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

APPELLANT WINN-DIXIE STORES, INC.'S RESPONSE TO APPELLEE JUAN CARLOS GIL PETITION FOR REHEARING *EN BANC*

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

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

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

76. Winn-Dixie Stores Leasing, LLC

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

78. Winn-Dixie Supermarkets, Inc.

79. Winn-Dixie Warehouse Leasing, LLC

80. World Institute on Disability

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES, STATUTES AND OTHER AUTHORITY

I. STATEMENT OF WINN-DIXIE

Appellee Juan Carlos Gil ("Gil") requests the Court take the extraordinary step of dismissing this appeal after almost four years of litigation in this Court and after a full decision on the merits on the basis of purported mootness. This appeal is not moot, as the expiration of a permanent injunction cannot moot an appeal where there has been a trial on the merit and Appellant Winn-Dixie Stores, Inc. ("Winn-Dixie") is entitled to a determination by this Court of the propriety of the trial court's judgment. Further, there is an outstanding award of nearly $100,000 in attorneys' fees and costs to Gil as the prevailing party below, which is contingent upon this appeal. For those reasons, there remains a live case and controversy between the parties.

The Court properly considered and ruled upon the issue of whether a website can be a place of public accommodation under Title III of the Americans with Disabilities Act ("ADA"), as that issue was fully litigated in both the trial court and this appeal. Gil cannot remove this issue from consideration by this Court by simply declining to address it in his brief. However, the argument that Winn-Dixie's website did not provide proper auxiliary aids was not an issue raised or considered by the parties or the trial court below. It was raised for the first time in this appeal by Gil, and it cannot be considered now as a basis for affirming the trial court's decision. The majority opinion also was not in conflict with any precedential law,

and it properly declined to adopt the "nexus" standard, as no such standard had been established in precedent of this Circuit. Accordingly, the Court properly should deny rehearing *en banc* and issue the mandate in this appeal.

II. ARGUMENT

A. This Appeal is Not Moot

Gil urges this Court to dismiss this *appeal* as moot and affirm the trial court's order below, which would not only leave standing the trial court's legal finding of the ADA's applicability to websites, that was specifically overruled by this Court, but would also conveniently leave untouched the award of attorneys' fees in the amount of $99,879.00 to Gil as the prevailing party below. (*See* D.E. 76.) This case is not moot. "Where . . . a federal district court has granted a permanent injunction, the parties will already have had their trial on the merits, and, even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's decision on the merits . . . ."[1] *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981) (finding that expiration of preliminary injunction moots appeal of issue of the grant of a preliminary injunction but not other issues in the case). There still exists a live controversy between the parties as to correctness of the lower

[1] An injunction bond was not required in this case because Winn-Dixie did not seek a stay of the permanent injunction pending this appeal.

court's award of final judgment and the attorney fee award in favor of Gil and Winn-Dixie has a legally cognizable interest in the outcome of this appeal.

Neither of the cases Gil cites to regarding the necessity of a live controversy involved a claim of mootness based on the expiration of a permanent injunction. *Cf. Kremens v. Bartley,* 431 U.S. 119 (1977) (mootness created by change in law); *Already, LLC v. Nike, Inc*., 568 U.S. 85 (2013) (lawsuit mooted by dismissal of claims with prejudice and issuance of covenant not to sue). Gil has not cited to a single case that holds that an appeal from a permanent injunction becomes moot if the appeal outlasts the length of the permanent injunction. Nor could he, as the expiration of the injunction alone cannot moot this appeal. *See Camenisch*, 451 U.S. at 396. While the injunction expired on July 5, 2020, almost a year ago and nearly two years after oral argument,[2] Gil waited until *after* the Court issued its Opinion, reversing the judgment in favor of Gil, to assert that this appeal is moot. Winn-Dixie is not aware of a single case where a case was dismissed based on mootness *after* the appellate court rendered its opinion. It would be extraordinary to allow parties to lay in wait for the outcome of an appeal, and only move for dismissal based on mootness after receiving an adverse decision. The Court should not allow such an outcome here.

[2] Winn-Dixie has no doubt that the intervening time between oral argument and the issuance of the opinion in this appeal was due in no small part to both the complexity of the issues presented and the intervening COVID-19 pandemic.

