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April 8, 2020

**BY ECF**

Honorable Gregory H. Woods  
United States District Court  
Southern District of New York  
500 Pearl Street, Room 2260  
New York, NY 10007

Re: *Murphy v. Kohl's Department Stores, Inc.*, No. 19 Civ. 09921 (GHW)

Dear Judge Woods:

The Retail Litigation Center, Inc. (“Retail Litigation Center”), Restaurant Law Center (“Restaurant Law Center”), National Retail Federation (“NRF”), Retail Gift Card Association (“RGCA”), and National Association of Theater Owners (“NATO”), with the consent of the Defendant,<sup>1</sup> respectfully seek leave to file the attached amici curiae brief.<sup>2</sup> This action is one of nearly 250 essentially identical suits pending in the United States District Courts for the Eastern and Southern Districts of New York.<sup>3</sup> These cases involve issues with broad ramifications for the thousands of retailers, restaurants, and theaters who comprise Amici’s membership.

The Retail Litigation Center is the only trade organization dedicated solely to representing the retail industry in the judicial system. The Retail Litigation Center seeks to provide courts with retail-industry perspectives on important legal issues impacting its members and to highlight the

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<sup>1</sup> Defendant consents to the filing of the brief. Plaintiff opposes and requested that we inform the Court: “We deem this filing to be abusive, unwarranted and totally uncalled for in the face of the emergency brought on by the Corona Virus and our law offices are closed by governmental decree and we are all self-quarantined.” Amici have no objection if Plaintiff needs additional time to respond. The proposed brief is identical to one that several courts have accepted for filing over plaintiffs’ same objections. See *Matzura v. Red Lobster Hospitality LLC*, No. 19 Civ. 9929 (MKV)(DCF); *Lopez v. Kahala Restaurants, L.L.C.*, No. 19 Civ. 10077 (AJN) (S.D.N.Y.); *Mendez v. Outback Steakhouse*, 19 Civ. 9858 (JPO) (S.D.N.Y.); *Camacho v. Dave & Buster's Ent. Inc.*, 19 Civ. 6022-GRB-RER (E.D.N.Y.); *Tucker v. Saks Fifth Avenue LLC*, 19 Civ. 10289 (LTS)(RWL) (S.D.N.Y.); *Tucker v. Ulta Beauty, Inc.*, 19 Civ. 9845 (KPF) (S.D.N.Y.); *Dominguez v. Taco Bell Corp.*, 19 Civ. 10172 (LGS) (S.D.N.Y.); *Dominguez v. Athleta, LLC*, No. 19 Civ. 10168 (GBD) (S.D.N.Y.).

<sup>2</sup> No party’s counsel authored the brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than amici curiae, their members, or their counsel – contributed money that was intended to fund preparing or submitting the brief.

<sup>3</sup> Appendix A to this letter sets out the other similar cases pending before the Court.

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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 150 judicial proceedings. Its amicus briefs have been favorably cited by 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.*, 586 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. The Restaurant Law Center provides courts with the industry's perspective on significant legal issues. Specifically, the Restaurant Law Center highlights the potential industry-wide consequences of pending cases, such as this one, through amicus briefs.

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 lawsuits. NRF's amicus briefs have been cited favorably, including cases in the Second Circuit. *See, e.g., Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 791 n.20 (2d Cir. 2016).

RGCA — the only nonprofit trade association representing the gift card industry — is comprised of members committed to promoting and protecting the use of retail gift cards. RGCA members follow a code of principles promoting best practice standards that support consumer-friendly policies for the purchase and redemption of gift cards.

Finally, 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.

While the decision to permit a party to file an amicus brief is reserved to the Court's discretion, "[a]n amicus brief should normally be allowed . . . when the amicus has an interest in some other case that may be affected by the decision in the present case . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *C & A Carbone, Inc. v. County of Rockland, NY*, No. 08-cv-6459-ER, 2014 WL 1202699, at \*3-4 (S.D.N.Y. Mar. 24, 2014) (citation omitted). Amici's interest in this matter and unique perspective favor allowing their participation.

