Appeal No. 17-13776

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DENNIS HAYNES,
individually,

Appellant-Plaintiff,

v.

OUTBACK STEAKHOUSE OF FLORIDA, LLC,
a Florida limited liability company,

Appellee-Defendant,

Appeal from a Final Judgment of the United States District Court
for the Southern District of Florida
Lower Court Case No. 0:17-cv-60851

BRIEF OF THE RESTAURANT LAW CENTER; AMERICAN BANKERS ASSOCIATION; AMERICAN HOTEL & LODGING ASSOCIATION; ASIAN AMERICAN HOTEL OWNERS ASSOCIATION; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; INTERNATIONAL COUNCIL OF SHOPPING CENTERS; INTERNATIONAL FRANCHISE ASSOCIATION; NATIONAL ASSOCIATION OF CONVENIENCE STORES; NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES; NATIONAL ASSOCIATION OF THEATRE OWNERS; NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER; NATIONAL MULTIFAMILY HOUSING COUNCIL; NATIONAL RETAIL FEDERATION; AND RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEE-DEFENDANT OUTBACK STEAKHOUSE OF FLORIDA, LLC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 16.1-1, *Amici* disclose the following:

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3. Amador, Esq., Angelo I.
4. American Bankers Association
5. American Hotel & Lodging Association
6. Asian American Hotel Owners Association
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25. National Association of Convenience Stores
26. National Association of Home Builders of the United States
27. National Association of Theatre Owners
28. National Federation of Independent Business Small Business Legal Center
29. National Multifamily Housing Council
30. National Retail Federation
31. Outback Steakhouse of Florida, LLC
32. Postman, Esq., Warren
33. Restaurant Law Center
34. Retail Litigation Center, Inc.
35. Shaughnessy, Esq., Kevin W.
36. Thomas B. Bacon, PA

37. Watson, Esq., Felicia

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STATEMENT OF THE ISSUES

1. Whether websites are places of public accommodation covered by Title III.

2. Whether permitting identical lawsuits against businesses who are already committed to implementing a website remediation plan wastes judicial resources and disincentivizes companies from proactively improving website accessibility.

2. Whether dismissing or staying lawsuits against businesses already implementing remediation plans negatively impacts the rights of disabled individuals.

3. Whether businesses' remediation plans effectively moot other plaintiffs' identical claims under Title III.

INTEREST OF *AMICI CURIAE*

The **Restaurant Law Center** (the "Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. The industry is comprised of over one million restaurants and foodservice outlets employing 15 million people.

The **American Bankers Association** (the "ABA") is the principal national trade association of the financial services industry in the United States. The ABA is the voice for the nation's $13 trillion banking industry and its millions of employees.

The **American Hotel and Lodging Association** ("AHLA") is the sole national association representing all segments of the United States lodging industry, including iconic global brands, hotel owners, REITs, franchisees, management companies, independent properties, bed and breakfasts, and hotel associations.

The **Asian American Hotel Owners Association** ("AAHOA") is the largest association of hotel owners in the world. Representing more than 16,500 members nationwide, AAHOA members own 22,000 properties – nearly one out of two hotels in the United States.

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

The **International Council of Shopping Centers** ("ICSC") is the global trade association of the shopping center industry. Its more than 70,000 members in over 100 countries include shopping center owners, developers, managers, investors, retailers, and brokers.

The **International Franchise Association** ("IFA") is the largest trade association in the world dedicated to the entire franchise industry. Its membership

spans more than 300 different industries and includes more than 733,000 franchise establishments.

The **National Association of Convenience Stores** ("NACS") is an international trade association that represents both the convenience and fuel retailing industries, with more than 2,200 retail and 1,800 supplier company members.

The **National Association of Home Builders of the United States** ("NAHB") represents over 140,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, apartments, condominium, commercial, and industrial properties, as well as land developers and remodelers.

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

The **National Federation of Independent Business Small Business Legal Center** (the "NFIB") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues affecting small businesses.

The **National Multifamily Housing Council** ("NMHC") is the leadership of the trillion-dollar apartment industry. NMHC unites the prominent owners,

managers, and developers who help create thriving communities by providing apartment homes for 35 million Americans.

The **National Retail Federation** ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries.

The **Retail Litigation Center, Inc.** (the "RLC") is a public policy organization whose members include many of the country's largest and most innovative retailers. The RLC's members employ millions of people, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales.

