

Appeal No. 17-13467

---

**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

**WINN-DIXIE STORES, INC.,**

**Defendant-Appellant,**

**vs.**

**JUAN CARLOS GIL,**

**Plaintiff-Appellee.**

---

**Appeal from a Final Judgment of the United States District Court  
for the Southern District of Florida, Miami Division**

**District Court Case No. 1:16-cv-23020-RNS**

---

**APPELLANT WINN-DIXIE STORES, INC.'S  
PETITION FOR REHEARING *EN BANC***

---

**Susan V. Warner**  
**FISHERBROYLES LLP**  
1221 Brickell Avenue  
Suite 900  
Miami, Florida 33131  
Tel.: (786) 310-0637  
Fax: (786) 524-0260  
[susan.warner@fisherbroyles.com](mailto:susan.warner@fisherbroyles.com)

**Tillman J. Breckenridge**  
**STRIS & MAHER LLP**  
1717 K Street, NW  
Suite 900  
Washington, DC 20006  
Tel.: (202) 800-6030  
[tbreckenridge@stris.com](mailto:tbreckenridge@stris.com)

*Attorneys for Appellant, Winn-Dixie Stores, Inc.*

**Appeal No. 17-13467**  
**Winn-Dixie Stores, Inc. v. Juan Carlos Gil**

**CERTIFICATE OF INTERESTED PERSONS/  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Appellant discloses the following:

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

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

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

76. Winn-Dixie Logistics, LLC
77. Winn-Dixie Montgomery, LLC
78. Winn-Dixie Montgomery Leasing, LLC
79. Winn-Dixie Properties, LLC
80. Winn-Dixie Raleigh Leasing, LLC
81. Winn-Dixie Raleigh, LLC
82. Winn-Dixie Stores Leasing, LLC
83. Winn Dixie Stores, Inc., non-public Florida corporation with no parent corporations and no publicly held corporation owns 10% or more of its stock.
84. Winn-Dixie Supermarkets, Inc.
85. Winn-Dixie Warehouse Leasing, LLC
86. World Institute on Disability

## STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *University of Texas v. Camenisch*, 451 U.S. 390, 396 (1981), *Georgia Advocacy Office v. Jackson*, 4 F.4th 1200 (11th Cir. 2021), and precedent of this Circuit that holds that party is entitled to review the propriety of a trial court's trial verdict that is entered after a full trial on the merits.

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether an appellate court can cause a case, after a full trial on the merits, to become moot by failing to act until after the time for compliance with the terms of a permanent injunction ends?

By: \_\_\_\_\_  
s/Susan V. Warner  
Susan V. Warner  
*Counsel of Record for Appellant, Winn-Dixie Stores, Inc.*