Any decision on the issues pending before this Court will have broad ramifications for amici's industries. As noted, there are hundreds of suits pending in the Eastern and Southern Districts of New York alleging that a retailer or restaurant violated the Americans with Disabilities Act (ADA) and New York civil rights laws by failing to sell gift cards embossed with Braille. All of the actions are controlled by the same initial legal issue: whether the ADA requires a place of

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public accommodation to provide gift cards in Braille. Consequently, a decision in this case could ripple throughout the hundreds of other nearly identical suits. Judges in this District have allowed amicus participation in analogous circumstances, noting that “[a] full airing of the issues at stake is . . . particularly desirable,” when “it is fairly evident that the ultimate outcome of [the] litigation could prove dispositive in future disputes over [the same legal issue].” *C & A Carbone*, 2014 WL 1202699, at \*4.

Further, amici have insights and perspectives on the dynamics of gift cards that may be useful to the Court. Given the size and scope of their membership, amici appreciate the broader context in which gift cards operate, so much so that the Complaint actually cites and relies on NRF data concerning gift card usage. As national organizations representing thousands of retailers, restaurants, and theaters, amici also have unique perspectives on the importance of preserving the carefully crafted boundaries created by the express language of the ADA and its implementing regulations. Those boundaries protect public accommodations’ ability to sell the goods of their choosing and empower them to decide which auxiliary aids or services they will offer to effect communication with customers with disabilities. This action and the hundreds like it challenge these fundamental ADA provisions.

Where, as here, the resolution of questions of statutory interpretation is likely to have an impact beyond a single case, trade group insights “help[ ] ensure that there has been ‘a complete and plenary presentation of difficult issues so that the court may reach a proper decision.’” *C & A Carbone*, 2014 WL 1202699, at \*4 (quoting *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991)). Permitting amici to participate in this case ensures a fulsome presentation on legal issues that are significant to a wide range of retailers, restaurants, theaters, and other businesses.

Finally, amici also have unique insight into the extensive regulatory framework that already governs gift card contents, including the ways in which the type of line-drawing that would be required to grant the relief Plaintiff seeks could expose amici’s members to competing and contradictory regulatory obligations.

For the foregoing reasons, amici respectfully request leave to file the attached brief.

Respectfully submitted,

/s/ A. Owen Glist

A. Owen Glist

**APPENDIX A: Cases Assigned  
To The Honorable Gregory H. Woods**

- *Calcano v. Domino's Pizza*, No: 1:19-cv-09823-GHW
- *Thorne v. Jersey Mike's*, No: 1:19-cv-09934-GHW
- *Dominguez v. Banana Republic, LLC*, No: 1:19-cv-10171-GHW
- *Delacruz v. Jamba Juice*, No: 1:19-cv-10321-GHW
- *Calcano v. The Art of Shaving-FL, LLC*, No: 1:19-cv-10432-GHW
- *Calcano v. Swarovski North America Limited*, No: 1:19-cv-10536-GHW
- *Mendez v. Ann Taylor, Inc.*, No: 1:19-cv-10625-GHW
- *Dominguez v. CKE Restaurant Holdings, Inc.*, No: 1:19-cv-10816-GHW
- *Matzura v. Nintendo of America Inc.*, No: 1:19-cv-11346-GHW
- *Calcano v. Sally Beauty Holdings, Inc.*, No: 1:19-cv-11433-GHW
- *Lopez v. Timberland LLC*, No: 1:19-cv-11769-GHW
- *Mendez v. Coach Services, Inc.*, No: 1:19-cv-11856-GHW

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JAMES MURPHY AND ON BEHALF :  
OF ALL OTHER PERSONS SIMILARLY :  
SITUATED, :  
 : No. 19 Civ. 09921 (GHW)  
Plaintiff, :  
 :  
v. :  
 :  
KOHL'S DEPARTMENT STORES, INC., :  
 :  
Defendant. :  
----- x