Many of *Amici's* members operate websites in conjunction with their businesses. While the plain text of Title III of the Americans With Disabilities Act ("Title III" or the "ADA") does not regulate the form or functionality of such websites, a recent series of inconsistent judicial decisions has created significant confusion regarding the circumstances under which websites may fall within Title III's reach. In the midst of such confusion, many of *Amici's* members are facing a flurry of lawsuits, all filed on behalf of a limited number of visually impaired plaintiffs represented by an even smaller group of plaintiffs' attorneys, attacking the accessibility of their websites under Title III.

In an effort both to protect themselves from the continued onslaught of duplicative lawsuits *and* to improve the accessibility of their websites, many businesses – including several of *Amici's* members – have begun developing and effectuating large-scale website modification plans. By committing to align their websites with certain voluntary private-sector accessibility guidelines, such as the Web Content Accessibility Guidelines ("WCAG") 2.0, these businesses hope to receive a much-needed reprieve from the recent unpredictable and unrelenting rise in website accessibility litigation. The lower court's decision in *Dennis Haynes v. Outback Steakhouse of Florida, LLC*, No. 0:17-cv-60851, 2017 WL 4284487 (S.D. Fla. Aug. 17, 2017), helps businesses achieve this necessary sense of security and finality by preventing copy-cat plaintiffs from filing identical website accessibility lawsuits against companies who have already begun the process of improving their websites' accessibility. *Amici* have a strong interest in upholding this decision.

As many of *Amici's* members are in the process of implementing website modification plans while, in many cases, simultaneously defending numerous duplicate website accessibility lawsuits, *Amici* possess unique insight regarding the realities of both website modification plans and website accessibility litigation. With this interest and insight in mind, *Amici* submit this Brief to aid the Court in its consideration of the important questions at issue in this appeal.

STATEMENT OF AUTHORITY TO FILE

Amici have prepared this Brief in Support of the Appellee-Defendant, Outback Steakhouse of Florida, LLC ("Outback"). This Brief accompanies *Amici's* Motion for Leave to Participate as *Amici Curiae*, in which *Amici* seek this Court's permission to file the present Brief.

This Brief was not authored, in whole or in part, by counsel for either Party, nor did any Party, counsel for any Party, or any person other than *Amici*, their counsel, or their members contribute money intended to fund this Brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In recent years, the business community has faced a deluge of lawsuits, including the Complaint filed by Appellant-Plaintiff, Dennis Haynes ("Haynes"), in the lower court case that forms the basis for this appeal, attacking the accessibility of companies' websites. Despite the sheer volume of these lawsuits, the various individual complaints filed are nearly identical in substance. Each complaint alleges that defendant-businesses' websites are "inaccessible" to blind and visually impaired individuals and, as a result, such businesses have denied disabled individuals "full and equal access" to the goods and services of a "place of public accommodation" in violation of Title III. As money damages are not available to plaintiffs under Title III, these complaints seek only injunctive relief and, notably, attorneys' fees.

Historically, claims under Title III have been limited to those directly implicating *physical* places of public accommodation, which websites are decidedly not. Despite this limitation, various courts across the country have begun expanding Title III's application to non-physical "spaces" like websites. In doing so, these courts have established a variety of inconsistent standards imposing often shifting and unpredictable obligations on businesses. As a result, it is becoming increasingly difficult for businesses to determine, with any sort of meaningful finality, whether their websites fall within Title III's purview and, if so, to understand the applicable standards governing website accessibility.

Despite this uncertainty, many businesses have undertaken large-scale modification projects designed to increase their websites' accessibility to visually impaired individuals. Whether such initiatives are taken proactively or as part of a settlement agreement or consent decree in response to threatened or filed litigation, each website modification project evidences a business' commitment to providing accessibility above and beyond what the language of Title III currently requires. Additionally, though, these website modification projects (often called remediation plans) also serve another important purpose: they provide businesses with a shield of protection from a potential onslaught of identical website accessibility lawsuits by effectively mooting would-be plaintiffs' claims. In doing so, remediation plans can and should save businesses from expending an inordinate amount of resources

to defend numerous copy-cat lawsuits seeking relief the businesses have already agreed to provide.

The lower court's decision in *Outback*, in which the Southern District of Florida dismissed a website accessibility lawsuit brought against a business already bound to remediate its website pursuant to a judicially-enforceable settlement agreement, encourages companies to improve website accessibility, promotes the broad purpose of the ADA, and conserves judicial resources – all while preserving the rights of other non-party disabled individuals.

