

RECORD NOS.

20-1552(L)

20-1559(CON), 20-1588(CON), 20-1594(CON), 20-1608(CON)

In The
United States Court of Appeals
For The Second Circuit

HIMELDA MENDEZ,
and on behalf of all other persons similarly situated,
Plaintiffs,

MARCOS CALCANO, On behalf of himself and all other persons similarly situated,
YOVANNY DOMINGUEZ, on behalf of all other persons similarly situated,
BRAULIO THORNE, on behalf of himself and all other persons similarly situated,
JAMES MURPHY, on behalf of himself and all other persons similarly situated,
Plaintiffs – Appellants,

v.

ANNTAYLOR, INC., SWAROVSKI NORTH AMERICA LIMITED,
BANANA REPUBLIC, LLC, JERSEY MIKE'S FRANCHISE SYSTEMS, INC.,
THE ART OF SHAVING-FL, LLC, KOHL'S DEPARTMENT STORES, INC.,
Defendants – Appellees,

KOHL'S CORPORATION,
Defendants.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**MOTION OF THE RETAIL LITIGATION CENTER, INC.,
RESTAURANT LAW CENTER, NATIONAL RETAIL FEDERATION,
AND NATIONAL ASSOCIATION OF THEATRE OWNERS FOR LEAVE
TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES AND
URGING AFFIRMANCE OF THE DECISIONS BELOW**

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN
SUPPORT OF APPELLEES AND URGING AFFIRMANCE OF
THE DECISIONS BELOW**

This consolidated appeal presents five of nearly 250 virtually identical suits that were filed in the Southern and Eastern Districts of New York alleging that a business's failure to sell gift cards embossed with Braille violates the Americans with Disabilities Act ("ADA") and New York civil rights laws. One need not resort to hyperbole to recognize that this Court's decision in the matters before it will immediately affect not only the hundreds of retailers, restaurants, and theaters already facing gift card litigation, but also the many thousands of other businesses who sell gift cards and other products. Because these actions threaten to disrupt the careful balance that is the hallmark of the ADA and its implementing regulations, The Retail Litigation Center, Inc. ("Retail Litigation Center"), Restaurant Law Center ("Restaurant Law Center"), National Retail Federation ("NRF"), and National Association of Theatre Owners ("NATO") respectfully move under Federal Rule of Appellate Procedure 29(a)(3) and Local Rule 29.1 for leave to file the attached brief addressing the legal and

practical reasons why the lower courts' decisions to preserve the ADA's inherent balance should be affirmed.¹

In support of this motion, Amici show the Court the following:

AMICI'S INTEREST

The Retail Litigation Center is the only trade organization dedicated solely to representing the retail industry in the judicial system. Its members include many of the country's largest and most innovative retailers. Collectively, the Retail Litigation Center's members employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The Retail Litigation Center seeks to provide courts with retail-industry perspectives on important legal issues impacting its members and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the Retail Litigation Center has participated as an amicus in more than 160 judicial proceedings on a wide range of

¹ The undersigned counsel have conferred with counsel for the principal parties. Appellees consent to Amici's requested participation. Appellants oppose Amici's requested participation—as they did below—and intend to file an opposition to this motion.

issues important to retailers. Its amicus briefs have been favorably cited by multiple courts, including the U.S. Supreme Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation’s second-largest private-sector employers. Through amicus participation, the Restaurant Law Center provides courts with the industry’s perspective on legal issues that have the potential to significantly impact its members and their industry. The Restaurant Law Center’s amicus briefs have been cited favorably by state and federal courts, most recently by the majority in an Eleventh Circuit en banc decision. *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1303 n. 15 (11th Cir. 2019) (en banc).

NRF is the world's largest retail trade association, representing the nation's largest private-sector employer and an industry that contributes \$2.6 trillion dollars to annual GDP. NRF advocates for the retail industry on a wide range of issues, regularly weighing in on legislation being considered by Congress, regulations proposed by federal agencies, and in lawsuits. NRF's amicus briefs have been cited favorably, including by this Court. *See, e.g., Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 791 n.20 (2d Cir. 2016).

NATO is the largest motion picture exhibition trade organization in the world, representing more than 33,000 movie screens in all 50 states, and additional cinemas in 103 countries worldwide. NATO's membership includes the largest cinema chains in the world and hundreds of independent theater owners.

