 is an appropriate means of assessing whether websites are effectively communicating with users with disabilities, and the district court properly adopted that standard for remediating Winn-Dixie's website.

⁵ The Perkins School for the Blind has released a short demonstration of what a blind user experiences: <https://www.youtube.com/watch?v=KxhRV18m-d8>.

⁶ These issues apply equally to those who have a "print disability," in that they cannot readily access print text due to a visual (blindness), perceptual (learning impairment), or physical (inability to manipulate a mouse) disability.

⁷ Press Release, One in Five Americans Has Hearing Loss, https://www.hopkinsmedicine.org/news/media/releases/one_in_five_americans_has_hearing_loss.

WCAG 2.0 is a testable, consensus standard developed by experts from the technology industry, academia, advocacy organizations, and the public for ensuring that websites and other digital media are accessible to persons with disabilities.⁸ In 1999, these experts, as members of the World Wide Web Consortium (W3C), published the WCAG 1.0 guidelines.⁹ In 2008, these experts released WCAG 2.0, which has hence been the industry standard of website accessibility.¹⁰

WCAG 2.0 sets four principles that address the way websites must function to be accessible to persons with disabilities: (1) **perceivable** - information and user interface components must be presentable to users in ways they can perceive, (2) **operable** - user interface components and navigation must be operable, (3) **understandable** - information and the operation of user interface must be understandable, and (4) **robust** - content must be robust enough that it can be interpreted reliably by a wide variety of user agents, including assistive technologies.¹¹ There are 12 total guidelines divided amongst the four principles.

⁸ Participants in the Accessibility Guidelines Working Group, <https://www.w3.org/2000/09/dbwg/details?group=35422&public=1>.

⁹ Web Content Accessibility Guidelines 1.0, <https://www.w3.org/TR/WCAG10/>.

¹⁰ Web Content Accessibility Guidelines 2.0, <https://www.w3.org/TR/WCAG20/>.

¹¹ *Id.*

The following illustrates an example of the perceivable principle that often occurs on retailer websites. WCAG 2.0 Guideline 1.1 states that when a website presents an image that conveys substantive information to a user (e.g., a graphic about a sale), that image must have screen-readable text describing to a blind user the information that the image communicates to a sighted user. Proper coding allows a user of screen reader software to get a text description of the image (i.e., that apples are on sale). This coding does not alter a sighted user's experience.

Each WCAG Guideline provides testable "success criteria" at three levels of increasing rigor (A, AA, and AAA). Thus, "AA" represents a measured balance of accessibility for users, and feasibility for designers.

The federal government has adopted WCAG 2.0 AA as the benchmark for website accessibility in several areas. Since December 2015, the U.S. Department of Transportation has applied WCAG 2.0 AA as the regulatory standard for accessibility of core functions on airline websites under the Air Carrier Access Act.¹² On January 18, 2017, the U.S. Access Board adopted WCAG 2.0 AA, with few exceptions, as the accessibility standard for federal agency websites under Section 508 of the Rehabilitation Act.¹³ As a testament to the stability of and

¹² 14 C.F.R. § 382.43(c).

¹³ Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5790, 5791 (codified at 36 C.F.R. § 1194.1, Appx C § 702.10.1); *see also* 29 U.S.C. § 794d.

consensus around WCAG standards, for the previous 16 years, Section 508 regulations regarding accessible websites largely incorporated WCAG 1.0.¹⁴

Various state and local governments have expressly adopted WCAG 2.0 AA as the accessibility standard for their websites and other digital media, including Maryland;¹⁵ Rhode Island;¹⁶ Texas;¹⁷ Washington;¹⁸ and New York City.¹⁹

Many settlement agreements with public accommodations, including other grocers like Peapod, have called for accessible websites as measured by WCAG 2.0 AA.²⁰ Similarly, many companies have independently made it a policy to abide by WCAG 2.0 AA, including grocers like Safeway.²¹

¹⁴ Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80500, 80510 (Dec. 21, 2000).

¹⁵ COMAR §§ 13A.04.15.03, 13A.04.15.04, 13A.04.15.07.

¹⁶ Gen. Laws 1956, § 17-9.1-34(g); R.I. Admin. Code 23-1-20:4.

¹⁷ 19 TAC §§ 66.28(a)(2), 66.67(f), 66.1014(a)(3).

¹⁸ Washington State Office of the Chief Info. Officer, Policy 188.10, <http://ocio.wa.gov/policy/minimum-accessibility-standard>.