**BRIEF OF THE RETAIL LITIGATION CENTER, INC., RESTAURANT LAW CENTER, NATIONAL RETAIL FEDERATION, RETAIL GIFT CARD ASSOCIATION, AND NATIONAL ASSOCIATION OF THEATER OWNERS, AS AMICI CURIAE, CONCERNING DEFENDANT'S MOTION TO DISMISS**

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April 8, 2020

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The Retail Litigation Center, Inc., Restaurant Law Center, National Retail Federation, Retail Gift Card Association, and National Association of Theater Owners, as amici curiae, submit the following brief in support of Defendant’s motion to dismiss.<sup>1</sup>

### **INTRODUCTION**

Although Amici’s goal is to bring “relevant matter to the attention of the Court that has not already been brought to its attention by the parties,”<sup>2</sup> it is difficult to discern the precise legal and factual bases of the Plaintiff’s theory. At times, plaintiff seems to argue that a gift card itself is a place of public accommodation. At others, the complaint postures a gift card as an auxiliary aid or service or, in contradiction to this theory, as a barrier to access. The plain fact is that a gift card is a product: it is displayed and sold like a product; it is booked by the merchant line as a product sale; and it is used by the consumer as a product.

Moreover, although ostensibly limited to gift cards, Plaintiff’s demand that Defendant sell a specific product specially designed for people with visual impairments threatens to untether the Americans with Disabilities Act (“ADA” or “Act”) from its statutory moorings and dramatically expand the potential obligations and liabilities of all public accommodations, including the thousands of retailers, restaurants, and theaters who comprise amici’s membership. Taken to its logical

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<sup>1</sup> No party’s counsel authored the brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than amicus curiae, its members or its counsel – contributed money that was intended to fund preparing or submitting the brief.

<sup>2</sup> Fed. R. App. P. 29, 1998 Committee Notes.



conclusion, Plaintiff's argument would prohibit amici's members from selling any product that is not independently usable by people with visual impairments or any other disability. This is not the law. The ADA does not require a public accommodation to "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities," expressly including Braille materials. 28 C.F.R. § 36.307(a, c); 28 C.F.R. Pt. 36 App. C § 36.307. It follows that the ADA does not obligate amici's members to carry Braille versions of gift cards or any other goods.

In an apparent attempt to sidestep the ADA's clear limitations, the Complaint also argues that Braille gift cards must be provided either as "auxiliary aids or services" or as a necessary means of removing access barriers. Neither characterization is accurate. An "auxiliary aid or service" is not a good, in itself, but a means of facilitating effective communication with a person with a disability. Moreover, the ADA expressly imbues public accommodations with the ultimate choice as to which effective aid or service to offer. Likewise, a "barrier" is a component of an existing structure, not a good, and barrier removal does not require the addition of adaptive technologies. As a result, any argument that the ADA prescribes the sale of Braille gift cards, or any other specially-designed good, is inconsistent with the plain terms of the Act, its implementing regulations, and DOJ guidance.

Plaintiff's argument should also be rejected for the separate reason that it requires the Court to engage in unworkable line drawing. Federal and state regulations already detail the disclosures gift cards must contain, including certain

information that must be printed on the cards themselves. Plaintiff's Complaint asks the Court to wade into this heavily-regulated area by declaring that gift cards must also contain certain information in Braille. The probable result of such a ruling would be to subject amici's members to competing and irreconcilable obligations. Because the benefits and trade-offs of the regulatory burdens imposed by the ADA are properly within the sphere of Congress and DOJ, the Court should decline Plaintiff's invitation to engage in legislation-by-litigation.

### **FACTUAL BACKGROUND**

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.”<sup>3</sup> Gift cards have become tremendously popular: some 91% of consumers have purchased one,<sup>4</sup> and the Federal Reserve reports that Americans made 5.5 billion retail gift card payments during 2018, representing a value of \$100 billion.<sup>5</sup>

While retailers, restaurants, and theaters generally sell their gift cards at their own locations, the majority of such businesses also allow their gift 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

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<sup>3</sup> 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) (hereinafter, the “Gift Card Rule.”)