DISCUSSION

These appeals, and the hundreds of similar cases pending below, present a question that is pivotal to public accommodations: does the ADA require that a particular product—a gift card—be offered in a form embossed with Braille? Representing thousands of retailers, restaurants, and theaters, Amici have insights and perspectives

concerning this issue that might be helpful to the Court. In fact, Appellants cited and relied on NRF data in their original Complaints, (J.A. 10, 76, 143, 224, 328, 394), and multiple District Court Judges cited points raised in the brief Amici filed below (*See, e.g.*, J.A. 210). *See also Thorne v. Boston Mkt. Corp.*, No. 19-CV-9932 (RA), 2020 WL 3504178, at *9 (S.D.N.Y. June 29, 2020).

These cases are about more than gift cards. In the ADA and its implementing regulations, Congress and the Department of Justice carefully balanced the needs of people with disabilities with the practical limitations faced by public accommodations. As Amici's brief explains, adopting Appellants' argument that the ADA requires public accommodations to sell a particular product that is specially designed for a subset of individuals with disabilities would make businesses and Courts the guardians of accessible product design: an obligation onerous in its scope and unworkable in its execution. Accepting Appellants' argument that Braille is the single permissible auxiliary aid or service for gift cards would limit the flexibility that enables businesses to best serve all customers with disabilities, in addition to ignoring Braille's practical limitations. And construing a gift card as a place would make

it impossible for public accommodations to ascertain the scope of their ADA requirements with respect to the products they sell. Amici seek to provide the Court with insight into these practical issues, beyond the purely legal arguments raised by the principal parties.

Further, this litigation does not exist in a vacuum. Amici's brief explains that gift cards are already highly regulated at the federal and state levels, and public accommodations already face a labyrinth of technical ADA requirements. The relief Appellants request could expose public accommodations to competing obligations under these bodies of law. As a result, if gift cards are to be subjected to special accessibility rules, those rules are best left to the legislative or administrative processes.

For all of the foregoing reasons, Amici respectfully request leave to file the accompanying brief in support of Appellees and urging affirmance of the decisions below.

Respectfully submitted this the 28th day of August, 2020.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of August, 2020, I caused the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

/s/ James A. Dean
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[X] this motion contains [1,079] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[] this motion uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This motion 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:

[X] this motion has been prepared in a proportionally spaced typeface using [*Microsoft Word 2016*] in [*14pt Century Schoolbook*]; *or*

[] this motion has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: August 28, 2020

/s/ James A. Dean
Counsel for Amici Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae The Retail Litigation Center, Inc., Restaurant Law Center, National Retail Federation, and National Association of Theatre Owners each certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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STATEMENT OF INTEREST¹

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¹ No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the Amici Curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

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annual GDP. NRF advocates for the retail industry on a wide range of issues, regularly weighing in on legislation being considered by Congress, regulations proposed by federal agencies, and in lawsuits. NRF's amicus briefs have been cited favorably, including by this court. *See, e.g., Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 791 n.20 (2d Cir. 2016).

The National Association of Theatre Owners ("NATO") is the largest motion picture exhibition trade organization in the world, representing more than 33,000 movie screens in all 50 states, and additional cinemas in 103 countries worldwide. NATO's membership includes the largest cinema chains in the world and hundreds of independent theater owners.

STATEMENT OF THE CASE

Retailers, restaurants, and movie theaters exist to serve consumers. The more consumers they serve, the better off they are. One in four Americans has a disability.² Thus, apart from the

² *Disability Impacts All of Us*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited Aug. 25, 2020).

requirements of the Americans with Disabilities Act (“ADA”), businesses have a fundamental interest in serving this important market segment and many have chosen to do so in creative and cutting-edge ways.³ Nonetheless, the capacity of retailers, restaurants, and theaters is not limitless. Acknowledging this fact, Congress drew the statutory lines bounding the ADA’s legal mandate with care, balancing the needs of people with disabilities, on the one hand, and the practical constraints faced by public accommodations, on the other.⁴ In so doing, Congress recognized that, as important as it is for public

³ As but one example, Target stores offer visually-impaired customers the ability to use Aira, a service that uses mobile devices to connect low vision customers with trained agents who can assist them in real time with tasks including finding carts or baskets, selecting specific items from shelves, and locating the shortest check out line. *See Aira Service Now Available At All Target Stores*, AIRA.IO, <https://aira.io/target> (last visited Aug. 25, 2020).