**TABLE OF CONTENTS**

**CERTIFICATE OF INTERESTED PERSONS/  
CORPORATE DISCLOSURE STATEMENT . . . . . C1**

**STATEMENT OF COUNSEL. . . . . i**

**TABLE OF AUTHORITIES . . . . . iii**

**I. STATEMENT OF ISSUE FOR EN BANC CONSIDERATION. . . . . 1**

**II. STATEMENT OF COURSE OF PROCEEDINGS. . . . . 2**

**A. Bench Trial. . . . . 2**

**B. Appeal . . . . . 5**

**III. ARGUMENT . . . . . 7**

**A. This Case is Not Moot Because Extant Controversies Exist. . . . . 8**

**B. The Voluntary Cessation Doctrine is Not Applicable . . . . . 13**

**IV. CONCLUSION . . . . . 15**

**CERTIFICATE OF COMPLIANCE . . . . . 16**

**CERTIFICATE OF SERVICE. . . . . 16**

**TABLE OF AUTHORITIES**

**CASES**

*Already, LLC v. Nike, Inc.*,

568 U.S. 85 (2013) . . . . . 14

*County of Los Angeles v. Davis*,

440 U.S. 625, 99 S. Ct. 1379, 59 L.Ed.2d 642 (1979). . . . . 8, 13

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,

528 U.S. 167, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000) . . . . .14

*Georgia Advocacy Office v. Jackson*,

4 F.4th 1200 (11th Cir. 2021) . . . . . 4, 9, 10

*Gil v. Winn-Dixie Stores, Inc.*,

993 F.3d 1266 (11th Cir. 2021) . . . . . 5, 6

*Gil v. Winn-Dixie Stores, Inc.*,

No. 17-13467-CC, 2021 WL 6129128 (11th Cir. Dec. 28, 2021). . . . . 6, 9-10

*Hand v. Desantis*,

946 F.3d 1272 (11th Cir. 2020) . . . . . 12

*McArthur v. Firestone*,

817 F.2d 1548 (11th Cir. 1987) . . . . . 8

*Troiano v. Supervisor of Elections in Palm Beach County, Fla.*,

382 F.3d 1276 (11th Cir. 2004) . . . . . 14, 15



*United States v. Munsingwear, Inc.*,

340 U.S. 36, 39–41, 71 S.Ct. 104, 95 L.Ed. 36 (1950) . . . . . 12

*United States v. W. T. Grant Co.*,

345 U.S. 629, 73 S. Ct. 894, 97 L.Ed. 1303 (1953) . . . . . 13

*University of Texas v. Camenisch*,

451 U.S. 390 (1981). . . . . 9, 10, 15

**RULES, STATUTES AND OTHER AUTHORITY**

28 U.S.C. § 1291. . . . . 9

Fed. R. Civ. P. 1 . . . . . 13

U.S. Courts of Appeals Federal Court Management Statistics-  
Profiles—During the 12-Month Periods Ending June 30, 2016  
Through 2021, at 2 (June 30, 2021) . . . . . 11

## I. STATEMENT OF ISSUE FOR EN BANC CONSIDERATION

The panel vacated its prior opinion and the case below as moot because one of three remedies the district court awarded to Plaintiff-Appellee Juan Carlos Gil (“Gil”) had run its course. Though the district court’s injunction had expired, the panel’s prior opinion—issued *two and half years* after oral argument and now vacated as moot—also eliminated declaratory relief and the right to attorney’s fees. Those were extant controversies leaving the case far from moot when the injunction expired. Moreover, the panel’s per curiam opinion deviates from the precedent of the Supreme Court of the United States and this Circuit in holding that the expiration of a permanent injunction after a full trial on the merits deprives the appellate court of its ability to review the propriety of the district court’s trial verdict.

The panel has misapplied and contorted the voluntary cessation doctrine to apply to litigants who change their behavior under court order. In essence, if this published opinion stands, no verdict is safe from being declared moot retroactively once the losing party complies with judgment. En banc review is necessary to conform this case with this Circuit’s existing precedent and the issue presents a question of exceptional importance on whether an appellate court can cause a case, after a full trial on the merits, to become moot by failing to act until after the time for compliance with the terms of a permanent injunction ends.

## II. STATEMENT OF PROCEEDINGS

On July 1, 2016, Gil initiated this lawsuit against Appellant Winn-Dixie Stores, Inc. (“Winn-Dixie”), asserting that Winn-Dixie’s website was not accessible to visually-impaired persons and, therefore, in violation of Title III of the Americans with Disabilities Act (“ADA”). (D.E. 1.) “Plaintiff [sought] declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.” (D.E. 1 ¶ 10.) Specifically, in his prayer for relief, Gil demanded judgment and requested that the district court

**“issue a declaratory judgment that Defendant Winn-Dixie Stores, Inc. has violated the Plaintiff’s rights as guaranteed by the ADA,”**

as well as issue an injunctive order prohibiting Winn-Dixie from operating its website “without adequate accommodation,” direct Winn-Dixie, *inter alia*, to remove all alleged barriers from the website, and award Gil his attorneys’ fees. (D.E. 1 at 16-18 (emphasis added).) On August 5, 2016, Winn-Dixie answered the complaint and asserted affirmative defenses thereto. (D.E. 7). Thereafter, the parties participated in discovery.

### A. Bench Trial

In June 2017, the district court held a bench trial on this matter. (D.E. 64; D.E. 65.) A central legal issue before the district court at trial was whether Winn-Dixie’s website was a place of public accommodation under the ADA. (D.E. 34.) The district court accepted evidence, heard testimony from Gil, Winn-Dixie’s

corporate representative, and Gil's website accessibility expert, and heard legal argument from counsel. (D.E. 64; D.E. 65.)