Overturning this decision, and permitting a never-ending line of plaintiffs to levy identical lawsuits against businesses who have already committed themselves to improving website accessibility, will run counter to Title III's purpose, deter businesses from improving the accessibility of their websites, and provide no meaningful benefit or protection to any disabled individual. Accordingly, *Amici* respectfully urge this Court to affirm the decision below and, in doing so, provide a dose of much-needed clarity to both businesses and disabled individuals amidst an otherwise uncertain legal landscape.

ARGUMENT

I. Despite The Uncertain And Inconsistent Legal Landscape Faced By Businesses Who Operate Websites, Many Businesses Have Taken Steps To Increase The Accessibility Of Their Websites.

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

Title III provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any *place* of public accommodation." 42 U.S.C. § 12182(a) (emphasis added).

While the statute does not define the term "place," the term is best read as referring to "a physical environment." *See* MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/place (last visited November 30, 2017) (defining "place" as "a physical environment;" "a particular region, center of population, or location to visit;" or "a building, part of a building, or area occupied"). Title III does, however, define the term "public accommodation" by listing twelve distinct categories of physical, brick-and-mortar establishments open to the public at a specific physical location. 42 U.S.C. § 12181(7).

The regulations issued by the Department of Justice to implement Title III reinforce the fact that places of public accommodation must be physical in nature. The regulations define the term "place of public accommodation" as "a facility," which is further defined as "all or any portion of buildings, structures, sites,

complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104.[1] A website, by contrast, is simply a collection of data that one "accesses" by requesting a web server to transmit the data to his or her computer from another host source. Under any natural definition, collections of data are not "places of public accommodation."

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

As described above, Title III and its implementing regulations, as currently written, do not apply to websites. *See Ford v. Schering–Plough Corp.*, 145 F.3d

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[1] In July of 2010, the DOJ issued an Advanced Notice of Proposed Rulemaking ("ANPR"), in which it explained that it was "*considering* revising the regulations implementing title III of the ADA in order *to establish requirements* for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web ('Web') accessible to individuals with disabilities." *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of Public Accommodations*, 75 Fed. Reg. 43460 (proposed July 26, 2010) (emphasis added). The ANPR did not set forth any proposed regulations or guidelines and explicitly explained that the DOJ has yet to adopt regulations regarding website accessibility. Despite issuing the ANPR seven ago, the DOJ has yet to enact any official regulation addressing website accessibility. To this end, the Trump Administration recently put the ANPR on its list of "inactive" regulations. *2017 Inactive Regulations*, REGINFO.GOV,https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf (last visited November 4, 2017).

601, 612–14 (3d Cir. 1998) ("[W]e do not find…the terms in 42 U.S.C. § 12181(7) to refer to non-physical access…"); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–13 (6th Cir. 1997) ("As is evident by § 12187(7), a public accommodation is a physical place…"); *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (explaining places of public accommodation are limited to physical "facilities"); *Earll v. eBay, Inc.*, No. 5:11-cv-0262, 2011 WL 3955485, at *2 (N.D. Cal. Sept. 7, 2011) (holding websites are not places of public accommodation). Despite this limitation, some courts have impermissibly expanded Title III's reach to include websites. In doing so, these courts have utilized vastly different approaches.

1. The "Spirit Of The Law" Approach

In considering whether Title III applies to non-physical spaces like websites, some courts – including those in the First and Seventh Circuits – construe the language of Title III broadly "to effectuate its [remedial] purpose of providing a … national mandate for the elimination of discrimination against individuals with disabilities." *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (internal citation and quotations omitted). Courts utilizing this "spirit of the law" approach do not consider whether businesses offer goods or services to the public *at a physical place*, but instead ask whether businesses offer goods or services to the public via *any* platform. Under this approach, several courts have held that

purely online businesses – those with no connection to any physical storefront, theater, or any other type of "public accommodation" listed in Section 12181(7) – are nonetheless places of public accommodation covered under Title III. *See Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012) ("[E]xcluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA…'") (quoting *Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994)).