⁴ Many of these boundaries are cemented in the ADA’s definition of “discrimination,” which provides, for example, that a public accommodation is not required to: (1) modify its policies, practices, or procedures when doing so would require a “fundamental alteration” in the goods, services, facilities, privileges, advantages, or accommodations at issue; (2) provide auxiliary aids or services that require a “fundamental alteration” or result in an “undue burden;” or (3) remove architectural or structural communications barriers when doing so is not “readily achievable.” 42 U.S.C. §§ 12182(b)(2)(A)(ii)-(iv); *see also* 28 C.F.R. § 36.302(a).

accommodations to grant access to individuals with disabilities, there must be practical limits to the scope of that grant, including allowing public accommodations to stock a product mix of their choosing and to select the reasonable auxiliary aids or services they use to communicate with a broad range of customers with differing abilities.

Appellants seek to erase these legislatively designed boundaries by forcing Appellees to sell a good specially designed for one subset of individuals with one type of impairment or to provide a specific auxiliary aid or service that benefits only a small percentage of that population. Removing half of the legislative equation would not only pave the way for a wave of product-based ADA litigation, but it would create practical compliance problems for public accommodations and courts. Accordingly, Amici urge the court to affirm the decisions below.

STATEMENT OF FACTS

As the name indicates, “[a] gift card is a type of prepaid card that is designed to be purchased by one consumer and given to another consumer as a present or expression of appreciation or recognition.”⁵ In

⁵ Electronic Fund Transfers, 75 Fed. Reg. 16580 (Apr. 1, 2010) (amending 12 C.F.R. part 205, which implements the Electronic Fund Transfers Act to cover gift cards).

fact, gift cards have topped consumers' holiday wish lists for thirteen consecutive years.⁶ During 2018, alone, this demand translated into more than 5.5 billion retail gift card payments representing a value of \$100 billion.⁷

Consistent with their popularity, gift cards are available through a variety of channels. Importantly, many retailers, restaurants, and theaters – in addition to selling their own gift cards – permit their cards to be sold through kiosks or “gift card malls” placed in department stores, pharmacies, grocery stores and other locales. Gift card malls generally account for more than one-third of all gift card sales and often are operated by third-party program managers who work with the host store where the mall is located to select the gift cards to be sold, design the display, activate cards, and transfer funds. Even when a retailer, restaurant, or theater sells its cards directly, the card program may be

⁶ *Holiday Shoppers Plan to Spend 4 Percent More This Year*, NRF.COM, [https://nrf.com/media-center/press-releases/holiday-shoppers-plan-spend-4-percent-more-year#:~:text=For%20the%2013th%20year%20in,percent\)%2C%20personal%20care%20or%20beauty](https://nrf.com/media-center/press-releases/holiday-shoppers-plan-spend-4-percent-more-year#:~:text=For%20the%2013th%20year%20in,percent)%2C%20personal%20care%20or%20beauty) (last visited Aug. 27, 2020).

⁷ Fed. Reserve Sys., *The 2019 Federal Reserve Payments Study at 4* (Dec. 2019), *available at* <https://www.federalreserve.gov/newsevents/pressreleases/files/2019-payments-study-20191219.pdf> (referring to gift cards as “private-label prepaid debit cards”).

administered by one or more third parties who print or procure the cards, activate them upon purchase, track balances, and provide customer service for card-related issues.

Like many other consumer products, federal regulations require gift cards to bear certain printed information.⁸ Consistent with the notion that gift cards are designed to be transferred from one consumer to another, these disclosures must be printed on the gift card itself; placing the information on a sticker or label affixed to the card or in packaging or printed materials accompanying the card is not sufficient to comply with federal dictates.⁹ Federal regulations also require all gift cards to bear a toll-free number and, if available, a web address where all of the information that must be printed on the card is also available to consumers.¹⁰ Increasingly, gift cards are associated with websites for consumers such that now practically all gift cards bear a web address where the full terms and conditions may be found by all consumers.

⁸ 12 C.F.R. § 1005.20(c).

⁹ *Id.* § 1005.20(c)(4).