¹⁹ N.Y.C. Admin. Code § 23-802(a).

²⁰ *E.g.*, Settlement Agreement Between the U.S.A., Ahold U.S.A., Inc. and Peapod, LLC, No. 202-63-169 (Nov. 14, 2014), http://www.ada.gov/peapod_sa.htm; Consent Decree, *United States v. Greyhound Lines, Inc.*, No. 16-67-RGA (D. De. Feb. 10, 2016), https://www.ada.gov/greyhound/greyhound_cd.html; Consent Decree, *Nat'l Fed. of the Blind v. HRB Digital LLC*, No. 1:13-cv-10799 (March 25, 2014), www.ada.gov/hrb-cd.htm; Settlement Agreement Between American Council of the Blind, Bay State Council of the Blind, Robert Baran, and Netflix Inc., https://www.adatitleiii.com/wp-content/uploads/sites/121/2016/04/Settlement_Agreement_FOR_WEBSITEv2.pdf; *see generally* Settlements, <http://www.lflegal.com/negotiations/>.

²¹ *E.g.*, Policy on Website Accessibility, <http://www.safeway.com/ShopStores/AccessibilityPolicy.page>; Accessibility

Recently, accessibility experts developed a draft for WCAG 2.1 that extends, rather than supplants as opposing *amici* have posited, WCAG 2.0.²² The draft standards chiefly extend WCAG 2.0 to mobile devices that were not as commonly used when WCAG 2.0 was published.²³ WCAG 2.1 maintains the same four principles and does not affect whether a website complies with WCAG 2.0.²⁴

II. *Amici*'s unreserved "due process" argument lacks merit.

A. Winn-Dixie has not alleged any violation of due process.

The "due process" argument introduced on appeal by *amici* seeking reversal relies on the void-for-vagueness doctrine:²⁵ "the principle that a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."²⁶ This theory has not been properly raised in accord with this Court's declaration that it will "review

Information Page, <https://www.dennys.com/accessibility/>; Conformance Statements, <https://www.microsoft.com/en-us/Accessibility/accessibility-conformance-reports>.

²² *E.g.*, Web Content Accessibility Guidelines – What is WCAG?, <https://www.essentialaccessibility.com/blog/web-content-accessibility-guidelines-wcag/>.

²³ Web Content Accessibility Guidelines 2.1, <https://www.w3.org/TR/WCAG21/>.

²⁴ *Id.*

²⁵ Brief of *Amici*, *The Restaurant Law Center et al.* at 19-27; Brief of *Amicus*, *The Florida Justice Reform Institute* at 9-17.

²⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984).

statutes for vagueness concerns only when a litigant alleges a constitutional harm.”²⁷

First, Winn-Dixie’s brief in this Court does not contain any reference to “due process,” nor did its motions at the trial level. The non-litigant *amici* seeking reversal cannot belatedly do in this Circuit what Winn-Dixie has not: “without exceptional circumstances, *amici curiae* may not expand the scope of an appeal to implicate issues not presented by the parties to the district court.”²⁸

Even if there were a live due process issue, the argument fails for want of constitutional harm. Neither Winn-Dixie nor opposing *amici* claim (because they cannot) that the district court’s order requiring Winn-Dixie to provide an accessible website to patrons with disabilities impinges on any of Winn-Dixie’s liberty or property interests.

B. Public accommodations have long known that their websites must provide effective communication.

Opposing *amici*’s due process argument also falters at the subsequent step of the analysis: “the court looks to whether the ordinance forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

²⁷ *Indigo Room, Inc. v. City of Ft. Myers*, 710 F.3d 1294, 1301 (11th Cir. 2013).

²⁸ *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017).

guess at its meaning and differ as to its application.”²⁹ There is no such vagueness here. In fact, opposing *amici* have publicly expressed that they understand the legal requirement just as the district court did.

1. The DOJ has steadfastly declared that public accommodation websites must be accessible.

Over 26 years ago, the DOJ regulations implementing Title III made it clear that a public accommodation must ensure effective communication with patrons with disabilities through a non-exclusive list of auxiliary aids and services.³⁰ In 2010, that list was enlarged – recognizing the expanding digital age – to include “screen reader software[,] . . . accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.”³¹ The regulation also further explained what effective communication means: “to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a

²⁹ *Indigo Room, Inc.*, 710 F.3d at 1301 (internal quotation marks and citations omitted).

³⁰ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35596-97 (July 26, 1991) (codified at 28 C.F.R. § 36.302(c)).