"A case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *McArthur v. Firestone*, 817 F.2d 1548, 1551 (11th Cir. 1987) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)). Gil states that, because the injunction has expired, Gil no longer has any claim for compliance against Winn-Dixie, eliminating *his interest* in this matter. Gil seemingly is arguing for the application of the voluntary cessation doctrine against Winn-Dixie simply because the permanent injunction expired. "[A]s a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e*., does not make the case moot.'" *Davis*, 440 U.S. at 631 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L.Ed. 1303 (1953)). The voluntary cessation doctrine, which holds that a *defendant* may moot case if it can show "'that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,'" is not applicable here. *Already*, 568 U.S. at 91 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc*., 528 U.S. 167, 190, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000)). The voluntary cessation doctrine is a shield available to a defendant, not a sword for a plaintiff attempting to preserve its trial court victory after an appellate court reverses that win.

"The Supreme Court has established two criteria to determine if a case is moot: (1) there is no reasonable likelihood of a recurrence of the alleged violation and (2) 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *McArthur*, 817 F.2d at 1551 (quoting *Davis*, 440 U.S. at 631)). There is no evidence in this record that would establish either criteria. Gil makes no claim that there is no likelihood that Winn-Dixie's website will become inaccessible to him in the future, nor does he claim that the expiration of the injunction has completely and irrevocably eradicated the effects of the alleged violation. He simply notes that he no longer has the ability to enforce this particular injunction due to its expiration.

The expiration of the injunction, however, does not eliminate either parties' legal interests, particularly if the majority's conclusion that websites are not place of public accommodation is vacated. This Court has already held that the completion of a remediation plan does not automatically moot a claim under the ADA for an alleged inaccessible website. *See Haynes v. Hooters of Am., LLC*, 893 F.3d 781 (11th Cir. 2018) (holding that a private settlement by one plaintiff cannot moot the claims of another party). Thus it follows that an expiration of a permanent injunction similarly would not automatically moot future claims by other parties. While Gil may no longer have standing to enforce the permanent injunction after its expiration in this case, it certainly does not eliminate his ability to bring a new claim against

Winn-Dixie. *See, e.g.*, *Access 4 All Inc. v. Met. Life Ins. Co*., Case No. 1:21-cv-21782-BB (S.D. Fla. May 11, 2021) (Gil ADA Title III Complaint against Winn-Dixie based on barriers to physical store locations). Additionally, there is another lawsuit against Winn-Dixie, based upon the purported inaccessibility of its website, by another plaintiff currently pending, but stayed pending the outcome of this appeal, in the Southern District of Florida. *See Andres Gomez v. Winn-Dixie Stores, Inc.*, Case No. 1:16-cv-24965-FAM (S.D. Fla.). Winn-Dixie also was sued a third time for an ADA claim based upon the accessibility of its website between the time Gil filed his initial complaint and the final judgment. *See Walter Joseph Beckman v. Winn-Dixie Stores, Inc*., Case No. 3:16-cv-00706-MCR-CJK (N.D. Fla. Dec. 28, 2016) (case voluntarily dismissed by plaintiff). Winn-Dixie is entitled to a determination by this Court as to the correctness of the trial court's decision on the merits of this case and whether the ADA is applicable to websites. *See Camenisch*, 451 U.S. at 396. Such a determination goes not only to Winn-Dixie's liability to Gil in this case, but also to what legal obligations Winn-Dixie has under the ADA as to its website and to other parties who might assert similar claims. Both Winn-Dixie and the public have an interest in having this Court settle whether and how the ADA applies to websites, mitigating against any potential mootness.

Finally, this appeal is not moot because of the outstanding award of attorneys' fees that is contingent on the outcome of this appeal. On August 11, 2017, following

the Final Judgment in his favor, Gil filed a Motion for an Award Attorneys' Fees and Costs as the prevailing party. (D.E. 73.) Winn-Dixie was "not opposed to the request for attorneys' fees and costs requested [therein], provided however, an award of attorneys' fees and costs shall be subject to the pending appeal, and the execution of payment shall be stayed until resolution of the appeal," to which Gil agreed. (D.E. 73 at 16.) Accordingly, the trial court entered an award of attorneys' fees to Gil in the amount of $99,879.00, but the "[e]xecution of [that] Order [was] . . . stayed until resolution of the Defendant's appeal, Juan Gil v. Winn-Dixie, Inc., Case No. 17-13467-C, currently pending before the United States Court of Appeals for the Eleventh Circuit Court." (D.E. 76.)