¹⁰ *Id.*

In addition to these federal requirements, gift cards, like many other products, must comply with relevant state laws. For example, New York law requires gift cards to disclose any expiration date, the amount of any fee, and whether the card is subject to a replacement fee if it is lost or stolen.¹¹ Any additional terms and conditions must either be stated on the card or must be accessible via a toll-free number that is printed on the card.¹²

ARGUMENT

I. THE ADA DOES NOT SEEK TO DICTATE THE PRODUCTS A PUBLIC ACCOMMODATION MAY SELL.

Despite Appellants' urging to the contrary, public accommodations are not required to stock products that are specially designed for people with disabilities, including Brailled goods.¹³ 28 C.F.R. §§ 36.307(a), (b). By taking the position that a gift card is a service, a place, money, or anything other than a good, Appellants seek to make an end run around

¹¹ N.Y. Gen. Bus. Law § 396-i(3).

¹² *Id.*

¹³ Or, as DOJ has explained, "The purpose of the ADA's public accommodations requirements is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided." 28 C.F.R. Pt. 36, App'x C § 36.307.

this bright line rule and replace it with uncertain, unworkable, and potentially unlimited obligations.

If retailers, restaurants, and theaters were required to stock Brailled versions of gift cards, then it would be difficult to envision what limiting principle they could look to when responding to future demands that they carry special versions of other products. As one Circuit Court has noted:

[T]he language of [Title III] can only reasonably be interpreted to have some practical, common sense boundaries. And if we construe Title III to regulate the content of goods and services, there seem to be *no statutory boundaries*.

McNeil v. Time Ins. Co., 205 F.3d 179, 187 (5th Cir. 2000) (emphasis added). For instance, Appellants' logic could be used to mandate that retailers sell Brailled books,¹⁴ closed-captioned DVDs,¹⁵ special

¹⁴ See 28 C.F.R. Pt. 36, App'x C, § 36.307 (“[A] bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books.”).

¹⁵ See *Jancik v. Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 WL 1920751, at *5 (C.D. Cal. May 14, 2014) (concluding that closed-captioned DVDs were a special good retailer was not required to stock under § 36.307(a)).

clothing,¹⁶ automobiles with hand controls,¹⁷ and specially-designed electronics;¹⁸ limit restaurants to using drink dispensers that can be independently used by people with disabilities;¹⁹ and force theaters to screen only films that have open captioning visible to all patrons.²⁰ But guidance from the Department of Justice (“DOJ”) and other courts makes clear that the ADA requires none of these things. Indeed, taking Appellants’ argument to its logical conclusion could prevent retailers,

¹⁶ See *Anderson v. Kohl’s Corp.*, No. 2:12-CV-00822, 2013 WL 1874812, at *9 (W.D. Pa. May 3, 2013) (concluding that ADA did not require retailer to carry particular plus-sized clothing).

¹⁷ See *Funches v. Barra*, No. 14 Civ. 7382 (KPF), 2016 WL 2939165, at *4 (S.D.N.Y. May 17, 2016) (concluding that car manufacturers were not “required to alter the mix of goods they sell by manufacturing a set portion of their vehicles with hand controls”).

¹⁸ See *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999) (“The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons.”).

¹⁹ See *West v. Moe’s Franchisor, LLC*, No. 15 Civ. 2846 (WHP), 2015 WL 8484567, at *3 (S.D.N.Y. Dec. 9, 2015) (“Nothing in the ADA or its implementing regulations supports Plaintiffs’ argument that Moe’s must alter its Freestyle [drink] machines in a way that allows blind individuals to retrieve beverages without assistance.”).

²⁰ See *Cornilles v. Regal Cinemas, Inc.*, NO. 00-173-AS, 2002 WL 31440885, at *6 (D. Or. Jan. 3, 2002) (finding that open-captioned movies were a special good that a theater need not provide under the ADA).

restaurants, or theaters from selling any product that is not independently usable by any person with any disability or that does not have an independently-usable equivalent.²¹ “Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, . . . it would have made its intention clearer and would at least have imposed some standards.” *Mutual of Omaha*, 179 F.3d at 560. It did neither.

Finally, there is no question that the relief Appellants seek runs afoul of the ADA’s limitations. *See* 28 C.F.R. § 36.307. Gift cards are goods that are stocked, displayed, marketed, and sold like any other product. They are not bound to any ongoing service or linked to a particular user or retail location. Indeed, this freedom is the very point of the cards, which are intended to be bought by one person and given to another with no strings attached. Aside from the cards’ inherent attributes, the fact that they are goods is reflected in the manner of their distribution. In particular, around one-third of all gift card sales

²¹ The most likely result of any such requirement would be a dramatic decrease in the goods that could be brought to market. *See, e.g., McNeil*, 205 F.3d at 187 (enumerating restrictions that retailers and restaurants would face if required to ensure that every good offered was equally accessible to people with disabilities as to those without).

occur through kiosks or “gift card malls” that are located in department stores, pharmacies, and other locales and offer literally dozens of card options. While the host store might have some input in the cards to be offered, the malls and cards are controlled and administered by third parties, and the host store has no involvement beyond the point of sale.