The district court entered a Verdict and Order Following Non-Jury Trial, entering a trial verdict in favor of Gil, and, on July 6, 2017, it entered final judgment in favor of Gil, expressly incorporating the Verdict and Order [D.E. 63]. (D.E. 63; D.E. 68.) In the Verdict and Order, the district court found that that websites, such as Winn-Dixie's were covered by the ADA, determining that "[t]he [c]ourt need not decide whether Winn-Dixie's website is a public accommodation in and of itself, because the factual findings demonstrate that the website is heavily integrated with Winn-Dixie's physical store locations and operates as a gateway to the physical store locations" and that Winn-Dixie's website was inaccessible to visually impaired persons. (D.E. 63 at 10.)

The district court then declared that:

**Therefore, Winn-Dixie has violated the ADA because the inaccessibility of its website has denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its sighted customers.**

(*Id.* at 10 (emphasis added.) Thus, the trial court entered formal declaratory relief in favor of Gil that "Defendant Winn-Dixie Stores, Inc. has violated the Plaintiff's rights as guaranteed by the ADA," as specifically requested by Gil in his Complaint. (*Compare* D.E. 1 at 16-18 *with* D.E. 63 at 10.)

Having found that Winn-Dixie’s website was subject to the ADA and that Winn-Dixie had in fact violated that statute, the district court then stated it would enter an injunction requiring Winn-Dixie to undertake remediation measures. (D.E. 63 at 10-11.)

On July 6, 2017, the district court entered a separate Order and Injunction, which contained the terms of one remedy awarded to Gil.<sup>1</sup> (D.E. 67.) The injunction ordered Winn-Dixie to:

1. Make a statement of its Accessibility Policy available on the website by October 1, 2017;
2. Make its website accessible to individuals with disabilities no later than December 1, 2017;
3. Adopt a Web Accessibility Policy that ensures the website confirms with WCAG 2.0—a privately defined accessibility goal—by January 1, 2018;
4. Require its third party vendors who participate in the website also be fully accessible to disable persons by January 1, 2018;
5. Provide yearly mandatory accessibility training to all employees who work on the website; and

---

<sup>1</sup> The injunction was permanent one because it was issued in conjunction with the final judgment in the case. “A suit for a permanent injunction contemplates a bench trial on the merits followed by findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a)(1) and the entry of a final judgment granting or denying the requested relief. *See* Permanent Injunction, Black's Law Dictionary 788 (defining “permanent injunction” as “[a]n injunction granted after a final hearing on the merits”).” *Georgia Advocacy Office v. Jackson*, 4 F.4th 1200, 1211–12 (11th Cir. 2021).

6. Conduct automated accessibility tests on the website every three months.

(D.E. 67 at 1-2.) The Court also ordered that the Injunction, and in turn Winn-Dixie’s continuing duty to provide yearly training and quarterly automated accessibility tests, would expire in three years, or on July 5, 2020. (*Id.* at 2.) The district court also entered an award of attorneys’ fees to Gil *as the prevailing party* in the litigation in the amount of \$99,879.00, but the “[e]xecution of [that] Order [was] . . . stayed until resolution of [Winn-Dixie’s] appeal . . . .” (D.E. 76.)

## **B. Appeal**

On July 31, 2017, Winn-Dixie filed its Notice of Appeal from the Final Judgment. (D.E. 71.) Briefing proceeded on a reasonable schedule, and Winn-Dixie filed its Reply Brief less than six months later, on December 27, 2017. The Court held oral argument nine months after that—on October 4, 2018. *Over two and a half years after argument*, on April 7, 2021, the Court issued its Opinion and Judgment, reversing the district court’s judgment and declaration that websites were subject to the ADA and that Winn-Dixie violated the ADA. *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021).

This Court held that “that websites are not a place of public accommodation under Title III of the ADA. Therefore, Gil’s inability to access and communicate with the website itself is not a violation of Title III.” *Id.* at 1277. Further, this Court declined to adopt the “nexus” standard and “conclude[d] that, on the facts of this

case, Gil is able to enjoy fully and equally ‘the goods, services, facilities, privileges, advantages, or accommodations of’ Winn-Dixie’s physical stores as contemplated by Title III of the ADA.” *Id.* at 1284. In short, the Court held that Winn-Dixie did not violate Gil’s rights under the ADA and the district court’s judgment was in error. Thus, the Court “vacate[d] the district court’s Final Judgment and remand[ed] for further proceedings consistent with [that] opinion.” *Id.*