2. The "Nexus" Approach

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

Under this approach, a website cannot form the basis of a Title III claim when it does not impede a disabled individual's ability to access the goods or services available at a related physical establishment. *See Gomez v. Bang & Olufsen Am.,*

Inc., No. 1:16-cv-23801, 2017 WL 1957182, at *2 (S.D. Fla. Feb. 2, 2017) ("Because Plaintiff has not alleged that Defendant's website impeded his personal use of [Defendant's] retail locations, his ADA claim must be dismissed."); *Jancik v. Redbox Automated Retail, LLC*, No. 8:13-cv-01387, 2014 WL 1920751, at *8–9 (C.D. Cal. May 14, 2014) (holding website was not place of public accommodation because there was insufficient nexus between website and physical space); *Young v. Facebook*, 790 F. Supp. 2d 1110, 1115 (N.D. Cal. 2011) ("Although Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which [the plaintiff] sought access are offered to the public."); *Ouellette v. Viacom*, No. 9:10-cv-00133, 2011 WL 1882780, at *4-5 (D. Mont. Mar. 31, 2011) (holding online theater websites were not physical places and were not sufficiently connected to any physical structure), *report and recommendation adopted*, No. 9:10-cv-00133, 2011 WL 1883190 (D. Mont. May 17, 2011); *Access Now, Inc. v. Sw. Airlines, Co.*, 227 F. Supp. 2d 1312, 1319-20 (S.D. Fla. 2002) (refusing to apply Title III to website because it was not physical location nor means of accessing concrete space); *appeal dismissed,* 385 F.3d 1324 (11th Cir. 2004).

Courts utilizing this approach have found that a business' website *can* run afoul of Title III, however, when it impedes a disabled individual's "full and equal enjoyment" of the goods and services offered at that business' *physical* establishment(s). *See National Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d

946, 954-955 (N.D. Cal. 2006) (holding plaintiffs had alleged sufficient facts to state Title III claim when plaintiffs "alleged the inaccessibility of Target.com denie[d] the blind the ability to enjoy the services *of Target stores*") (emphasis added). In *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340 (S.D. Fla. 2017), the Southern District of Florida recently applied an expanded version of the nexus approach, holding that Winn-Dixie's website *itself* is a service of a physical place of public accommodation (Winn-Dixie stores).[2]

3. Uncertain Lessons From *Netflix*

As a result of the inconsistent legal analyses courts have used in assessing whether a particular website falls within the purview of Title III, entities with a broad geographic presence now face inconsistent exposure to liability based upon where a plaintiff lives or in what geographic forum a claim is brought. *Compare National Ass'n of the Deaf v. Netflix*, 869 F. Supp. 2d 196 (D. Mass. 2012) (following "spirit of the law" approach in holding Netflix's video streaming website *is* place of public accommodation, even though its web-based services are unrelated to any physical space); *with Cullen v. Netflix*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (following "nexus" approach in holding Netflix's online streaming service *is not* place of public accommodation because Netflix's services are *only* available online). These *Netflix* decisions – under which the same website is a place of public accommodation in one

[2] This case is currently on appeal before this Circuit. *See* Appeal No. 17-13467.

judicial district but is not in another – demonstrate the uncertainty businesses now face in determining their obligations, if any, under Title III.

C. In The Midst Of Such Legal Uncertainty, Many Businesses Have Nonetheless Begun Working To Improve The Accessibility Of Their Websites.

Regardless of the uncertain legal obligations they face under Title III, businesses across the country are making concerted efforts to improve the accessibility of their websites. Some companies, like Outback, have chosen to settle website accessibility lawsuits and, in doing so, have agreed to modify their websites per the terms of judicially-enforceable settlement agreements.[3] Other companies have submitted remediation plans in response to the court practices of individual judges, who administratively close and stay website accessibility cases upon a finding that the defendant-business intends to remediate in a timely manner per the terms of a submitted modification plan.[4] Still other businesses have devised and

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[3] *See Jose Del-Orden v. Outback Steakhouse of Florida, LLC*, No. 1:16-cv-02319 (S.D.N.Y. Sept. 13, 2016). Instead of litigating this matter, Outback, who was admittedly "interested in having [its] websites be accessible to customers who suffer from disabilities," "agreed to revise its websites to make them more accessible." Unopposed Motion for Entry of Judgment, at 1, *Del-Orden* (filed Sept. 12, 2016). Outback implemented this remediation plan *despite* the fact that "the U.S. Department of Justice has not issued any regulations definitively establishing whether the ADA imposes accessibility requirements upon [] websites …" *Id.*

[4] At least one federal judge, the Honorable Darrin P. Gayles of the Southern District of Florida, has taken this approach, perhaps recognizing the waste of company *and* court resources incurred when businesses who are already in the process of

begun implementation of website remediation plans on their own volition, not in response to any threatened or filed litigation.