In sum, Congress and DOJ made a clear choice that the ADA should not regulate retailers’, restaurants’, and theaters’ inventories. Amici urge the court to recognize this key principle by affirming the decisions below.

II. THE ADA PLACES PRACTICAL LIMITATIONS ON THE “AUXILIARY AIDS OR SERVICES” REQUIREMENT.

The ADA’s auxiliary aids or services requirement is intended to facilitate communication between public accommodations and customers with sensory impairments. It does not deputize retailers, restaurants, and theaters to intrude on their customers’ privacy by asking questions about their abilities; require those businesses to provide the particular aid or service a customer requests rather than an effective aid or service the business already has on hand; or mandate Braille as the exclusive aid or service for any communication.

A. Retailers, Restaurants, and Theaters Do Not Have a Duty to Divine the Existence of Undisclosed, Unobservable Disabilities.

Retailers, restaurants, and theaters should not be required to guess at the existence of undisclosed, unobservable disabilities in order to avoid ADA liability, but this is precisely what Appellants contend Appellees were bound to do. As reflected in their Complaints, Appellants' claims are based on brief telephone interactions in which they merely asked whether Appellees sell Braille gift cards. (J.A. 35, 101, 166, 286, 350, 416.) The fact that Appellants are visually impaired was not disclosed (*see id.*) and could not have been reasonably inferred from Appellants' (telephoned) questions, since gift cards are primarily bought to be used by individuals other than the purchasers. Yet the alleged failure to provide an auxiliary aid or service to accommodate Appellants' undisclosed conditions is at least one basis on which Appellees now find themselves in court, along with hundreds of other retailers, restaurants, and theaters facing similar suits in this Circuit.

Common sense dictates that it should not be incumbent on public accommodations to interrogate customers whenever they have an inkling that the customer has an undisclosed disability. In fact,

multiple ADA regulations forbid such questions, even where a customer's disability is evident. For example, when ascertaining whether an animal qualifies as a "service animal," public accommodations "shall not ask about the nature or extent of a person's disability." 28 C.F.R. § 36.302(c)(6). Likewise, "[a] public accommodation shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability". 28 C.F.R. § 36.311(c)(1).

Even apart from the ADA's prohibitions, intrusive questions about the existence of disabilities are not the type of inquiries most individuals — disabled or otherwise — would expect (or tolerate) in a customary business transaction. Such questions could be perceived as demeaning or as reinforcing the prejudices that led to the ADA's passage in the first place. *See* 42 U.S.C. § 12101. After all, even if a customer has a disability, she may not need or want assistance. Retailers, restaurants, and theaters should not be obligated to intrude on individuals who might prefer to shop, dine, or view independently.

In sum, Appellants' attempt to make public accommodations liable for failing to sleuth out customers' disabilities is not consistent with the text or purposes of the ADA and should be rejected.

B. The ADA's Implementing Regulations Allow Retailers, Restaurants, and Theaters to Select the Effective Auxiliary Aids or Services They Will Provide.

Retailers, restaurants, and theaters understand the ADA's auxiliary aids or services requirement to mean that they must communicate effectively with customers who have hearing, visual, or speech limitations, which, of course, is something businesses have an interest in doing apart from any legal requirement.²² See 28 C.F.R. § 36.303(c)(1); 28 C.F.R. Pt. 36, App'x C § 36.303. Of practical importance, the ADA's implementing regulations give public accommodations the discretion to decide which effective auxiliary aid or

²² Appellants' claims are based on telephone calls, but the ADA does not contemplate that an auxiliary aid or service will be required to facilitate this type of entirely aural communication between a public accommodation and a blind customer. Compare 28 C.F.R. § 36.303(b)(2) (listing examples of methods to effectively communicate visual information to people with visual impairments, none of which involve telephones), with 28 C.F.R. § 36.303(b)(1) (listing examples of methods to effectively communicate aural information to people with hearing impairments, including several technologies specific to telephones).

service to offer in a given circumstance.²³ 28 C.F.R. § 36.303(c)(1)(ii).

Public accommodations depend on this flexibility to be able to offer aids or services that are both effective for a wide range of customers with different disabilities and efficient for their businesses.