Gil then filed a Petition for Rehearing En Banc, requesting in part that the Court take the extraordinary step of dismissing this appeal as moot after a full trial on the merits, almost four years of appellate litigation in this Court, and after a full decision on the merits because the permanent injunction had run its course in 2020. On June 1, 2021, as ordered by the Court, Winn-Dixie filed its Response to Gil’s Petition noting that extant controversies remained—the underlying declaration of liability and the prevailing party attorney’s fees. Six months later, on December 28, 2021, the Court granted rehearing, vacated its Opinion, and dismissed this appeal as moot *and* remanded to the district court with direction to dismiss the entire underlying district court case as moot. *Gil v. Winn-Dixie Stores, Inc.*, 17-13467-CC, 2021 WL 6129128, at \*1 (11th Cir. Dec. 28, 2021).<sup>2</sup> This Petition for Rehearing en banc ensued.

---

<sup>2</sup> The Court then prematurely issued the mandate on January 5, 2022. Winn-Dixie filed a motion to recall the mandate, which is currently pending.

### III. ARGUMENT

In an extraordinary and unprecedented reversal, three years following oral argument and six months after a 31-page majority opinion and a 35-page dissent, this Court has now deemed that this case is moot when it patently is not. This case proves the old adage is true, that justice delayed is justice denied. This Court cannot, as a matter of the administration of justice, allow no relief to *either party* because it delayed issuing a decision for over two and half years after oral argument during which time the injunction portion of the remedies of the final judgment expired. This Court should grant en banc review to correct the panel's erroneous holding that this case became moot solely because of this Court's delay on appeal. Aside from the fact that this case is not moot because the declaratory judgment and entitlement to attorneys' fees still present live controversies, the panel's current opinion announces a new rule of law in which an appellate court can force a case to mootness simply by refusing to act before the time for compliance with a permanent injunction runs. If allowed to stand, this will allow myriad cases and issues to evade review.

Dismissal of the entire underlying case after a full trial on the merits is also unprecedented. Winn-Dixie was unable to find a single case where, after a full trial on the merits and declaratory and injunctive relief and attorneys' fees were awarded to the prevailing party, that the case was declared moot because a permanent injunction ended. This decision would call into doubt the finality of any case where



limited time permanent injunctive relief was awarded. For example, under the Court's new precedent, if a plaintiff prevails on a claim based on a trade secret or a contractual restrictive covenant at trial and the trial court enters a permanent injunction extending a non-compete period for two years after judgment, the defendant is now entitled to move the district court to dismiss the entire case as moot once those two years run out. This then raises the question of whether the defendant can claw back any other relief that was awarded. The answer must obviously be no, but that is the logical end of the new rule of law that the panel has announced. Moreover, by directing the district court to dismiss the case as moot, the panel has not only deprived Winn-Dixie of its right to have the district court's final decision reviewed, it also has similarly deprived Gil of any relief. If this case is moot now, then no party prevailed. This miscarriage of justice is brought on solely by the panel's delay in issuing an opinion.

**A. This Case is Not Moot Because Extant Controversies Exist**

“A case becomes moot ‘when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’” *McArthur v. Firestone*, 817 F.2d 1548, 1551 (11th Cir. 1987) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)). This case cannot be moot because Winn-Dixie continued to have a legally cognizable interest in the outcome of this case when the opinion issued, and extant controversies still existed.

The district court entered a verdict in favor of Gil, declaring that Winn-Dixie's website had violated the ADA and that Winn-Dixie was liable for Gil's attorneys' fees in the amount of almost \$100,000. "Where . . . a federal district court has granted a permanent injunction, the parties will already have had their trial on the merits, and, even if the case would otherwise be moot, a determination can be had on appeal of the correctness of the trial court's decision on the merits . . . ." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981); *see also* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."); *Georgia Advocacy Office v. Jackson*, 4 F.4th 1200, 1216 (11th Cir. 2021) ("Defendants can obtain review when the District Court enters a permanent injunction after a trial on the merits, assuming Plaintiffs succeed.").

Winn-Dixie is entitled to a determination as to whether the district court's declaration that websites are subject to the ADA is correct. Winn-Dixie sought such review from this Court, and the panel majority determined, rightly so, that the district court's final decision was not correct and that Winn-Dixie did not violate Gil's rights under the ADA. The panel's delay cannot eliminate Winn-Dixie's rights and interest to have the trial verdict reviewed.