³¹ Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56236, 56253 (Sept. 15, 2010) (codified at 28 C.F.R. § 36.303(b), (c)).

way as to protect the privacy and independence of the individual with a disability.”³²

There is a long history of guidance applying these principles to websites specifically. In 1996, the DOJ declared that the ADA’s mandate of equal access, including the effective communication requirement, applies to websites.³³ It has consistently and publicly reaffirmed that position ever since³⁴ – an interpretation of its own regulations that is entitled to deference and should be given “controlling weight.”³⁵ The DOJ has applied that same view in this very case.³⁶

³² *Id.* (codified at 28 C.F.R. § 36.303(c)(1)(ii)).

³³ Letter from Deval L. Patrick, Assistant Att’y Gen., to Senator Tom Harkin (Sept. 9, 1996) (“Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet.”), *available at*: <https://www.justice.gov/crt/core-letters-0> (Core Letter #204).

³⁴ *E.g.*, Applicability of the Americans with Disabilities Act (ADA) to Private Internet Sites: Hearing before the House Subcommittee on the Constitution of the House Committee on the Judiciary, 106th Cong., 2d Sess. 65–010 (2000) (“It is the opinion of the Department of Justice currently that the accessibility requirements of the [ADA] already apply to private Internet Web sites and services.”); 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, 43465 (July 26, 2010) (“The Department believes that title III reaches the Web sites of entities that provide goods or services that fall within the 12 categories of ‘public accommodations’”); *see also Nat’l Ass’n of the Deaf v. Harvard Univ.*, No. 3:15-CV-30023, 2016 WL 3561622 at *18 (D. Mass. Feb. 9, 2016) (“DOJ has not wavered from its view that the ADA’s broad and expansive nondiscrimination mandate reaches goods and services provided by covered entities on Web sites over the Internet.”) (quotation and quotation marks omitted).

³⁵ *Shotz v. Cates*, 256 F.3d 1077, 1081 n.2 (11th Cir. 2001).

Nevertheless, opposing *amici* suggest that the DOJ has wavered, based on the notion that a July 2010 Advanced Notice of Proposed Rulemaking (ANPRM) “even questions whether the agency should adopt regulations in the first place.”³⁷ The DOJ expressed no such doubt. The ANPRM recounted at length that Title III’s broad mandate of “full and equal” access includes the benefits offered through websites, but that public accommodations’ failure to self-regulate despite the DOJ’s consistent public guidance suggested that additional regulatory guidance might be salutary.³⁸

Opposing *amici* also fail to draw a relevant comparison between this case and the “lines of sight” regulation at issue in *United States v. AMC Entertainment, Inc.*, which was found to violate due process for reasons that do not exist here.³⁹ To wit: (1) the “lines of sight” regulation was deemed ambiguous,⁴⁰ while the regulation on effective communication is not; and (2) governmental entities approved by the DOJ had given the defendant in *AMC* pre- and post-construction accessibility approval of their designs,⁴¹ which did not occur here.

³⁶ Statement of Interest, https://www.ada.gov/briefs/winn_dixie_soi.pdf.

³⁷ Brief of *Amici*, *The Restaurant Law Center et al.* at 21.

³⁸ 75 Fed. Reg. at 43463-64.

³⁹ 549 F.3d 760 (9th Cir. 2008).

⁴⁰ *Id.* at 764-67.

⁴¹ *Id.* at 769 n.3.

The lack of vagueness is evident in this Court's own decisions, which have repeatedly applied the effective communication requirement without difficulty,⁴² an action which would only be possible if the law's requirement was clear.⁴³ It is not a due process infirmity that the question of whether a public accommodation has provided effective communication is subject to a factually-intense inquiry,⁴⁴ nor is a law void for vagueness simply because courts have arrived at differing interpretations of the statute based on different facts.⁴⁵

In this case, the district court conducted the required factual analysis and determined that Winn-Dixie's website was in violation of the ADA.⁴⁶ Nothing opposing *amici* have written invalidates that finding.

⁴² *E.g., Silva v. Baptist Health South Florida, Inc.*, 856 F.3d 824, 833-36 (11th Cir. 2017) (interpreting effective communication to mean interaction and understanding between a hospital and its deaf patients, rather than a positive medical result); *Liese v. Indian River County Hosp. Dist.*, 701 F.3d 334, 342-43 & n.5 (11th Cir. 2012) (applying the effective communication requirement of the Rehabilitation Act, which is substantively the same as the ADA's requirement).

