

RECORD NOS.

**20-1552(L)**

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

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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

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

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

Appellants ask the Court to adopt an interpretation of the Americans with Disabilities Act (“ADA”) that would obligate public accommodations to (1) sell goods specially designed for people with disabilities; (2) provide the specific auxiliary aid or service a customer requests and no other; and (3) ascertain whether each item they stock is, in fact, a place, all in contravention of the plain text of the ADA, its implementing regulations, and Department of Justice (“DOJ”) guidance. Such a ruling would significantly alter the obligations, practices, and potential liability of the hundreds of businesses facing class action gift card suits in this Circuit and the thousands still watching from the sidelines, many of whom comprise Amici’s members.<sup>1</sup> Appellants do not refute this point, which underpins Amici’s strong interest in this matter. Instead, they argue that Amici’s motion for leave to file a brief that provides additional insights into and perspectives on the ADA’s

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<sup>1</sup> Appellants imply that there is something improper about Amici advocating a position favorable to their members, but that is exactly what is contemplated by Federal Rule of Appellate Procedure 29(a)(6), which requires an amicus to file its brief within seven days of the brief of “the party being supported.”

proper interpretation should be denied as redundant and irrelevant. These arguments do not fairly address the content of Amici's brief or the substance of Amici's arguments and should be rejected.

Amici's brief is not derivative of Appellees'. Of course Amici reference the same statutes and regulations cited by the principal parties; it would be odd if they did not. But Amici focus on the practical reasons why, from the industries' perspectives, the Court should maintain the balance that Congress and DOJ wove throughout the ADA and its implementing regulations. These practical issues, all of which have industry-wide significance, include, for example, (1) the uncertain, unbounded obligations public accommodations would face if the ADA were expanded to regulate the contents of their shelves (Am. Br. pp. 8–12); (2) the impropriety of requiring public accommodations to interrogate customers about unobservable disabilities that the customers have elected not to disclose (*id.* at 13–15); (3) the constraints public accommodations would face if required to provide the particular auxiliary aid or service requested by a customer rather than relying on their employees or other effective aids to assist customers with disabilities (*id.* at 15–19); (4) the ways in which defining “place of public

accommodation” using Appellants’ subjective, transaction-based approach would be unworkable in practice (*id.* at 21–23); and (5) the potential for any ruling requiring gift cards to be embossed with Braille to subject public accommodations to contradictory or competing legal obligations (*id.* at 23–27).<sup>2</sup> Such insights provide a more complete picture of the matter before the Court and are a proper purpose for amicus participation. *See, e.g., Andersen v. Leavitt*, No. 03-CV-6115 DRHARL, 2007 WL 2343672, at \*6 (E.D.N.Y. Aug. 13, 2007) (granting motion for leave to file amicus brief where amicus presented insight on broader implications of legislation under review).

Appellants also incorrectly assert that Amici ask the Court to make factual determinations about whether Braille is an effective

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<sup>2</sup> The fact that Appellants felt it necessary to separately address several of these points in their reply demonstrates that Amici did not simply parrot Appellees’ arguments. (*See, e.g., Reply* at 15–16 (addressing Amici’s point that the usage and distribution of gift cards supports the conclusion that they are goods), 21 (addressing Amici’s point that Appellants improperly ask the Court to adopt an interpretation of the ADA that would require public accommodations to interrogate customers about their disabilities), 25 (addressing Amici’s point that any change to gift card disclosure requirements should be left to the legislative or rulemaking processes).)

auxiliary aid or service. But Amici's brief makes clear that they are doing no such thing:

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.

(Am. Br. at 21.) The referenced "facial limitations," including Braille's large size and extremely low usage rate, are not cited to argue that Braille can never be an effective aid or service. Rather, these practical constraints underscore the importance of permitting public accommodations to decide which effective aid or service to offer: something the ADA's implementing regulations specifically allow and Appellants directly undermine. See 28 C.F.R. § 36.303(c)(1)(ii) ("A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, *but the ultimate decision as to what measures to take rests with the public accommodation*, provided that the method chosen results in effective communication.") (emphasis added).

In sum, Appellants seek relief that would directly impact the way that retailers, restaurants, and theaters bring products to market and serve the needs of their customers with disabilities. Amici represent thousands of the businesses who stand to be affected. Because they have an interest in the outcome of these actions and can provide insights and perspectives helpful to the Court, Amici respectfully request leave to file their amicus curiae brief in support of Appellees and urging affirmance of the decisions below.

Respectfully submitted this the 16<sup>th</sup> day of September, 2020.

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 16th day of September, 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*  
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**CERTIFICATE OF COMPLIANCE**

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Dated: September 16, 2020

/s/ James A. Dean  
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