This Court has held that "[d]ue to the expiration of the injunction while the appeal was pending *and the absence of any formal award of declaratory relief*, the

appeal was rendered moot.” *Gil*, 2021 WL 6129128, at \*1 (emphasis added). The panel made a critical factual error in stating that there was no formal award of declaratory relief. That is incorrect. The district court awarded Gil the very specific declaratory relief that he requested: that Winn-Dixie “violated the Plaintiff’s rights as guaranteed by the ADA.” (*Compare* D.E. 1 at 16-18 *with* D.E. 63 at 10.) The district court declared that websites were subject to the ADA under the “nexus” theory and that “Winn-Dixie has violated the ADA because the inaccessibility of its website has denied Gil the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations that Winn-Dixie offers to its sighted customers.” (D.E. 63 at 10.) Moreover, the grant of a permanent injunction necessarily flows from the award of formal declaratory relief because it is granted *after* a final hearing on the merits. *See Jackson*, 4 F.4th at 1211–12. Thus, no “formal award of declaratory relief” was necessary. *See Camenisch*, 451 U.S. at 396. The permanent injunction was granted after a full trial on the merits that concluded that Winn-Dixie violated Gil’s rights under the ADA. The panel based its decision to dismiss the appeal and entire underlying case in part on this critical factual error. For this reason alone, the Court should grant rehearing and reinstate the Opinion issued on April 7, 2021.

The panel’s decision also raises questions of exceptional importance as to the administration of justice in this Court. The only reason the three-year injunction

expired during this appeal is because the panel took over 2 ½ years to issue a decision after oral argument. According to the latest U.S. Courts of Appeals Federal Court Management Statistics, the national median time from notice of appeal to disposition is 9.9 months. U.S. Courts of Appeals Federal Court Management Statistics—Profiles—During the 12-Month Periods Ending June 30, 2016 Through 2021, at 2 (June 30, 2021).<sup>3</sup> The median time from notice of appeal to disposition in the Eleventh Circuit is currently 8.2 months. *Id.* at 26. In this case, the time from the notice of appeal to the April 7, 2021 decision was *44 months*. For the other appeals heard on oral argument the week of October 2-5, 2018, the same week as this case was heard, the average time from oral argument to a decision was 259 days. Time from oral argument to the first opinion in this case was *916 days*.

Now, after erroneously determining that the case is moot based entirely on a delay of the panel's own making, the panel has taken the extraordinary action of directing the district court to dismiss the underlying case as moot. This action deprives relief from every party in this case. Winn-Dixie is deprived of this Court's determination as to whether and how its website is subject to regulation under the ADA. By dismissing the underlying case as moot, Gil also is deprived of a decision

---

<sup>3</sup> Available at [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_appprofile0630.2021.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2021.pdf)

on the merits of his claim, as the panel's opinion necessarily wipes out the verdict and attorney fee award to Gil.

The district court held a full trial on the merits. Gil was the prevailing party and the district court awarded him nearly \$100,000 in attorneys' fees. The outstanding award of attorneys' fees was contingent on the outcome of this appeal. If the appeal and the underlying case are now moot because the permanent injunction ended, in light of the panel's direction to dismiss the case below as moot, it follows that the district court's verdict is also vacated, as well as the award of attorney's fees. *Hand v. Desantis*, 946 F.3d 1272, 1275 n.5 (11th Cir. 2020) ("The Supreme Court in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–41, 71 S.Ct. 104, 95 L.Ed. 36 (1950), held that a circuit court should vacate as moot a district court's order where the case becomes moot pending appeal.").<sup>4</sup> If that was not the panel's intent, and its ordered dismissal is not intended to disturb the district court's judgment and award of attorney's fees, then this case *cannot* be moot. Either way, the panel's new opinion is erroneous.