Appellants' insistence that public accommodations must offer Braille because, in their view, it is the lone aid or service that can facilitate effective communications with visually impaired consumers regarding gift cards contradicts the ADA in multiple respects. Indeed, DOJ guidance expressly rejects the notion that the auxiliary aid or service requirement requires public accommodations to provide Brailled materials. 28 C.F.R., Pt. 36, App'x C § 36.303 (explaining that “a restaurant would not be required to provide menus in Braille for patrons who are blind, if the waiters in the restaurant are made available to read the menu” and “a clothing boutique would not be

²³ While the regulations state that the disabled individual should be consulted as to the appropriate aid or service, the individual's preference need not even be a “primary consideration” in the public accommodation's decision of what aid or service to provide. 28 C.F.R., Pt. 36, App'x C § 36.303; *accord Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (“Nothing in the ADA itself or its implementing regulations dictates that a disabled individual must be provided with the type of auxiliary aid or service he requests.”).

required to have Brailled price tags if sales personnel provide price information orally upon request”).

This guidance recognizes a practical reality that Amici’s members and other businesses have relied on since long before the ADA’s passage. Namely, the best aid or service for any customer might just be a person. It is no surprise, then, that the ADA includes “qualified interpreters” and “qualified readers” first among its examples of acceptable aids or services for the hearing and visually impaired, respectively. 42 U.S.C. §§ 12103(1)(a), (b). The benefits that a human reader can provide to customers with disabilities are myriad and obvious. Human readers will almost always be on hand at any public accommodation; are able to assist a customer with minimal disruption; can respond dynamically to questions and evolving circumstances; and require no investment in special technologies or products that have the potential to go unused, break, or become obsolete. If this court ruled that Braille is the only acceptable auxiliary aid or service for a visually impaired consumer seeking to purchase a gift card, it would prevent public accommodations from using one of the most efficient means to

communicate with customers and replace it with a substitute that has none of these advantages.

Furthermore, practical problems would abound if retailers, restaurants, and theaters were required to provide each customer with the specific aid or service that she preferred. The range of potential aids or services that could theoretically accommodate visual impairments, alone, is daunting, not to mention all of the other conditions that potentially fall under the ADA's expansive definition of "disability." 42 U.S.C. § 12102. Some visually impaired customers might prefer audio-recorded materials; others might prefer large print; others Braille; and still others something completely different. Without the flexibility to select the aid or service to provide to customers, retailers, restaurants, and theaters would be forced to prepare for every conceivable eventuality. Public accommodations should not incur the expense and burden of maintaining duplicative, alternate versions of the same materials²⁴ when each of the hypothetical customers could be

²⁴ This list only includes some of the options applicable to individuals with visual impairments. Extrapolated to every type of condition that could be covered by the ADA, a requirement that Amici's members must provide the specific accommodation requested by every individual of any type of disability would create an insurmountable hurdle, indeed.

adequately served by an efficient alternative, such as an employee reading print materials aloud. The ADA recognizes as much by granting public accommodations the flexibility to offer effective aids and services of their choice. This court should not impair that flexibility.

C. Braille Is Not a Practical Option for Most Visually-Impaired People or Public Accommodations.

There are many sound reasons why a public accommodation might use the discretion granted by the ADA to offer an auxiliary aid or service *other* than Braille. For one, the vast majority of visually impaired people do not use it.²⁵ In 2008, the National Federation of the Blind estimated that fewer than 10% of blind people read Braille.²⁶ Likewise, the Library of Congress has reported that, of the participants in its program providing printed materials in alternative formats, only 5% are Braille readers.²⁷ It would be a relative exercise in futility for

²⁵ Under Appellants' "Braille only" view, apparently there is no way to make a gift card accessible to the majority of visually impaired consumers who do not read Braille.

²⁶ Nat'l Fed'n of the Blind, *The Braille Literacy Crisis in America: Facing the Truth, Reversing the Trend, Empowering the Blind*, at 8 (Mar. 26, 2009), available at https://www.nfb.org/images/nfb/documents/pdf/braille_literacy_report_web.pdf.

²⁷ Nat'l Library Serv. for the Blind and Physically Handicapped, Library of Congress, Specification 800: Braille Books and Pamphlets, at 2 (Febr. 2008), available at http://www.loc.gov/nlsold/specs/800_march5_2008.pdf.

public accommodations to undertake designing and stocking Braille gift cards when 90 to 95% of the relevant population cannot use them.