<sup>4</sup> *The State of Consumer Gift Card Preferences in 2018*, BLACKHAWK NETWORK, <https://blackhawknetwork.com/consumer-gift-card-preferences/> (last visited Jan. 17, 2020).

<sup>5</sup> 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”).

all gift card sales and are often 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 mall, activate cards, and transfer funds. Even when a retailer, restaurant, or theater sells its cards directly, the card program may be 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. Because of the various costs and fees involved, the net revenue from the initial gift card sale is usually less than the card's face value. Ideally, these costs and fees are offset by the increased brand loyalty and sales that the cards engender.

Like labeling required for food and many other consumer products, federal regulations require gift cards to bear certain printed information.<sup>6</sup> 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.<sup>7</sup> 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. Gift cards increasingly are associated with websites for consumers such that now practically all gift cards bear a web address at which the full terms and conditions may be found by all consumers.

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<sup>6</sup> 12 C.F.R. § 1005.20(c).

<sup>7</sup> *Id.* § 1005.20(c)(4).

In addition to federal requirements, gift cards like other products must comply with relevant state law requirements. 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.<sup>8</sup> Any additional terms and conditions must either be stated on the card, or the card must include a printed toll-free number that consumers can use to access the additional terms and conditions.<sup>9</sup> New York law does not mandate the use of Braille on gift cards.

### **ARGUMENT**

#### **I. The ADA Does Not Require Retailers, Restaurants, Or Theaters to Sell Products Specially-Designed for People with Disabilities.**

One hallmark of the ADA and its implementing regulations is a careful balance between increasing accessibility for people with disabilities on the one hand, and allowing places of public accommodation to conduct their business efficiently on the other. Disregarding this balance, the Complaint cites a mishmash of ADA provisions and terminology focused on accessibility, but conspicuously omits any reference to the on-point regulation that preserves amici's members' freedom to sell products of their choosing. Specifically, the ADA does not require a place of public accommodation "to alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. § 36.307(a). Braille products, such as Brailled versions of books, are expressly listed as examples of

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<sup>8</sup> N.Y. Gen. Bus. Law § 396-i(3).

<sup>9</sup> *Id.*

“accessible or special goods” that need not be carried. 28 C.F.R. § 36.307(c). This is reiterated by DOJ’s commentary on the regulation:

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*. In other words, 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.

28 C.F.R. Pt. 36 App. C § 36.307. It follows that, while the ADA obligates amici’s members to provide access to their existing products, it does not require them to stock different products or make them responsible for accessible product design.<sup>10</sup>

Gift cards are goods, substantively indistinguishable from the print books referenced in DOJ’s hypothetical. *See* 15 U.S.C. § 1693l-1(a)(2)(C) (defining “gift card” as “[a] plastic card . . . purchased on a prepaid basis in exchange for payment”); *accord Black’s Law Dictionary* (11th ed. 2019) (defining the term “good” as, among other things, a “piece of merchandise or other product”) (internal punctuation omitted). Gift cards are stocked and sold like any other merchandise. Indeed, many of amici’s members carry gift cards issued by retailers, restaurants, and theaters with whom they have no affiliation. From the consumer’s standpoint, the process of going to a store, selecting a gift card from those displayed, and completing the gift card purchase is no different from buying any other merchandise. Like any other product, consumers buy gift cards because they have value that is commensurate with or

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<sup>10</sup> Nor are such roles even feasible, given the breadth of products on the market and the varying capabilities and needs among people with differing disabilities.

exceeds their purchase price. And most consumers continue to opt for plastic cards, which can be physically gifted, rather than virtual alternatives.<sup>11</sup>

Consequently, requiring amici's members to sell gift cards specially designed for people with visual impairments would erase the carefully-crafted boundaries Congress and DOJ established and it would effectively read § 36.307 out of the Code of Federal Regulations. The Complaint's demand that purveyors of goods modify their products in the name of the ADA should be rejected.