⁴³ *See Groome Res. Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 217 (5th Cir. 2000) (reasoning that courts' repeated application of the "reasonable accommodation" requirement under the Fair Housing Act demonstrated that it could not be void for vagueness).

⁴⁴ *Liese*, 701 F.3d at 342-43.

⁴⁵ *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1034 (5th Cir. 1981).

⁴⁶ D.E. 63 at 10.

2. Many of the *amici* seeking reversal have said that public accommodation websites must be accessible.

Opposing *amici*'s extrajudicial statements demonstrate that they, among others of "common intelligence,"⁴⁷ know well that Title III requires that public accommodations' websites provide effective communication. Many of these *amici* recommend designing websites to comply with WCAG 2.0 AA and one of them, the National Association of Convenience Stores, is a current member of the broader consortium that publishes the WCAG standards.⁴⁸

In September 2016, the American Bankers Association (ABA) released a six-page report stating banks have an obligation under Title III to provide effective communication, including via their websites:

Because vision impaired individuals may use assistive technology (e.g., screen readers) to access information contained on websites, a bank's failure to provide accessible features (e.g., corresponding text describing an image) that enable disabled users to use assistive technology, creates barriers. Accordingly, *just as the installation of ramps is a necessity for wheel-chair users to access bank branches, so is providing accessible websites and mobile apps, without which disabled individuals will be denied access to an increasingly important means of managing their finances.*⁴⁹

⁴⁷ *Roberts*, 468 U.S. at 629.

⁴⁸ Current Members, <https://www.w3.org/Consortium/Member/List/Consortium/fees#xN> (last visited November 16, 2017).

⁴⁹ ABA Staff Analysis: Americans with Disabilities Act: Accessibility of Web Information and Services at 1 (emphasis added), <https://wabankers.com/images/wba/pdfs/SA-ADA-WebAccess2016.pdf>.

The report noted that WCAG 2.0 AA was the presumptive standard for website accessibility, but that the principal question was whether website information and services could be accessed regardless of website-specific standards.⁵⁰ The ABA has echoed these statements in two different online ABA publications.⁵¹

The Asian American Hotel Owners Association has hosted at least one webinar, presented by two of *amici*'s counsel, noting that website accessibility under the ADA means that a person with a disability will be able to navigate, understand, and interact with the website; warning that third-party material hosted on a hotelier's website must be accessible; describing practical design techniques; and commending WCAG 2.0 AA as the "go-to standard."⁵²

The National Association of Realtors (NAR) recognized in April 2016 that "DOJ has long taken the broad position that the ADA's obligations extend to all websites under Title III," as supported by "an accumulation of case law . . . [making it] a smart risk management decision to evaluate your own websites now"

⁵⁰ *Id.* at 5.

⁵¹ Is Your Website ADA Compliant?, ABA Bank Marketing, <http://ababankmarketing.com/insights/website-ada-compliant/>; Avoiding the Website Accessibility Shakedown, ABA Banking Journal, <https://bankingjournal.aba.com/2017/02/avoiding-the-website-accessibility-shakedown/>.

⁵² ADA Compliance: Website Accessibility, <https://register.gotowebinar.com/register/6605971792911572483> (last visited December 20, 2017).

consistent with WCAG 2.0.⁵³ A month later, the NAR released a video repeating this conclusion.⁵⁴

The National Restaurant Association, of which the *amicus* Restaurant Law Center is a component,⁵⁵ stated in a February 8, 2016 alert that the DOJ was enforcing website accessibility and advised its “members to proactively explore these voluntary guidelines [WCAG 2.0] to address the accessibility of their websites.”⁵⁶

The American Lodging and Hotel Association has expressed its view that public accommodation websites must be accessible under the ADA, at least, if they “have some sort of connection, or ‘nexus,’ to physical places of business.”⁵⁷ The National Federation of Independent Businesses has publically stated the same

⁵³ Is Your Website ADA Compliant?, <http://realtormag.realtor.org/technology/feature/article/2016/04/your-website-ada-compliant>.

⁵⁴ Window to the Law: Accessible Websites and the ADA, https://www.nar.realtor/sites/default/files/file_attach/WTTL-transcripts/WTL-ADA-web-access-transcript-2016-05-12a.pdf.

⁵⁵ Press Release, Nat’l Restaurant Ass’n, Restaurant Law Center Launched to Advocate for Industry, <http://www.restaurant.org/Pressroom/Press-Releases/Restaurant-Law-Center-Launch>.