Additionally, Braille's sheer size creates practical constraints. Put simply, Braille is big. It takes 10 volumes of Braille to publish *Harry Potter and the Goblet of Fire*.²⁸ Webster's Unabridged Dictionary requires 72 volumes.²⁹ Using ADA-mandated size and spacing, the industry-standard gift card could only fit between 11 and 14 Braille characters, horizontally, and 5 lines, vertically.³⁰ Thus, a gift card could hold, at most, 55 to 70 Braille characters.³¹ This is not sufficient space

²⁸ Perkins School for the Blind, *12 Things You Probably Don't Know About Braille*, <https://www.perkins.org/stories/12-things-you-probably-dont-know-about-braille> (last visited Aug. 25, 2020).

²⁹ *Id.*

³⁰ Based on ISO/IEC 7810 ID-1, which requires card dimensions of 3 3/8 inches by 2 1/8 inches and the 2010 ADA Standards for Accessible Design, which requires that dots in adjacent cells be spaced 0.241-0.300 inches apart and dots on adjacent lines be spaced 0.395-0.400 inches apart. *2010 Standards for Accessible Design*, ADA.GOV, <https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm> (last visited Aug. 25, 2020).

³¹ In reality, not every area of the card is available for embossing. For example, the magnetic stripe on the back of a gift card is essential to a transaction but embossing would render it unusable. To prevent fraud, most modern gift cards also include a "scratch off" section on the reverse side that reveals a security code. The area of the card opposite this code could not be embossed without interfering with the security feature. Nor is it apparent how, technically, this type of security measure could be utilized using a Braille card.

to include all the information that Appellants seek or, as described in Section IV, below, that might be required by law.

Ultimately, the court need not determine the viability of adding Braille to gift cards as an auxiliary aid or service in order to reject Appellants' arguments. But Braille's facial limitations, particularly when compared to the benefits of alternatives such as human readers, illustrate why it is critical for public accommodations to retain their discretion to decide what auxiliary aid or service to provide.

III. THE DEFINITION OF “PLACE OF PUBLIC ACCOMMODATION” SHOULD NOT BE EXPANDED TO INCLUDE PRODUCTS.

The gateway to the ADA's Title III obligations is the statute's definition of a “place of public accommodation.” That term is limited to “a facility . . . whose operations affect commerce.” 28 C.F.R. § 36.104. Gift cards (and other products), of course, are far beyond the definitional limits of a public accommodation. Nonetheless, Appellants argue that a gift card is a place because it is part of the commercial transaction. This subjective approach defies the statutory text, is unworkable in practice, and begs for limitless expansion of the ADA's coverage.

Public accommodations should be able to readily ascertain their ADA obligations. To that end, following Congress’s mandate, DOJ has created volumes of standards, guidelines, and commentary that provide highly-specific details on how a public accommodation can comply with the ADA’s requirements for physical places. *See* 42 U.S.C. § 12206 (describing requirement for production of technical assistance materials); 28 C.F.R., Pt. 36, App’x A-F (embodying DOJ’s standards and guidance on its Title III regulations); *see also Ariz. ex rel. Goddard v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 673 (9th Cir. 2010) (“Entities . . . should be able to rely on the plain import of DOJ’s commentary until it is revised.”). This guidance would be nonsensical if applied to products instead of places.

Appellants’ subjective, transaction-based approach to defining “place” contradicts existing ADA guidance. For example, following Appellants’ logic could result in treating a restaurant’s menus or a boutique’s price tags as “places,” since both items list prices (and in some cases are even scanned at check-out) and, theoretically, are part of the commercial transaction. But, of course, DOJ has already stated that neither item needs to be provided in Braille. 28 C.F.R. Pt. 36,

App'x C § 36.303. Likewise, following Appellants' logic, coupons (including those printed on soup cans, cereal boxes, and other products) and the bar codes on product packaging might all be "places." In such a world, a public accommodation could only determine the extent of its ADA obligations by undertaking a subjective evaluation of whether each product in its inventory is sufficiently integral to the transaction process to constitute a "place." This uncertain approach should be rejected in favor of the clear regulation and DOJ guidance establishing that products are simply outside the ADA's scope.

IV. ANY ADDITIONAL REGULATION OF GIFT CARD CONTENTS IS BEST LEFT TO CONGRESS OR DOJ.

Appellants invite the court to wade into two heavily-regulated areas—accessibility and gift cards—and make a new ruling that could become a de facto legal standard for all gift card providers. But a rule that has broad-reaching ramifications for multiple industries is best left to the legislative or administrative processes.