The expiration of the permanent injunction did not moot the live controversy of this case, nor does it eliminate Winn-Dixie's legally cognizable interest in the outcome of this matter. This case is not moot and the appeal cannot properly be

---

<sup>4</sup> Winn-Dixie respectfully requests that, in the alternative to the relief requested, the panel amend its order to clarify that the judgment below and underlying orders are vacated, as it did in *Hand*, 946 F.3d at 1275.

dismissed at this stage of the proceedings on that basis. En banc review is needed to correct the legal and factual errors of the panel. The trial courts are directed to “to secure the *just*, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1 (emphasis added). This Court should hold itself to that same standard and not conflate its delay into a result that deprives relief to all parties in this litigation.

### **B. The Voluntary Cessation Doctrine is Not Applicable**

Even if injunctive relief had been the only remedy, the appeal was not mooted by the injunction’s expiration. The panel erred in relying upon the voluntary cessation doctrine to find that the end of the permanent injunction mooted this case. “[A]s a general rule, ‘voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot.’” *Davis*, 440 U.S. at 631 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L.Ed. 1303 (1953)). Important and critical in that factual determination is a finding that the defendant **voluntarily** ceased the challenged activity. In this case, Winn-Dixie did not voluntarily take any action; it was ordered by the district court to take action pursuant to the permanent injunction, and it appealed that order—plainly establishing lack of assent. Moreover, the panel did not even make any such finding that Winn-Dixie voluntarily remediated its

website or adopted the policies ordered by the district court. It only determined that the injunction expired.

The voluntary cessation doctrine, which holds that a **defendant** may moot case if it can show “that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,” cannot be applicable here. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 190, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000)). Winn-Dixie cannot find a single case in the United States where the voluntary cessation doctrine was used by a plaintiff to moot an entire case after a full trial on the merits. Nor should it be able to find such a case. The voluntary cessation doctrine is a shield available to a defendant during the trial proceedings, not a sword for a plaintiff on appeal attempting to preserve a trial verdict in its favor or a tool for an appellate court to dismiss an entire action after a full trial on the merits below.

The panel cited *Troiano v. Supervisor of Elections in Palm Beach County, Fla.*, 382 F.3d 1276 (11th Cir. 2004), for proposition that a moot case is nonjusticiable, but *Troiano* is inapplicable here. In *Troiano*, visually-impaired voters brought a class action against the Palm Beach County elections supervisor, alleging that county’s failure to make available auxiliary audio devices available in voting booths was a violation of the ADA. *Id.* at 1278. The trial court dismissed the case as moot, which was upheld on appeal, “conclud[ing] that the case was mooted

by events that occurred *subsequent* to the filing of the lawsuit,” namely that the government entity voluntarily provided the equipment at every precinct. *Id.* at 1282. That is opposite from this case, where there was a full trial on the merits, the district court declared that Winn-Dixie violated the ADA, and ordered injunctive relief as a remedy. Winn-Dixie is entitled to a determination from this Court as to whether the district court’s decision in finding that the ADA applies to websites and that Winn-Dixie violated the ADA was correct on the merits. *See Camenisch*, 451 U.S. at 396; *Jackson*, 4 F.4th at 1216. To refuse to do so, in the name of mootness, is in direct contradiction of the precedent of this Court and the Supreme Court.

#### **IV. Conclusion**

For the reasons set forth above, the Court should grant rehearing en banc, vacate the December 28, 2021 order, and reinstate the opinion issued on April 7, 2021.

Respectfully submitted,

By: s/Susan V. Warner  
Susan V. Warner  
Florida Bar No. 38205  
e-mail: [susan.warner@fisherbroyles.com](mailto:susan.warner@fisherbroyles.com)  
FISHERBROYLES LLP  
1221 Brickell Avenue, Suite 900  
Miami, FL 33131  
Tel.: (786) 310-0637  
Fax: (786) 524-0260

By: s/Tillman J. Breckenridge  
Tillman J. Breckenridge



Email: [tbreckenridge@stris.com](mailto:tbreckenridge@stris.com)  
STRIS & MAHER LLP  
1717 K Street, NW  
Suite 900  
Washington, DC 20006  
Tel.: (202) 800-6030

*Attorneys for Appellant, Winn-Dixie Stores,  
Inc.*

### **CERTIFICATE OF COMPLIANCE WITH RULE 35**

This petition complies with the type-volume limitation of Fed. R. App. P. 35(b) because this petition contains 3865 words, excluding those portions of the response exempted by Fed. R. App. P. 32(f). This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

s/Susan V. Warner  
Susan V. Warner

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served via email this **18th** day of January, 2022 upon:

Joshua M. Entin, Esq.  
[josh@entinlaw.com](mailto:josh@entinlaw.com)  
Entin Law Group, P.A.  
633 S. Andrews Avenue, Suite 500  
Ft. Lauderdale, Florida 33301  
Tel: (954) 761-7201

David Ferleger, Esq.  
Law Office of David Ferleger  
413 Johnson St., Suite 203  
Jenkintown, PA 19046  
Tel: (215) 498-1777  
[inbox@dininlaw.com](mailto:inbox@dininlaw.com)  
*Attorney for Appellee, Juan Carlos Gil*

*Attorneys for Appellee, Juan Carlos Gil*

Carol C. Lumpkin, Esq.  
[carol.lumpkin@klgates.com](mailto:carol.lumpkin@klgates.com)  
Stephanie N. Moot, Esq.  
[stephanie.moot@klgates.com](mailto:stephanie.moot@klgates.com)  
K&L GATES LLP  
Southeast Financial Center  
200 South Biscayne Blvd., Suite 3900  
Miami, Florida 33131-2399  
Phone: (305) 539-3900  
Fax: (305) 358-7095  
*Counsel for Amicus Curiae, The Florida Justice Reform Institute*

Karen R. Harned, Esq.  
Elizabeth Milito, Esq.  
NATIONAL FEDERATION OF  
INDEPENDENT BUSINESS SMALL  
BUSINESS LEGAL CENTER  
1201 F Street, NW  
Washington, D.C. 20004  
(202) 406-4443  
*Counsel for Amicus Curiae National Federation of Independent Business Small Business Legal Center*

Angelo I. Amador, Esq.  
RESTAURANT LAW CENTER  
2055 L Street, NW  
Washington, D.C. 20036  
(202) 331-5913  
*Counsel for Amicus Curiae Restaurant Law Center*

Warren Postman, Esq.  
Janet Galeria, Esq.

Kevin W. Shaughnessy, Esq.  
[kshaughnessy@bakerlaw.com](mailto:kshaughnessy@bakerlaw.com)  
Joyce Ackerbaum Cox, Esq.  
[jacox@bakerlaw.com](mailto:jacox@bakerlaw.com)  
BAKER & HOSTETLER, LLP  
SunTrust Center, Suite 2300  
200 South Orange Avenue  
Orlando, Florida 32801  
Tel: (407) 649-4000  
*Counsel for Amici Curiae in Support of Appellant*

Justin Vermuth, Esq.  
AMERICAN RESORT  
DEVELOPERS ASSOCIATION  
1201 15th Street, NW  
Washington, D.C. 20005  
*Counsel for Amicus Curiae American Resort Developers Association*

Gregory P. Care  
BROWN, GOLDSTEIN & LEVY,  
LLP  
120 E. Baltimore Street, Suite 1700  
Baltimore, Maryland 21202  
Tel: (410) 962-1030  
[gpc@browngold.com](mailto:gpc@browngold.com)  
*Counsel for Amici in Support of Appellee*

U.S. CHAMBER LITIGATION  
CENTER

1615 H Street, NW

Washington, D.C. 20062

(202) 463-5337

*Counsel for Amicus Curiae Chamber of  
Commerce of the United States of  
America*

s/Susan V. Warner

---

Susan V. Warner

[PUBLISH]

In the  
United States Court of Appeals  
For the Eleventh Circuit

---

No. 17-13467-CC

---

JUAN CARLOS GIL,

Plaintiff-Appellee,

*versus*

WINN-DIXIE STORES, INC.,

Defendant-Appellant.

---

Appeal from the United States District Court  
for the Southern District of Florida

---

BEFORE: JILL PRYOR, BRANCH, Circuit Judges, and REEVES,\*  
District Judge.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellee Juan Carlos Gil is GRANTED. Due to the expiration of the injunction while the appeal was pending and the absence of any formal award of declaratory relief, the appeal was rendered moot. “A moot case is nonjusticiable and Article III courts lack jurisdiction to entertain it.” *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1281 (11th Cir. 2004).

Accordingly, we vacate our opinion and the underlying judgment, dismiss the appeal, and remand for the district court to dismiss the case as moot.

---

\* Honorable Danny C. Reeves, United States District Chief Judge for the Eastern District of Kentucky, sitting by designation.