## **II. The ADA's Auxiliary Aids or Services Requirement Does Not Obligate Retailers, Restaurants, or Theaters to Sell Braille Gift Cards.**

Like other places of public accommodation, amici's members must, subject to certain limitations, provide "auxiliary aids or services" needed to ensure effective communication with individuals with visual, hearing, or speech impairments. 42 U.S.C. § 12103(1); 28 C.F.R. §§ 36.303 (a), (c). These "auxiliary aids and services" are not goods, but "a wide range of services and devices for ensuring effective communication" between the customer and the place of public accommodation, such as human readers, audio texts, or specialized computer software.<sup>12</sup> 42 U.S.C.

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<sup>11</sup> John Stewart, *Mobile Wallets Dominate the News, But Most Consumers Still Want Physical Gift Cards*, Digital Transactions (10-10-2019), available at <https://www.digitaltransactions.net/mobile-wallets-dominate-the-news-but-most-consumers-still-want-physical-gift-cards/>.

<sup>12</sup> It is concerning to amici and their members that, in this case, Plaintiff did not request any such aid or service, but simply filed suit after confirming that Defendant does not carry Braille gift cards. DOJ's guidance suggests that a request for an adequate aid or service is integral to a business's obligation to furnish the needed aid. 28 C.F.R. Pt. 36 App. C § 36.303 (noting that Braille price tags are not required if a retailer's employee is available to provide pricing information orally, "upon request"). Asking to use an auxiliary aid or service also affords businesses the opportunity to provide an appropriate vehicle of its choosing, as the ADA permits. A ruling that Plaintiff's approach exposed Defendant to liability would incentivize "gotcha" litigation rather than encouraging businesses and customers to find effective means of communicating with one another.

§ 12103(1)(B); 28 C.F.R. § 36.303(b)(2); 28 C.F.R. Pt. 36 App. C § 36.303. The ADA balances the auxiliary aids or services requirement with practical business realities by affording places of public accommodation the power to choose which effective aid or service they will offer. Plaintiff's attempt to construe Braille gift cards as a mandatory "auxiliary aid or service" rather than a specially-designed good misconstrues that term and strips amici's members and other places of public accommodation of their statutorily-granted decision making authority.

**a. Retailers, Restaurants, and Theaters Are Empowered to Choose Which Effective Auxiliary Aid or Service to Offer.**

Even assuming that some auxiliary aid or service is needed to provide access to gift cards, the authority to decide which effective auxiliary aid or service to offer is expressly delegated to public accommodations.<sup>13</sup> 28 C.F.R. § 36.303(c)(1)(ii). DOJ guidance directly rejects the notion that the auxiliary aid or service requirement commands amici's members to provide Braille materials:

The auxiliary aid requirement is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication. For example, 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. Similarly, a clothing boutique would not be required to have Brailled price tags if sales personnel provide price information orally upon request; and a bookstore would not be required to make available a sign language interpreter, because effective communication can be conducted by notepad.

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<sup>13</sup> 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. C § 36.303; *accord Burkhart v. Washington Metropolitan 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.").

28 C.F.R. Pt. 36 App. C § 36.303. Accordingly, public accommodations do not violate the ADA by providing auxiliary aids or services different from those requested by particular customers.

The case of *West v. Moe's Franchisor, LLC* is illustrative. No. 15cv2846, 2015 WL 8484567, at \*1 (S.D.N.Y. Dec. 9, 2015). There, the plaintiffs, who were blind, alleged that a restaurant violated the ADA and state civil rights laws by utilizing touch-screen drink machines that were not independently usable by customers without sight. *Id.* at 1. Plaintiffs argued that the restaurant was required to modify the machines, but the court disagreed and dismissed the Complaint:

Nothing in the ADA or its implementing regulations supports Plaintiffs' argument that [restaurant] must alter its [drink] machines in a way that allows blind individuals to retrieve beverages without assistance. . . . Plaintiffs may be correct that technological additions to the [drink] machines are both feasible and preferable. However, under the ADA, effective assistance from [restaurant] employees acting as "qualified readers" is sufficient.