Whatever the circumstances giving rise to the remediation plan, the process of improving a website's accessibility is both expensive and laborious. Businesses who implement remediation plans do so at a substantial financial cost, as website modification projects almost always involve hiring third-party contractors to assist with both re-design and implementation efforts. Not only are such modification projects expensive, they also require considerable time to effectuate fully. Modern websites have become increasingly complex, and one business' "site" may easily include a multitude of distinct web pages. Additionally, many businesses' websites also include content created and hosted by third-party sources. Ensuring that all

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remediating their websites are forced to litigate website accessibility claims. *See, i.e.*, Defendant's Response to Court's Order and Remediation Report, *Haynes v. Texas Roadhouse, Inc.*, No. 0:17-cv-61565 (S.D. Fla. filed Sept. 18, 2017) (case administratively closed in response to remediation report on October 2, 2017); Defendant's Notice of a Pre-Existing Remediation Plan, *Moncada v. Red Lobster Seafood Co., LLC*, No. 0:17-cv-61707 (S.D. Fla. filed Sept. 14, 2017) (case administratively closed in response to remediation report on September 28, 2017); ADA Report, *Haynes v. Little Caesar Enterprises, Inc.*, No. 0:17-cv-61073 (S.D. Fla.fFiled Sept. 8, 2017) (case administratively closed in response to remediation report on October 2, 2017); Defendant Burlington Stores, Inc.'s Remediation Report, *Haynes v. Burlington Stores, Inc.*, No. 0:17-cv-61640 (S.D. Fla. filed Aug. 31, 2017) (case administratively closed in response to remediation report on September 1, 2017). In each of these cases, Judge Gayles has retained jurisdiction to supervise the submitted remediation plans.

discrete pages and content meet certain accessibility guidelines is a time-consuming, detail-oriented process.

The expensive and time-consuming process involved in improving website accessibility is especially notable given the fact that, according to the majority of federal courts interpreting Title III's scope, businesses either: (a) are only required to make certain *limited* web-based information accessible; or (b) are not legally required to make *any* websites or web-based information accessible. Given the lack of uniform decisional law and specific regulations regarding business' obligations to provide accessible websites, companies could continue defending individual lawsuits as they are filed based upon the legal approach taken in the jurisdiction in which each claim is made. Businesses like Outback, and many of *Amici's* members, however, have taken a different path by creating and beginning to implement specific remediation plans.

II. Allowing Copy-Cat Plaintiffs To Levy Identical Lawsuits Against Businesses Who Are Already Committed To Improving Website Accessibility Runs Counter To Title III's Purpose And Provides No Meaningful Benefit Or Protection To Disabled Individuals.

A. Permitting Identical Lawsuits To Proceed Against Companies Who Are Already Implementing Remediation Plans Unreasonably Burdens Businesses And Disincentivizes Remediation Plans.

At the highest level, the goal of the ADA is the provision of full and equal access to individuals with disabilities. Regardless of the particular requirements imposed by the statute and its implementing regulations – i.e., whether and under

what circumstances businesses must make their websites accessible to visually impaired individuals – a business' decision to improve the accessibility of its website furthers the ADA's broad purpose.

As explained above, there is currently great uncertainty regarding whether websites are places of public accommodation under Title III and, consequently, whether businesses are legally required to maintain websites that are accessible to visually impaired individuals. In the midst of this uncertainty, recent years have seen a dramatic rise in the number of nearly-identical website accessibility lawsuits filed by visually impaired plaintiffs. While defendant-businesses are arguably under no legal obligation to make their websites accessible, their promises to do so – either voluntarily or pursuant to a court-enforceable or court-supervised remediation plan – have led, and will continue to lead, to a more accessible Internet.

Such agreements do more than increase website accessibility, however. Importantly, they also provide businesses with a much-needed sense of certainty amidst an otherwise uncertain legal landscape. By agreeing to bring their websites into compliance with certain private-sector accessibility guidelines, businesses also seek – and deserve – protection from a potential onslaught of other identical website accessibility lawsuits. This protection is critical. Website modification plans take time to effectuate; they are often completed in stages with the help of expert consultants. Once a company begins the process of modifying its website, it can

take several months or even years to ensure a remediation plan's completion. This in mind, when a business commits to completing a remediation plan, it reasonably expects to enter a "safe zone" of sorts, in which it can focus its efforts and resources on actually *implementing* such plans without having to defend additional website accessibility lawsuits seeking the very relief to which it has already committed itself. In addition to providing companies a reprieve from repetitive litigation (and, in doing so, preserving judicial resources), this sense of protection actually *incentivizes* businesses to establish remediation plans – something Title III does not currently require.