As Appellants point out, gift cards are subject to multiple state and federal regulations. Rather than requiring judicial intervention, the existence of these regulations counsels judicial restraint. This is particularly true because a ruling that the ADA mandates Braille gift

cards could expose public accommodations to conflicting obligations. Given the size of Braille, it is unlikely that all public accommodations could design and sell gift cards that include Braille equivalents for every text component. Under federal law, alone, gift cards must disclose, if applicable, (1) the expiration date for the underlying funds, (2) the amount of any fees that may be imposed in connection with the card, and (3) a toll-free telephone number and, if available, web address a consumer can use to obtain fee information. 12 C.F.R. § 1005.20(a)(4)(iii). Additional disclosures are required for cards that charge a dormancy fee or whose funds expire. 12 C.F.R. § 1005.20(d)(2); 12 C.F.R. § 1005.20(e)(3). These disclosures must appear on the card itself, and cannot simply be included on the packaging or other ancillary materials. 12 C.F.R. § 1005.20(c)(4). In addition to these legally-required disclosures, Appellants would have gift cards display information including the name of the business associated with the card and the card's denomination. (J.A. 43, 109–10, 174, 294, 358, 424.)

As noted above, the industry-standard gift card could only fit five lines of Braille containing between 11 and 14 characters, and that is before allowing any space for the card's security code or magnetic

stripe.³² Simply embossing a business's telephone number is likely to take 15 characters, which would require more than one full line.³³ A web address written in "www. .com" format would require at least 9 characters, though most would be much longer. Even embossing the name of the business associated with the card will often require more than 14 characters and, thus, more than one line. For example, embossing "Banana Republic" in Braille requires 17 characters.³⁴

Because of these size constraints, any determination that the ADA requires gift cards to contain some or all of the mandated disclosures (or any other information) in Braille would probably require reworking of

³² Although Appellants do not raise the issue, the gift card's security code is essential for any user to read. Currently that code is written on the card and usually covered by a thin plastic strip that can be rubbed off. If the security code was embossed in Braille, it would not be secure at all. Enterprising thieves could tactilely discern the code and thwart its purpose.

³³ In Braille, a special "number sign" character is required to indicate that the following characters are numerals rather than letters. The American Printing House for the Blind, *Braille: Deciphering the Code*, https://braillebug.org/braille_deciphering.asp#:~:text=Braille%20does%20not%20have%20a,the%20whole%20word%20is%20capitalized (last visited Aug. 25, 2020).

³⁴ Another character would have to be added to the beginning of each word in the name to indicate that the initial letter is capitalized. *Id.*

the current gift card regulatory scheme, lest gift card providers be exposed to contradictory obligations.³⁵

Finally, Appellants implicitly suggest that gift cards somehow occupy a unique position in the economy that merits special treatment. But that only bolsters the conclusion that any change should come through the legislative or administrative processes. Both Congress and DOJ have proven willing to pass legislation or enact rules when needed to address the accessibility of a particular product or service. For example, the Twenty-First Century Communications and Video Accessibility Act requires manufacturers to make advanced communications equipment, such as televisions and cable boxes, accessible for people with disabilities. 47 U.S.C. § 617. Similarly, following the notice and comment process, DOJ implemented regulations requiring movie theaters to provide closed captioning and audio description devices for certain screenings. 28 C.F.R. § 36.303(g); 28 C.F.R. Pt. 36, App'x F, § 36.303. If gift cards are to be subjected to additional requirements under the ADA, those requirements should

³⁵ Further, the ADA contains no guidance on what it means for Braille to be clear and conspicuous, as gift card disclosures must be. If larger Braille characters or empty spaces are required, that only decreases the amount of information a card can contain.

only follow a robust investigation and analysis of competing interests, something that Congress or DOJ is best equipped to do.

CONCLUSION

For decades, retailers, restaurants, and theaters have been guided by the understanding that the ADA does not require them to sell particular goods or provide particular auxiliary aids or services. These limitations, established in the ADA and solidified in its implementing regulations, balance the needs of people with disabilities with the practical limitations that constrain public accommodations. Amici urge the court to maintain this intentional equipoise by affirming the decisions below.

Respectfully submitted, this 28th day of August, 2020.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of August, 2020, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

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