*Id.* at \*3. So too here. The ADA does not require amici's members to modify gift cards so that they are independently usable by people with visual impairments, but only to offer auxiliary aids or services sufficient to enable customers with visual impairments to purchase existing gift cards. This aid or service can be something as straightforward as an employee who assists the customer in locating the gift card and reading any information needed to complete the card purchase. 42 U.S.C. § 12103 (identifying a "qualified reader" as one potential auxiliary aid or service); 28 C.F.R. § 36.303(b)(2) (same). Indeed, this scenario is substantively indistinguishable from DOJ's examples of having employees read menus and price tags to customers with visual impairments, on request. 28 C.F.R. Pt. 36 App. C § 36.303.



Importantly, any standard that requires amici's members to provide the specific aid or service a particular customer prefers would be completely unworkable, because it would call on the business to anticipate every potential aid or service that might be requested. For instance, some visually-impaired customers might prefer audio-recorded materials in lieu of print; others might prefer large print; others Braille; and still others something completely different. Amici's members should not incur the expense and burden of maintaining all these materials on-hand<sup>14</sup> when each of the hypothetical customers could be adequately served by an employee reading the print materials aloud. The ADA recognizes as much by granting public accommodations the right to offer effective aids and services of their choice.

**b. A Braille Gift Card Would Not Be an Effective or Efficient Auxiliary Aid or Service.**

Although not dispositive, many sound, practical reasons explain why amici's members might choose to provide gift card access to consumers with visual impairments by means other than adding Braille. For one, Brailled gift cards would not be an effective aid or service for the vast majority of people with visual impairments because only a small minority of that population reads Braille. In 2008, the National Federation of the Blind estimated this number at less than 10%.<sup>15</sup> Likewise, the Library of Congress has reported that, of the participants in its program

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<sup>14</sup> This list only includes some of the options applicable to individuals with visual disabilities. Extrapolated to every type of disability that could be covered by the ADA, a requirement that amici's members must provide the specific accommodation requested by every individual would create an insurmountable hurdle, indeed.

<sup>15</sup> NATIONAL FEDERATION 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](https://www.nfb.org/images/nfb/documents/pdf/braille_literacy_report_web.pdf).

seeking printed materials in alternative formats, only 5% are Braille readers.<sup>16</sup> It would not be efficient or effective for amici's members to undertake the substantial burden and expense of designing and stocking Braille gift cards when 90 to 95% of the relevant population cannot use them.

Further, although Plaintiff suggests that adding Braille to a gift card is a "simple change," that ignores the size of Braille as compared to the industry standard gift card. Put simply, Braille is big. It takes 10 volumes of Braille, for example, to publish *Harry Potter and the Goblet of Fire*.<sup>17</sup> Printing Webster's *Unabridged Dictionary* requires 72 volumes.<sup>18</sup> 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.<sup>19</sup> Thus, a card could hold, at most, 55 to 70 Braille characters.<sup>20</sup> As discussed in Section IV, below, this is not sufficient space to

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<sup>16</sup> NATIONAL LIBRARY SERVICE 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](http://www.loc.gov/nlsold/specs/800_march5_2008.pdf).

<sup>17</sup> PERKINS SCHOOL FOR THE BLIND, *10 Things You Probably Don't Know About Braille*, <https://www.perkins.org/stories/10-things-you-probably-dont-know-about-braille> (last visited January 17, 2020).

<sup>18</sup> *Id.*

<sup>19</sup> Based on ISO/IEC 7810 ID-1, which requires card dimensions of 3 3/8 inches X 2 1/8 inches and Standard 703.3.1 of 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.

<sup>20</sup> 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.

include all the information that Plaintiff seeks or that amici's members might otherwise be required to include.