⁵⁶ Alert: Drive-by ADA Website Compliance Letters, http://www.garestaurants.org/uploads/4/4/5/3/44535221/ada_website_drive-by_lawsuit_alert_2-8-16.pdf.

⁵⁷ Am. Hotel & Lodging Ass’n, Creating an Accessible Presence for the Lodging Industry, quoted in How Hospitality Websites are Impacted by the Americans with Disabilities Act Guidelines, <https://www.rezstream.com/blog/website-guidelines-for-ada-accessibility>.

position.⁵⁸ A 2009 study sponsored by the U.S. Chamber of Commerce noted a lack of equal access to new technologies and cited WCAG 2.0 as an important aspect to addressing that inequality.⁵⁹

C. The pendency of regulations providing technical guidance does not obviate the existing duty to provide effective communication.

Although fair notice of what is prohibited must be given, “we can never expect mathematical certainty from our language.”⁶⁰ It would be a miscarriage of justice to hold that the absence of regulations establishing a technical website standard renders nugatory the ADA’s long-standing, workable mandate that public accommodations provide effective communication. Accordingly, in *Reed v. CVS*, the court found that delaying enforcement of the ADA until the DOJ promulgates a website-specific accessibility standard

would eviscerate the ADA. The DOJ’s position that the ADA applies to websites being clear, it is no matter that the ADA and the DOJ fail to describe exactly how any given website must be made accessible to people with visual impairments. Indeed, this is often the case with the ADA’s requirements, because the ADA and its implementing regulations are intended to give public accommodations maximum

⁵⁸ Here’s How to Make Sure Your Small Business Is ADA Compliant, <http://www.nfib.com/content/resources/labor/heres-how-to-make-sure-your-small-business-is-ada-compliant/>.

⁵⁹ The Impact of Broadband on People with Disabilities at 39, https://www.uschamber.com/sites/default/files/legacy/about/US_Chamber_Paper_on_Broadband_and_People_with_Disabilities_0.pdf.

⁶⁰ *Pine v. City of W. Palm Beach*, 762 F.3d 1262, 1275 (11th Cir. 2014) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)).

flexibility in meeting the statute's requirements. This flexibility is a feature, not a bug, and certainly not a violation of due process.⁶¹

The decisions in *Gorecki v. Hobby Lobby Stores, Inc.*,⁶² *Andrews v. Blick Art Materials, LLC*,⁶³ *Gorecki v. Dave & Buster's, Inc.*,⁶⁴ *Access Now, Inc. v. Blue Apron, LLC*,⁶⁵ and *Rios v. New York & Co.*,⁶⁶ echo this rationale and result.

CONCLUSION

Public accommodations like Winn-Dixie have long been on notice that they are obligated under Title III to communicate effectively with patrons with disabilities, including on their websites. The district court correctly ruled that Winn-Dixie failed to honor its obligation and the court acted within its discretion to apply WCAG 2.0 as a measure of compliance.

/s/ Gregory P. Care

Gregory P. Care (EDF #504983025)
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
Tel: (410) 962-1030
gpc@browngold.com

Counsel for Amici

⁶¹ No. CV 17-3877, 2017 WL 4457508 at *5 (C.D. Cal. Oct. 3, 2017).

⁶² No. CV 17-1131, 2017 WL 2957736 at *4 (C.D. Cal. June 15, 2017).

⁶³ No. 17-CV-767, 2017 WL 3278898 at *17-18 (E.D.N.Y. Aug. 1, 2017).

⁶⁴ No. CV 17-1138, ___ WL ___, D.E. 39 at 3-6 (C.D. Cal. Oct. 10, 2017), <https://www.adatitleiii.com/wp-content/uploads/sites/121/2017/10/Goecki-Dave-and-Busters-Order-Denying-MSJ.pdf>.

⁶⁵ No. 17-CV-116, 2017 WL 5186354 at *5-7 (D.N.H. Nov. 8, 2017).

⁶⁶ No. 217CV04676, 2017 WL 5564530, at *5-6 (C.D. Cal. Nov. 16, 2017).

CERTIFICATE OF COMPLIANCE

1. This brief contains 6,395 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.
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.

/s/ Gregory P. Care
Gregory P. Care
Counsel for *Amici*

December 20, 2017

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 December 20, 2017.

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.

/s/ Gregory P. Care
Gregory P. Care
Counsel for *Amici*

December 20, 2017