By contrast, permitting numerous plaintiffs to bring identical lawsuits against businesses who have already committed, via specific remediation plans, to improving their websites' accessibility only serves – as it did in Outback's case – to encourage copy-cat lawsuits. This threat of continued litigation in turn *disincentivizes* companies from taking such proactive measures. If businesses are forced to continue re-litigating the same issues again and again *despite* having already committed to meeting specified website accessibility standards, companies may begin delaying remediation *entirely* until Congress, the Department of Justice, or the Supreme Court of the United States clarifies their obligations under Title III. A reversal of the lower court's decision at issue on this appeal would allow – and arguably incentivize – plaintiffs (and their attorneys) to levy identical website

accessibility lawsuits against already-remediating businesses. Such a result would run counter to Title III's most fundamental purpose and, in doing so, would harm businesses, disabled individuals, and the court system alike.

B. Dismissing Or Staying Lawsuits Identical To Those Already Being Resolved By Remediation Plans Does Not Negatively Impact The Rights Of Any Disabled Individual.

Importantly, the great benefits of preventing additional plaintiffs from bringing identical website accessibility lawsuits against already-remediating businesses – providing companies with a much-needed sense of legal certainty and, in doing so, preserving judicial resources and promoting the ADA's overarching purpose – come at *no cost* to disabled individuals.

1. A Business' Plans To Improve The Accessibility Of Its Website Effectively Moot The Claims Of Subsequent Plaintiffs By Providing The Very Relief They Seek.

"[A] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001). In other words, a plaintiff's claims are moot if he has already received all relief to which he would be entitled under the law giving rise to his cause of action. As explained above, Title III provides plaintiffs with the right to seek injunctive relief only; compensatory, punitive, and other money damages are not available remedies. As a result, in the context of claims brought under Title III, if a "plaintiff has already received everything to which he would be entitled, i.e., [if] *the*

challenged conditions have been remedied, then these particular claims are moot," as there is no longer any conduct to be enjoined. *Access 4 All, Inc. v. Casa Marina Owner, LLC*, 458 F. Supp. 2d 1359, 1365 (S.D. Fla. 2006) (internal citation and quotations omitted) (emphasis added), *vacated and remanded on other grounds*, 264 F. App'x 795 (11th Cir. 2008); *see also id.* at 1362 ("And the injunctive relief is the only thing sought. There is [sic] no damages sought, nor could there be in a case of this type under these circumstances. So therefore it would seem to me that it's sort of an exercise in futility, or a pointless effort to go forward at this point.") (quoting from court's own line of questioning during previous evidentiary hearing).[5] Under this basic framework, courts around the country routinely hold that plaintiffs' Title III claims are moot when the challenged conduct has already been remediated by the defendant. *See Kallen v. J.R. Eight, Inc.*, 775 F. Supp. 2d 1374, 1379 (S.D. Fla. 2011) ("Because the Parties agree that Defendant has remedied nine of the deficiencies alleged in the Amended Complaint, the Court finds that those nine claims are rendered moot and subject to dismissal for lack of jurisdiction."); *see also Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1286

[5] Plaintiffs are not considered prevailing parties, and consequently are not entitled to attorneys' fees, if they are ultimately denied injunctive relief. *See Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001).

(11th Cir. 2004) (holding remedial measures adopted pre-suit mooted plaintiff's ADA claim).

The analysis becomes more complicated, however, when a defendant is *in the process* of remediating a challenged access barrier or has *plans* to remediate a challenged access barrier in the future. Generally, a defendant's "mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant…free to return to his old ways.'" *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). But, if "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," a defendant's voluntary cessation can in fact moot a plaintiff's claims. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). The nuances of this voluntary cessation exception – and the "not reasonably expected to recur" exception to the exception – are critical in Title III cases involving in-progress or planned remediation plans, as opportunistic plaintiffs' attorneys are quick to characterize such remediation plans as leaving open the possibility of eventual un-remediation.