Ultimately, the Court need not determine the viability of adding Braille to gift cards as an auxiliary aid or service. What matters is that the ADA empowers amici's members to choose auxiliary aids and services that are both effective for their customers and efficient for their businesses. Plaintiff seeks to replace this flexible approach with one that is simultaneously more rigid and more uncertain, in that it would force amici's members to provide the auxiliary aid or service requested by each individual customer, regardless of whether other sufficient aids or services are available. Such an approach cannot be squared with the ADA's express terms.

### **III. The Lack of Braille on Gift Cards Is Not a “Barrier” that Must Be Removed Under the ADA.**

As Defendant points out, Plaintiff seems to suggest that the lack of Braille is an “access barrier” that Defendant is required to eliminate. This argument attempts to resurrect a flawed construction of the ADA's barrier removal requirement: one that DOJ has already rejected. Namely, during the rulemaking process, multiple commenters strove to equate the requirement to remove “communications barriers” with an affirmative duty to provide adaptive technology such as telephone handset amplifiers, assistive listening devices, or digital check-out displays. 28 C.F.R. Pt. 36 App. C § 36.304. DOJ refused this attempted expansion, explaining that communications barriers include only “those barriers that are an integral part of the physical structure of a facility.” *Id.* Consequently, the lack of Braille on a gift card is not a barrier subject to removal under the ADA.

**IV. Requiring Retailers, Restaurants, and Theaters to Provide Braille Gift Cards Exposes Them to Potential Conflicts and Competing Obligations.**

Plaintiff invites the Court to wade into two heavily-regulated areas—accessibility and gift cards—and make a ruling that could become a *de facto* legal standard for all gift card providers. Courts have previously declined such invitations, and there is good reason to do so in this case. *See, e.g., West*, 2015 WL 8484567, at \*3 (noting that, “given the labyrinth of city, state, and federal regulations [concerning public access for people with disabilities], it is not appropriate for this Court to announce new ones”).

Most important, Plaintiff asks the Court to engage in line-drawing that is better left to Congress and DOJ. Namely, given the sheer size of Braille, it is extremely unlikely that amici’s members could design and sell gift cards that include Braille equivalents for every text component that is potentially required. For example, under federal law, alone, 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). What is more, 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). This is problematic because, 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.<sup>21</sup> Simply embossing a business's telephone number and web address is likely to occupy four of these lines, leaving only one line for any expiration date and fee information.<sup>22</sup>

Consequently, any determination that the ADA requires gift cards to contain some or all of the mandated disclosures (or any other information) in Braille will require careful consideration and probable reworking of the current gift card regulatory scheme, lest gift card providers be exposed to contradictory obligations. This is the very type of exercise best left to Congress and DOJ, both of whom have proven willing to require Braille or other accessibility features for certain products or materials, when necessary,<sup>23</sup> and both are better equipped than the judiciary to weigh competing public interests and strike the balance required of a rule that would have broad ramifications for multiple industries.

### **CONCLUSION**

For all the foregoing reasons, amici respectfully urge the Court to grant the Defendant's Motion to Dismiss and enter a ruling recognizing that (1) the ADA does not require businesses to alter their product mix or to provide specific auxiliary aids

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<sup>21</sup> Further, the ADA contains no guidance on what it might mean 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.

<sup>22</sup> In Braille, a separate "number sign" character is required to indicate that the next characters are numerals rather than letters. Thus, writing a 16-digit credit card number, including spaces, would require a minimum of 20 characters. A toll-free telephone number would require 15. A web address written in "www. .com" format would require at least 9 characters, though most would be much longer.

<sup>23</sup> 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, the ADA requires places of public accommodation to include Braille on certain aspects of physical structures, such as elevators. *See, e.g.*, 36 C.F.R. Pt. 1191, App. D § 407.2.3.

or services demanded by customers, (2) print-only gift cards are not barriers under the ADA, and (3) any decision requiring gift cards to include information and Braille is better suited to the legislative and administrative processes.

Respectfully submitted this the 8<sup>th</sup> day of April, 2020.

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