Without mentioning the attorney fee award, Gil now asserts that because the underlying suit was not one of damages, his interest in attorneys' fees cannot create standing under Article III and cites to *Thole v. U. S. Bank N.A*, 140 S. Ct. 1615 (2020) for that proposition. *Thole*, however, is inapplicable here. In *Thole*, the Supreme Court, as well as the courts below, determined that the plaintiffs in that suit lacked Article III standing for their ERISA claims because the plaintiffs suffered no damages and had no concrete interest in the outcome of the case. *Thole*, 140 S. Ct. at 1619. The plaintiffs argued that, even if they suffered no damages, they would still be entitled to attorneys' fees under the ERISA statute if they prevailed, giving them standing to pursue their claims. *Id.* The Supreme Court determined that a

statutory entitlement to prevailing party attorneys' fees could not alone provide plaintiffs with a concrete stake in the lawsuit to create Article III standing. *Id.* The opposite is true here, where this Court explicitly found that Gil had Article III standing on the merits at the onset of this case. *Gil v. Winn-Dixie Stores, Inc*., 993 F.3d 1266, 1274 (11th Cir. 2021). Gil's standing is based on his assertions that he could not access Winn-Dixie's website, not on his potential entitlement to attorneys' fees as the prevailing party.

The expiration of the permanent injunction does not moot the live controversy of this case, nor does it eliminate Winn-Dixie's legally cognizable interest in the outcome of this matter or Gil's Article III standing. This appeal is not moot and it cannot properly be dismissed at this stage of the proceedings on that basis.

B. Gil Cannot Waive Winn-Dixie's Arguments for it in this Appeal

Gil also argues that the panel majority opinion should be vacated because its holding that websites are not places of public accommodation addressed an issue that the trial court declined to rule upon and that the issue was not litigated on appeal. First, the issue of whether a website is a place of public accommodation was squarely at issue and was litigated in the trial court. Gil asserted in his complaint that the website in and of itself was a place of public accommodation. (D.E. 1 ¶ 67.) Winn-Dixie moved for judgment on the pleadings on that specific issue. (D.E. 15.) Going into trial, both parties agreed that whether the website was a place of public

accommodation was an issue for determination by trial court. (D.E. 34.) In its Verdict and Order Following Non-Jury Trial, the lower court specifically recognized that an issue for determination was whether the website was a place of public accommodation. (D.E. 63 at 1.) The trial court only declined to reach the issue of whether the website was itself a place of public accommodation because it determined that the ADA was applicable to Winn-Dixie's website under the nexus standard. (*Id.* at 10.) Whether websites are places of public accommodation was central to Winn-Dixie's appeal; Winn-Dixie addressed the issue in its brief and it was the first argument raised at oral argument. (App. Br. 20-25.) That Gil chose not to directly address Winn-Dixie's argument in his Response Brief or at oral argument cannot eliminate its consideration and determination in this appeal.

None of the cases cited by Gil, or the dissent, for the proposition that an appellee's failure to address an argument raised in an appellant's brief removes that issue from consideration contain such a holding. The cases cited by Gil all contemplated whether an issue being raised for the first time on appeal *by the appellant* could be considered on appeal. *See*, *e.g.*, *United States v. McAllister*, 77 F.3d 387, 389 (11th Cir. 1996) (constitutional challenge raised for first time on appeal); *United States v. Strickland*, 682 F. App'x 742, 743 (11th Cir. 2017) (same); *United States v. Lewis*, 115 F.3d 1531, 1539 (11th Cir. 1997) (same). The cases cited by the dissent considered whether an appellee could raise a new defense or

argument once briefing had closed. *Hamilton v. Southland Christian Sch., Inc*., 680 F.3d 1316 (11th Cir. 2012) (rejecting new issue asserted by appellee in notice of supplemental authority after briefing and oral argument); *Young v. Grand Canyon Univ., Inc*., 980 F.3d 814 (11th Cir. 2020) (declining consideration of new issue asserted by appellee at oral argument). None of these cases considered whether an action of the appellee, or the lack thereof, would serve to waive an argument of the appellant. The issue of whether a website can be a place of public accommodation under the ADA was properly at issue and fully litigated in both the trial court and in this appeal. The panel majority properly considered and ruled upon this issue. Rehearing *en banc* on this issue is not warranted.