Despite such arguments, courts have held that the existence of a *genuine* remediation plan – even one that is incomplete or scheduled to commence at some point in the future – makes it unlikely that challenged conduct will reoccur and,

consequently, renders a plaintiff's Title III claims moot. *Compare Casa Marina*, 458 F. Supp. 2d at 1365 (holding challenged conduct unlikely to reoccur when defendant had already entered into various contracts to fix access barrier); *with Access for the Disabled, Inc. v. Caplan*, No. 0:01-cv-07310, slip op. at 7-8 (S.D. Fla. Sept. 17, 2002) ("The submission of plans for [remediating] construction at some future undetermined date is insufficient to [demonstrate mootness]. It is unclear whether the city will approve the plans – they were submitted nine months ago – and even if they are approved, there is no guarantee [the defendant] will implement them."). Mootness is especially likely when the remediation plan was contemplated or created *before* the plaintiff filed his lawsuit, as is the case in the instant appeal. *Compare Casa Marina*, 458 F. Supp. 2d at 1365 ("[D]efendant's remedial plan, which existed prior to Plaintiffs filing their lawsuit [but had not yet been implemented], renders Plaintiffs' claims moot, as a matter of law, and subjects Plaintiffs' Complaint to dismissal."); *with Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1186 (11th Cir. 2007). *But see Markett v. Five Guys Enterprises LLC*, No. 0:17-cv-788, 2017 WL 5054568, at *3 (S.D.N.Y. July 21, 2017).

Despite this well-established analysis, there is disagreement within the Eleventh Circuit as to whether a defendant's existing plans to improve the accessibility of its website – particularly those plans made in accordance with a court-enforced settlement agreement – moot subsequent plaintiffs' website

inaccessibility claims.[6] *Compare Haynes v. Brinker Int'l, Inc.*, No. 0:17-cv-61265, 2017 WL 4347204, at *3-5 (S.D. Fla. Sept. 29, 2017) (dismissing plaintiff's claims as moot in light of defendant's previous settlement and remediation plan because "the[] circumstances ensure[d] that the allegedly wrongful behavior could not reasonably be expected to recur"); *Outback*, 2017 WL 4284487, at *3; *and Haynes v. Hooters of Am., LLC*, No. 0:17-cv-60663, 2017 WL 2579044, at *1 (S.D. Fla. June 14, 2017) ("Where a prior identical, ADA-premises lawsuit has not only been filed but has been actually resolved before the filing of the second suit, [subsequent plaintiffs cannot sue the same defendant]. This is so where, as here, there ceases to be a live controversy: Hooters has agreed to remedy, in accordance with a binding settlement agreement in [a previous case], all of the website inaccessibility issues Haynes complains of in this suit. Ordering Hooters to do what it has already agreed to do affords Haynes *no meaningful relief*.") (emphasis added); *with Haynes v. Interbond Corp. of Am.*, No. 0:17-cv-61074, 2017 WL 4863085, at *3 (S.D. Fla. Oct. 16, 2017) (ignoring force of previous settlement agreement in conjecturing, "Defendant could, at some point, complete its remediation plan and potentially moot Plaintiff's claims…[b]ut this has yet to occur"); *and Haynes v. Carrabba's Italian Grill, LLC*, No. 0:17-cv-60644 (S.D. Fla. May 2, 2017) (denying motion to stay

[6] Appellant-Plaintiff's argument that "website ADA cases cannot be mooted" is incorrect and, more importantly, demonstrates the vastly uncertain legal landscape and lack of finality businesses are facing.

without providing any rationale or addressing defendant's mootness argument or pre-existing and court-enforceable remediation plan).

In ruling that continued challenges to a website's accessibility already in the process of remediation pursuant to a binding settlement agreement are *not* moot, the *Interbond* and *Carrabba's* courts not only ignored the great expense and time investment of website modification projects, but also seemingly disregarded the power of their sister district courts to hold defendants accountable to their remediation promises. As explained above, website accessibility plans are incredibly expensive, time-consuming, and typically involve third-party assistance. Once a business has begun the process of improving its website's accessibility, it is highly unlikely that the company will abandon its plans until full compliance with certain private-sector guidelines is reached (particularly when it knows that plaintiffs are ready to initiate, or have initiated, litigation). Additionally, when businesses enter into binding settlement agreements regarding their plans to remediate or otherwise submit remediation plans to be completed under court supervision, the risk that a company will successfully "abandon" its accessibility endeavors mid-modification project is eliminated entirely. If a company *did* attempt such abandonment and refused to make its website accessible per the terms of the settlement agreement, the enforcing court would have full authority to compel compliance.

The *Brinker* and *Hooters* courts, along with the *Outback* court below, more fully appreciated the benefit website remediation plans provide to all disabled individuals (including those not party to a particular settlement agreement or court-supervised plan). According to these courts, such remediation plans not only ensure that challenged conduct is unlikely to reoccur, but also provide potential future plaintiffs with the very relief they would seek – a defendant's genuine and often legally-binding obligation to improve the accessibility of its website. *See Brinker*, 2017 WL 4347204, at *3 ("Haynes' argument that his rights should not be affected by a settlement agreement to which he was not a party is a misnomer, as his rights are affected in this context only in the sense that the relief he seeks – which has everything to do with the Website – cannot be effectively or meaningfully granted."); *Outback*, 2017 WL 4284487, at *2 ("Outback has already committed, and is legally bound, to make the desired changes to its website."); *Hooters*, 2017 WL 2579044, at *2 ("The existence of the remedial plan, agreed to in the settlement, means that the plaintiff has already received everything to which he would be entitled, if his lawsuit were successful, leaving nothing for this Court to determine.") (internal citation and quotations omitted). In stressing that court-enforceable or court-supervised remediation plans are highly unlikely to remain uncompleted, and, in doing so, correctly classifying subsequent plaintiffs' identical website accessibility claims as moot, the *Brinker*, *Outback*, and *Hooters* decisions clearly

evidence a better understanding of and appreciation for the reality of such modification plans than *Interbond* and *Carrabba's*.[7]

2. Although Remediation Plans Moot Identical Claims, Such Plans Do Not Deprive Disabled Individuals Of Any Rights Under Title III.

While the existence of a website modification plan effectively moots other potential plaintiffs' identical claims, such mootness does not deprive any disabled individual of his ability to exercise or enforce his right to *be free from disability discrimination* under Title III.[8] First, as the lower court explained in *Outback*, these would-be plaintiffs usually have the ability to intervene in previously-settled cases against their would-be defendants, as these cases often remain open – *for enforcement purposes* – throughout the duration of the remediation plan. *Outback*, 2017 WL 4284487, at *3. Alternatively, if their would-be defendants ultimately fail in successfully completing their promised remediation efforts (and upon the unlikely

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[7] These decisions also expose the true motivation belying the recent trend in copy-cat website accessibility lawsuits – attorneys' fees. *See Hooters*, 2017 WL 2579044, at *2 ("It is therefore unclear what else Haynes hopes to accomplish, other than obtain attorney's fees for his counsel."); *see also* Chris Hofstader, *It's Gotten Much Worse ADA Trolling a Year Later*, BLIND PLANET (Jan. 16, 2017), http://blind-planet.com/its-gotten-much-worse-ada-trolling-a-year-later) (describing how small community of plaintiffs' attorneys are "perpetuating a lawsuit blitzkrieg against companies with web sites").

[8] Title III does *not* provide disabled individuals *carte blanche* to file duplicative lawsuits against defendants who have already changed or are in the process of changing their behavior.

event that the enforcing court refused to take appropriate responsive action), nothing would prevent would-be plaintiffs like Haynes from *then* filing their own individual lawsuits, as their claims would no longer be moot. *Id.* ("Alternatively, Haynes could wait to file his own lawsuit, if and when his fears about inadequate enforcement come to pass."). As a result, while court-enforceable remediation plans do moot subsequent plaintiffs' identical claims, they do *not* prevent such individuals from effectively enforcing their right to be free from actual discrimination under Title III.

CONCLUSION

Businesses today face enormous uncertainty in determining whether and under what circumstances their websites may run afoul of Title III. Add to this uncertainty an aggressive band of plaintiffs' attorneys who see nothing but dollar signs in the chaos, and businesses are faced with two equally undesirable choices – they may either continue to defend individual website accessibility lawsuits, without a plan in place to improve website accessibility, or, in the alternative, enter into expensive remediation plans with no assurance that such plans will provide any protection against duplicative lawsuits. This framework is not only damaging to both businesses and the judicial system, but it also undermines the broad purpose of the ADA and provides no meaningful benefit to disabled plaintiffs.

The *Outback*, *Brinker*, and *Hooters* decisions provide an alternative solution to this unworkable system. By preventing subsequent plaintiffs from bringing

duplicate website accessibility lawsuits against businesses who have already agreed to modify their websites through a remediation plan, these decisions provide businesses with a sense of much-needed legal certainty while incentivizing website accessibility and protecting the rights of disabled individuals. For this and the foregoing reasons, *Amici* respectfully request that this Court affirm the Southern District of Florida's decision in *Outback* and find in favor of Outback on this appeal.

Respectfully submitted this 6th day of December, 2017.

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