C. The Issue of Effective Communication and Auxiliary Aids was Not Raised in the Trial Court Below

Gil, and the dissent, argue that the trial court's order should be affirmed because the purported inaccessibility of Winn-Dixie's website was also a failure to provide an auxiliary aid in violation of the ADA. However, the issue of whether the website is a service that provides effective communication and whether Winn-Dixie provided proper auxiliary aids through the website, was not litigated or considered by the trial court below.[3] The issue of effective communication and auxiliary aids

[3] 42 U.S.C. § 12182(b)(2)(A)(iii), which refers to auxiliary aids, was never cited to in the lower court record. Gil was proceeding under 42 U.S.C. § 12182(b)(2)(A)(iv), alleging that the discrimination was because of barriers to access. (*See* D.E. 1 ¶¶ 30, 34, 51-54, 66 (alleging barriers in access to the website).) As the majority opinion

was raised for the *first time* in this case in the appellate response briefs of Gil and the Gil *Amici*. (*See* Appellee Br. at 19, 28-30; Gil *Amici* Br. at 16-25.) As Winn-Dixie pointed out in its Reply Brief (Reply Br. at 10-14), an issue not raised in the lower court cannot be considered for the first time on appeal. *Access Now, Inc. v. Sw. Airlines Co*., 385 F.3d 1324, 1331 (11th Cir. 2004). Further, none of the exceptions to this rule, as set forth in *Wright v. Hanna Steel Corp*., 270 F.3d 1336, 1342 (11th Cir. 2001), were present, particularly because the issue of the provision of auxiliary aids is a fact specific question, not a question of law, and it is the *appellee* who raised this issue for the first time on appeal, not the appellant Winn-Dixie. As Gil failed to raise the issue of effective communication and auxiliary aids below and it could not be considered for the first time on appeal, it cannot be advanced now as a proper basis to vacate the majority opinion and adopt the dissenting opinion, which relies upon legal and factual arguments not considered or ruled upon by the trial court.

D. The "Nexus" Standard was not Precedent in this Circuit

Gil next argues that the majority opinion should be vacated because it abandoned the established "nexus" standard. The majority opinion properly determined that the "nexus" standard was never established by this Court in *Rendon*

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correctly notes, however, the website was not limiting Gil's access to Winn-Dixie's good and services, thus under either subsection, any inaccessibility of the website could not constitute discrimination under the statute.

v. Valleycrest Products, 294 F.3d 1279 (11th Cir. 2002), or by any other statute or precedential case law. The majority's opinion presents no contradiction with established precedent in its determination to decline to adopt the "nexus" standard here. The cases cited to by Gil are district court cases, which clearly have no precedential authority on this Court, and an unpublished opinion. "Unpublished opinions are not considered binding precedent. . . ." 11th Cir. R. 36-2. As there is no authority that set forth the "nexus" standard as established precedent in this Circuit, the majority was not restrained from declining its adoption in this case. Accordingly, this issue does not provide a proper basis for rehearing *en banc* or vacating the majority opinion.

E. The Majority Opinion does not Conflict with *Walt Disney* & *Silva*

Finally, Gil asserts that the majority opinion should be vacated because it contradicts this Court's prior holdings in *A.L. by & through D.L. v. Walt Disney Parks & Resorts US, Inc*., 900 F.3d 1270 (11th Cir. 2018) and *Silva v. Baptist Health South Florida, Inc*., 856 F.3d 824 (11th Cir. 2017) through dicta found in a footnote, where the majority observed that Gil was at no less a disadvantage than a customer without internet access. Neither case stands for the proposition that the "correct comparison under Title III" would be between a blind customer and a sighted customer with internet access. Both *Walt Disney Parks* and *Silva* considered the standard for an analysis of whether a requested accommodation was "necessary" to

achieve the ability for a disabled person to have an equal opportunity to participate in a defendant's goods and services. *Walt Disney Parks*, 900 F.3d at 1296-98; *Silva*, 856 F.3d at 834-36. In this case, however, the majority opinion correctly found that the relevant goods and services to which Gil was entitled access to were found in Winn-Dixie's physical stores, not on the website, and it was undisputed that based on Gil's over fifteen year history as a customer of Winn-Dixie's stores, his access to Winn-Dixie's good and services was both unimpeded and equal to other customers. There is no contradiction between the majority opinion and *Walt Disney Parks* or *Silva*, let alone one that would provide a sufficient basis for this Court to rehear this matter *en banc* and vacate the majority's opinion.

III. Conclusion

For the reasons set forth above, the Court should deny Gil's Petition for Rehearing *en banc*. This appeal is not moot, as the expiration of the permanent injunction alone cannot moot an appeal and there is an outstanding prevailing party fee award. Further, the majority opinion properly considered and concluded that websites are not places of public accommodation under the ADA and its decision does not conflict with any precedent in this Circuit. Gil has presented no basis for vacating the majority opinion. The Court properly should issue the mandate in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 35(e) because this response contains 3,399 words, excluding those portions of the response exempted by Fed. R. App. P. 32(f). This response 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 for Office 365 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 **1st** day of June, 2021 upon:

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